

THE LAW OF COMPANIES,
&c., &c.

Second Edition, revised

A TREATISE
ON THE
LAW OF COMPANIES,
CONSIDERED AS A BRANCH OF
THE LAW OF PARTNERSHIP.

FIFTH EDITION.

BY

THE RIGHT HONOURABLE

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[17]
ONE OF THE LORDS JUSTICES OF HER MAJESTY'S COURT OF APPEAL.

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PREFACE.

THE present work is the result of an attempt to investigate the Law of Companies considered as a branch of the Law of Partnership.

The Statutory Law of Partnership was long in a state of transition ; but this state may be said to have terminated when the Companies act, 1862, was passed, consolidating, repealing and amending most of the statutes then in force relating to Joint-Stock Companies. The Law of Companies has so developed since that time that it has become desirable to devote a separate volume to it instead of including it in a treatise on the Law of Partnership as in former editions.

The Companies acts, 1862 to 1886, and the rules promulgated under their provisions are printed in an appendix ; and, to facilitate reference to them, a separate index to their sections and clauses is inserted immediately before the general index, with which the work concludes.

It must always be borne in mind, that in order to determine any legal question relating to companies, it is indispensable to attend closely to the language of the statutes by which they are governed ; and although for convenience, the substance of various statutory enact-

ments has been shortly stated in the text, the reader is warned not to rely on these abridgments, but to consult the statutes themselves in every case which he may have to investigate.

Great pains have been taken to render this Edition deserving of the favourable reception accorded to those which have preceded it. The separation of the matter in this treatise from that in the volume on Partnership already published has rendered it necessary to recast the whole work. The former arrangement has been followed in the main; but those portions which relate to Fraudulent Prospectuses, Borrowing Money, the Duties of Promoters, Transfers in blank, Forged Transfers, the amalgamation and reconstruction of Companies and Building Societies, have been so developed as to be practically new. Other portions, especially that relating to Contributories, have been rearranged and rewritten. The whole treatise has, in short, been carefully revised throughout, and adapted to the most recent decisions.

Notwithstanding, however, the labour bestowed upon the work, and the anxiety of the author to render it worthy of the profession to which he has the honour to belong, the multiplicity and difficulty of the questions with which he has had to deal are such, that he dare not venture to hope that he has always avoided error, or that his work is free from serious faults: and although it has engaged his unremitting attention for more than thirty years, he is painfully aware that it is even now but an imperfect production.

It only remains to add that this Edition has been prepared by the author and his son, Mr. W. B. Lindley, and Mr. W. C. Gull. They have not only revised the sheets, but have examined the decisions on all the most difficult subjects, recast some of the portions which are new, made new indexes, and have thus greatly diminished the author's labours and contributed to the utility of the work.

ROYAL COURTS OF JUSTICE,

June, 1889.

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The cases in each sheet have been brought down to the latest possible moment. It ought, however, to be mentioned, that no attempt has been made to collect cases decided since the establishment of the Law Reports, and not reported therein.

An attempt has been made to collect under the name of each company the cases reported in connection with its winding up; but the references to those cases will be found, not under the name of the company, but under the names of the persons to whom they relate; for owing to the way such cases are frequently reported, it has been found impossible to make complete lists of them under the names of their respective companies.]

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12	396, 414	§ 18 (3)	699
13	95, 265, 419, 425, 426, 427, 559, 565	24, cl. 5	676
14	96, 326, 466	25 (8)	596, 602, 603, 740
15	96, 326	26, cl. 6	
16	326, 529	34	
16-23	94, 326	49	699
21-23	524	37 & 38 Vict. c. 35	266
24	278, 326	37 & 38 Vict. c. 41	
25	95, 819	§ 7	918
32	699	37 & 38 Vict. c. 42	
33	701	Building Societies act,	
35	96, 326, 465, 825	1874. See Appendix	
36	278	918 <i>et seq.</i> , and also	
32 & 33 Vict. c. 46	426, 537	§ 4	614, 615
32 & 33 Vict. c. 48	7, 103, 198, 400	32	614, 615, 619, 627, 638, 887
§ 1	188, 203	43	189, 196
5	396, 399	37 & 38 Vict. c. 50	42
6	396, 399	37 & 38 Vict. c. 62	39
7	396, 399	37 & 38 Vict. c. 96	136
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23	556	38 & 39 Vict. c. 31	278
24	556	38 & 39 Vict. c. 55	
31	556	§§ 173, 174	223
32 & 33 Vict. c. 71, § 87	678	211	681
32 & 33 Vict. c. 96, § 14	458	38 & 39 Vict. c. 60, § 10	201, 918
32 & 33 Vict. c. 114	901	38 & 39 Vict. c. 66	7, 103, 188
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§§ 8-10	902, 903	act, 1875]	
33 Vict. c. 14	36	§ 10	678, 681, 685, 716, 719, 725, 726, 738, 739, 742, 858
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33 & 34 Vict. c. 23		39 & 40 Vict. c. 45	
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21	621, 625, 631, 634, 661	40 & 41 Vict. c. 26	
22	621, 634, 635, 717	(Companies act, 1877)	
33 & 34 Vict. c. 97	469	See the Appendix	1028
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69	469	42 & 43 Vict. c. 76	6
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ABBREVIATIONS.

The following abbreviations frequently occur in the present work :—

- R. S. C. = Rules of the Supreme Court, 1883. and subsequent rules.
Bank. Rules = The Bankruptcy Rules, 1886, and subsequent rules.
Buckley = The Law and Practice under the Companies Acts, 1862–1886. by
 H. Burton Buckley, Q.C. 5th edition. London, 1887.
Part. = A Treatise on the Law of Partnership, by the authors of the present
 work. 5th edition. London, 1888.

ADDITIONS AND CORRECTIONS.

- Pages 72, 73, and } *Peck v. Derry*, 37 Ch. D. 541, is under appeal in the House of
88-90 . } Lords.
- .. 93. Life assurance companies fall under one or other of the Classes 2, 3, and 4, unless they are merely large partnerships, which is seldom, if ever, the case. They are, however, governed by the Acts 33 & 34 Vict. c. 61, and 35 & 36 Vict. c. 41, which will be found in Appendix VII., pp. 1095 and 1103. These statutes ought to have been noticed in the introductory observations in Bk. I. c. 4.
- .. 113, note (u). Add *Outlay Assurance Society*, 34 Ch. D. 479.
- .. 123, note (m). *Railway Times Table Publishing Co.* overruled. W. N. 1889 p. 77.
Add *Ex parte Smith*, 39 Ch. D. 546.
- .. 184, line 7. For insurance companies, *read* Life insurance companies.
- .. 186, note (b). For Bk. III. c. 2, § 2, *read* c. 1, § 3, p. 323.
- .. 217, note (g). *British Mutual Banking Co. v. Charnwood Forest Rail. Co.* observe that their stock certificates were for stock which the company had no power to issue; being for stock in excess of the amount which the company had power to borrow.
- .. 229, note (y). The Companies seals act, 1864, will be found in the Appendix of Statutes, p. 1015.
- .. 263. Add *Ex parte Poppleton*, 14 Q. B. D. 379.
- .. 266, note (e). For Bk. III. c. 9, § 3, *read* Bk. III. c. 9, § 1.
- .. 267, note (g). Add reference to Bankruptcy Rules, 1886, r. 258, and cf. p. 549 and 550.
- .. 302. As to the removal of a managing director, see also *Boston Deep Sea Fishing Co. v. Ansell*, 39 Ch. D. 339.
- .. 431, note (u). *Lee v. Neufchatel Asphalt Co.* is now reported 41 Ch. D. 1.
- .. 464, note (i). Add but the Court will not grant a prerogative writ of mandamus to compel registration in such a case, see p. 603 and *R. v. Lambourn Valley Rail. Co.*, 22 Q. B. D. 463.
- .. 659, note (b). *Criterion Gold Mining Co.* is now reported 41 Ch. D. 146.
- .. 669. Transfers of shares, see p. 471 and p. 832.
- .. 738, note (h). For 37 & 38 Vict. c. 83, *read* 38 & 39 Vict. c. 77.
- .. 785, note (h). See also *Jones, Lloyd & Co., Limited*, 41 Ch. D. 159, where an agreement to set-off against future calls a present liability of the company to pay cash was held within the section.

Page 902, note (i). For 14 & 15 Vict., read 13 & 14 Vict.

- ,. 911 The following cases on income-tax payable by companies may be useful for reference:—
 Last v. London Assurance Corporation, 10 App. Ca. 438 ;
 12 Q. B. D. 389 ; 14 Q. B. D. 239.
 Ryhope Colliery Co. v. Fryer, 7 Q. B. D. 485.
 R. v. Commissioners of Income-Tax, 20 Q. B. D. 549.
 Lawless v. Sullivan, 6 App. Ca. 373.
- .. 916, note (d). Add p. 921 before the reference to notes (c) and (d) in next Appendix.
- .. 929. Add 1886, 49 Vict., c. 23, the Companies act, 1886.

THE LAW OF COMPANIES.

INTRODUCTORY.

1. *Nature of a company.*

By a company is meant an association of many persons who contribute money or money's worth to a common stock and employ it in some trade or business, and who share the profit or loss (as the case may be) arising therefrom. The common stock so contributed is denoted in money and is the capital of the company. The persons who contribute it or to whom it belongs are *members*. The proportion of capital to which each member is entitled is his *share*. Shares are always transferable; although the right to transfer them is often more or less restricted.

A company which is neither incorporated nor privileged by the Crown or the Legislature is substantially a partnership; and although the transferability of its shares considerably modifies the application to it of the ordinary law of partnership, still the company, like an ordinary firm, is not in a legal point of view distinguishable from the members composing it (*a*).

A company which is incorporated, whether by charter, special act of Parliament, or registration, is in a legal point of view distinct from the persons composing it, and is therefore regarded by lawyers somewhat as a firm is by non-lawyers. It sues and is sued by a name of its own, and its continuous existence is not affected by changes amongst its members.

(*a*) Part. 110 *et seq.*

INTRODUCTORY.

A company which without being incorporated is privileged to sue and be sued by the name of some public officer, is as it were half-way between an incorporated and an unincorporated company. So far as its privileges do not make a difference, the company is a partnership; and so far as its privileges extend, it may without any great inaccuracy be likened to a corporation; for the main object of these privileges is to confer upon the company a sort of continuous existence, whatever changes may take place amongst the individual shareholders.

2. *Historical sketch of the law relating to companies.*

Sketch of company law.

By the common law of this country every association of persons formed for the sake of sharing profits, is either a partnership or a corporation; and a company which is neither a corporation nor a partnership, is a thing unknown to the common law of England (*b*). It has even been said that a large partnership, the shares in which are transferable without the assent of all the members, is illegal at common law; and although the better opinion is that this is not so (*c*), still the courts treat as illegal any association for profit which attempts to arrogate to itself the privileges of a body corporate (*d*). But within the last century associations unknown to the common law have struggled into existence, and after much opposition have become legal. These are commonly called companies, or more accurately joint-stock companies.

Progress of joint-stock companies.

When unincorporated companies, with a joint-stock divided into numerous transferable shares, began to assume importance, and to force themselves upon the attention of the legislative and judicial departments of the State, the reception they met with was by no means encouraging. Owing to the then established rules relating to parties to actions at law and suits in equity, a joint-stock company could not practically sue its

(*b*) *M'Intyre v. Connell*, 1 Sim. & K. 76.

N. S. 233. Cost-book mining companies are partnerships governed by special local laws.

(*d*) *Blundell v. Winsor*, 8 Sim. 601. This subject will be examined more fully hereafter.

(*c*) See *Walburn v. Inghilby*, 1 M.

own debtors, nor could disputes between its members be readily, if at all, adjusted. At the same time, the doctrine that each member was answerable for the whole of the debts of the company was studiously promulgated and rigorously enforced. INTRODUCTORY.

Under these circumstances, joint-stock companies were regarded as nuisances, and the first legislative enactment relating to them (6 Geo. 1, c. 18, commonly called the Bubble act) was an attempt to put them down altogether. This attempt was simply futile; and notwithstanding the Bubble act, joint-stock companies increased both in number and importance. It was not, however, until the end of the first quarter of the present century, that the legislature began to retrace its steps. Regarded as nuisances.

In the year 1825 the Bubble act was repealed (*e*), and from that time to the present the legislature has endeavoured by various means so to amend the law as to give free scope to a combination of capital, and at the same time to prevent injustice being done either to or by its subscribers. Reaction.

Even when the opposition which joint-stock companies had to encounter was greatest, they could always apply to the Crown for a charter of incorporation. Whether a charter would be granted, depended mainly on the opinion which the officers of the Crown entertained of the proposed objects and constitution of the company. If a charter was granted, the company became a corporation for all intents and purposes; and with this amongst other results, viz., that the members of the company were rendered personally irresponsible for its debts. At common law, the Crown had no power to grant charters of incorporation, and also to declare that the persons incorporated by them should be subject to the same liabilities as members of unincorporated societies. Charters.

But in 1825 an act was passed, empowering the Crown to grant charters of incorporation, and at the same time to declare that the persons incorporated should be personally liable for the debts of the body corporate (*f*). This act was, in the year 1834, followed by another, enabling the Crown, 6 Geo. 4, c. 91.
4 & 5 Wm. 4,
c. 94.

(*e*) 6 Geo. 4, c. 91. The 2nd section of the Bubble act had been previously repealed by 5 Geo. 4, c.

INTRODUCTORY. without incorporating a company at all, to confer upon it by means of letters patent, certain privileges, and especially the privilege of suing and being sued in the name of a public officer (*g*). Both these acts have since been repealed, but the powers conferred upon the Crown by the act of 1834, are still exercisable under the provisions of the repealing act (*h*).

7 Wm. 4 &
1 Vict. c. 73.

Special acts of
Parliament.

If a charter could not be obtained from the Crown, a company which desired to be legally recognised as such was compelled to apply to Parliament for a special act of its own. The act usually sought to be obtained was either an act incorporating the company, or an act which, without incorporating it, authorised it to sue and be sued by its secretary, or some other officer.

Acts incorporating companies were sometimes silent as to the liabilities of their members, and in that case, they were not to any extent responsible for the debts of the incorporated company. But other incorporating acts rendered the members of the company liable for its debts to the extent of their respective shares of the nominal capital of the company, or of so much thereof as might not have been paid up.

Acts which did not incorporate companies, but merely empowered them to sue and be sued, invariably, it is believed, contained clauses rendering the shareholders liable for the debts of the company to the fullest extent.

Until the year 1826, there was no method by which a company could acquire any of the privileges of a corporation, or the power of suing and being sued by a public officer, except by means of a special application to the Crown or to Parliament. But in 1826 a general act was passed enabling joint-stock banking companies to obtain the power of suing and being sued in the name of a public officer, by simply complying with certain specified conditions, and making certain returns to the stamp office (*i*). And in the year 1844, another general act was passed, enabling all companies (with some exceptions) to obtain from an office in London a certificate of

7 Geo. 4, c. 46.

7 & 8 Vict.
c. 110.

(*g*) 4 & 5 Wm. 4, c. 94.

(*h*) 7 Wm. 4 & 1 Vict. c. 73, and

47 & 48 Vict. c. 56, § 1.

(*i*) 7 Geo. 4, c. 46.

incorporation without applying either for a charter, or for an act of Parliament (*k*). But, what is not a little remarkable is, in this very same year, 1844, the legislature retraced its steps as regards banking companies, and compelled banking companies formed after May, 1844, to apply to the Crown for incorporation. This the Crown was empowered to grant, without however limiting the liability of the shareholders (*l*).

As regards liability to creditors, companies formed under these acts were essentially partnerships. Their members were liable to their last farthing for the debts of the companies; only before recourse for payment of such debts could be had against an individual member, it was necessary for the creditors to show that they could not obtain payment from the company to which that member belonged. Companies which desired limited liability in any other sense than this, were still obliged to procure a charter from the Crown, or a special act of Parliament, and it was not until the year 1855 (*m*) that the law in this respect was altered. In that year, however, an act was passed enabling companies registered under the general act of 1844 (other than insurance companies), to obtain a certificate of incorporation with limited liability (*n*).

None of these acts provided for the dissolution and winding up of companies. The first act upon this subject was passed in 1844, and it declared what were to be deemed acts of bankruptcy in the case of joint-stock companies, and how bankrupt companies were to be wound up for the benefit of their creditors (*o*). In the year 1846 an act was passed for winding up railway companies projected before July, 1846, and not incorporated by act of Parliament (*p*). In 1848 and 1849, two statutes were passed enabling joint-stock companies generally to be dissolved and wound up in equity without the necessity of a bill to which all the shareholders must have been parties (*q*). The following year, 1850, produced another act for

(*k*) 7 & 8 Vict. c. 110.

(*l*) 7 & 8 Vict. c. 113.

(*m*) Long before this, however, the Parliament of Ireland had passed an act (21 & 22 Geo. 3, c. 46), authorising the formation of

partnerships with limited liability

(*n*) 18 & 19 Vict. c. 133.

(*o*) 7 & 8 Vict. c. 111.

(*p*) 9 & 10 Vict. c. 28.

(*q*) 11 & 12 Vict. c. 45, and 12 & 13 Vict. c. 108.

INTRODUCTORY. winding up railway companies incorporated by special acts of their own (*r*).

Acts of 1856-7. A rapid sketch has now been given of the progress of joint-stock company legislation down to the year 1856. In 1856 and 1857 acts (*s*) were passed, repealing more or less nearly all the acts which have been noticed, consolidating what were supposed to be their most valuable provisions, and introducing extensive alterations of an entirely new character. These acts, however, were themselves repealed by the Companies act, 1862 (*t*), which is now the principal statute relating to joint-stock companies, and will be found printed in the appendix at the end of this treatise. In the same year, 1862, a very important statute was passed relating to industrial and provident societies (*u*), and placing them on much the same footing as limited joint-stock companies.

Other statutes.
1 & 2 Vict.
c. 110. In addition to the statutes which have been referred to already, there was an important act passed in the year 1838, enabling separate creditors of shareholders in public companies to obtain an order charging their debtors' shares, whereby payment of their debts can be obtained without the intervention of a sheriff and a seizure by him of the property of the company (*x*); and in the year 1841 another act was passed, enabling the Court of Chancery, on a summary application, to restrain any public company from allowing any specified shareholder to transfer his shares or to receive dividends in respect of them (*y*).

8 & 9 Vict. c. 16. The year 1845 produced three statutes incorporating clauses usually inserted in special acts of Parliament relating to railway and other companies which interfere with private property; and of these statutes, one, viz., the Companies clauses consolidation act (*z*), forms an important part of the law to which this treatise relates.

(*r*) 13 & 14 Vict. c. 83.

(*s*) 19 & 20 Vict. c. 47, and 20 & 21 Vict. c. 14.

(*t*) 25 & 26 Vict. c. 89, amended by 30 & 31 Vict. c. 47, and c. 131; 33 & 34 Vict. c. 104; 40 & 41 Vict. c. 26; 42 & 43 Vict. c. 76; 43 Vict. c. 19; 46 & 47 Vict. c. 28, and c. 30;

and 49 Vict. c. 23.

(*u*) 25 & 26 Vict. c. 87, repealed by 39 & 40 Vict. c. 45. A note on these societies will be found in the appendix.

(*x*) 1 & 2 Vict. c. 110, § 14 *et seq.*

(*y*) 5 Vict. c. 5, § 4.

(*z*) 8 & 9 Vict. c. 16, amended by

In 1865, after a long and arduous struggle, an act (Bovill's ^{INTRODUCTORY.} act) was passed extending the principle of limited liability to ^{28 & 29 Vict.} large classes of persons previously excluded from it, and enabling them to lend their money and render their services in consideration of a share of profits, without thereby exposing themselves to indefinite losses. This act is discussed in the volume relating to Partnerships.

The criminal law applicable to partners and directors, with respect to thefts, embezzlements, fraudulent accounts, and statements, was amended in 1861 and 1868; and within the last few years important acts have been passed relating to Cost-book mining companies and Life insurance companies.

In the appendix will be found a chronological list of the statutes relating to companies so far as they fall within the scope of this work, and also a table showing which of these statutes are now in force.

3. *Different sorts of companies.*

Associations of persons having gain for their object, will be found to belong to one or other of the following classes, ^{Different sorts of partnerships and companies.} viz.:—

1. Partnerships in the proper sense of the word. ^{Partnerships.}
2. Partnerships with more members than usual, and with transferable shares. To this class belong all joint-stock companies which do not belong to one or other of the classes following. ^{Large partnerships.}
3. Partnerships governed by certain local customs which exclude those laws, applicable to partnerships generally, with which the customs are inconsistent. To this class belong Cost-book mining companies. ^{Partnerships governed by local customs.}
4. Partnerships privileged by the Crown or the legislature to sue and be sued by a public officer. These companies are sometimes said to be *quasi* incorporated; they include joint-stock banking companies, governed by the act of 7 Geo. 4, c. 46, joint-stock companies governed by the Letters Patent ^{Partnerships empowered to sue and be sued.}

INTRODUCTORY.	act of 7 Will. 4 & 1 Vict. c. 73, and a number of insurance and other companies governed by special acts of their own.
Corporations proper.	5. Corporations in the proper sense of the term, the members of which are to no extent liable to the debts of the body corporate. These must be created either by royal charter or by act of Parliament, and to them the law of ordinary partnerships has little, if any, application.
Incorporated companies.	6. Partnerships incorporated by royal charter or act of Parliament, but so nevertheless, as to leave their members more or less liable to the debts of the whole body. Companies governed by the Companies clauses consolidation act are, and banking companies governed by the repealed act of 7 & 8 Vict. c. 113, were, types of this class.
Registered companies.	7. Partnerships incorporated by registration. These constitute the great mass of joint-stock companies, and are of two sorts, according as the liability of the members for the debts of the body corporate is unlimited, or limited.
Unlimited.	The first sort included all joint-stock companies governed by the repealed act of the 7 & 8 Vict. c. 110, and it includes all unlimited companies registered under the acts of 1856-8, or under the Companies act, 1862.
Limited.	The second sort included those companies which availed themselves of the short-lived act of the 18 & 19 Vict. c. 93, and now includes all companies registered as limited companies under the acts of 1856-8, or under the Companies act, 1862(a).
	<p>Limited liability companies again are of two sorts, viz., 1, those in which the liability of the members is limited by the amount of their shares; and 2, those in which the liability of the members is limited by guarantee; <i>i.e.</i>, by the amount they have respectively undertaken to pay in the event of a contribution becoming necessary in order to discharge the liabilities of the company (b). Companies limited by guarantee may have their capitals divided into shares or not (c), and are supposed to admit of greater varieties of internal organisation</p>
	<p>(a) To this class also belonged Irish anonymous partnerships, governed by 21 & 22 Geo. 3, c. 46 (Irish), repealed by the Companies act, 1862. (b) 25 & 26 Vict. c. 89, § 7. (c) <i>Id.</i> § 14.</p>

than companies limited by shares. The latter, however, are much the more numerous.

The following table conveniently exhibits the above classes of companies.

Joint Stock Companies	Unincorporated, <i>viz.</i>	Large Partnerships.	
		Cost-Book Mining Companies.	
		Companies empowered to sue and be sued by a public officer, including	Banking Companies governed by 7 Geo. 4, c. 46.
			Companies governed by the Letters Patent Act 7 Wm. 4 & 1 Vict. c. 73.
			Companies having special Acts of their own.
	Incorporated by	Special Act of Parliament, <i>e.g.</i> , Railway, Canal, Dock, and Waterworks Companies.	
		In which the members are not liable to the debts of the company.	
		Royal Charter	In which the members are liable to the debts of the company.
		Registration	Without limited liability.
			With limited liability } limited by shares.
			} limited by guarantee.

For some purposes, and particularly in order properly to interpret certain statutes (*d*), it is necessary to distinguish *public companies* from others. But in this, as in many other instances, the word public is used with no definite signification; and it is extremely difficult to say exactly what the essential character of a public company really is. It has, however, been decided that banking companies, governed by the 7 Geo. 4, c. 46, are public companies within the meaning of the statute 1 & 2 Vict. c. 110, s. 14 (*e*); and that an insurance company governed by a special act of its own was a public company within the meaning of the Apportionment act

(*d*) The statutes here referred to are: 1 & 2 Vict. c. 110, § 14, relating to executions against shareholders for their separate debts; 24 & 25 Vict. c. 96, §§ 81 to 84, relating to frauds by directors, officers, and

members of companies; 33 & 34 Vict. c. 35, § 5, relating to the apportionment of dividends.

(*e*) *McIntyre v. Connell*, 1 Sim. N. S. 225.

INTRODUCTORY.

of 1870 (*f*). It would however seem that those companies only are public which are either incorporated, or, if unincorporated, are endowed by the Crown or the legislature with some special privileges, and are bound to make some kind of return or list of their officers or members which the public have a right to see. A mere partnership, however large and however transferable its shares, is apparently not a public company (*g*).

Companies not
for gain.

Companies formed for merely scientific, literary, artistic, or charitable purposes, and not with any view to the acquisition of gain or the avoidance of loss by themselves or their members do not fall within the scope of this treatise, which is confined to companies formed for the purpose of acquiring and dividing profit in some form or other, or, as in the case of mutual insurance companies, of avoiding loss.

Owing to the course legislation has taken and to the classes into which companies must be divided if confusion is to be avoided, it is absolutely necessary to consider companies not only with reference to general principles more or less applicable to them all, but also particularly with reference to the statutes applicable to their several sorts, viz. :—

1. The Banking act of 7 Geo. 4, c. 46.
2. The Letters Patent act, 7 Wm. 4 & 1 Vict. c. 73.
3. The Companies clauses consolidation act, 8 & 9 Vict. c. 16.
4. The Companies act, 1862.

(*f*) *Carr v. Griffith*, 12 Ch. D. 655.

(*g*) See the last two cases, and *Jones v. Ogle*, 8 Ch. 192.

BOOK I.

OF THE FORMATION OF COMPANIES AND OF THE
ALLOTMENT OF SHARES.*General observations.*

A COMPANY, so far as it is only a partnership consisting of a large number of persons having a joint stock, and associated for the purpose of sharing profits, is formed in precisely the same manner as any other partnership, viz., by agreement; and after what has been stated in the volume on Partnership, it is unnecessary to dwell upon the formation of those companies which, being unincorporated and subject to no statutory provisions have nothing to distinguish them from societies the nature and formation of which have been explained in that volume.

With respect to other companies, an agreement to share profits or to take shares is more or less remotely the basis of them all.

Indeed, except where a person is made a member of a company by some act of Parliament which there is no gainsaying, it may be safely laid down that no person can become an original member (*a*) of a company in the absence of some agreement, express or implied, between himself and the company; and further that every person who has agreed with a company to become a member of it can compel the company to do what is necessary to constitute him a member; and can on the other hand be himself compelled to do what is necessary to become a member, or to submit to the completion by the company of those formal acts, *e.g.*, registration, which may be necessary to make him, in point of law, a member of it.

What is necessary to constitute a binding agreement with a

(*a*) Members by transfer from other members are not here referred to.

Book I.

company to become a member of it, is determined by the general law of contracts as applied to the company in question; and what is necessary to become an actual member of any particular company depends upon the nature of that company, *i.e.*, upon its own regulations, or the statutory enactments relating to it. Each inquiry involves some examination into the nature of the company under consideration; for contracts with it depend for their validity on the authority of the persons who enter into those contracts on behalf of the company; and what constitutes membership depends entirely on the kind of company which is spoken of. Both of these matters will be examined hereafter.

Prospectus.

Practically the great bulk of companies are formed as follows. A few persons called *promoters* form a scheme by which they say money may be made but requiring considerable funds for its realisation. To make their scheme known and to raise the funds required, they publish a *prospectus*, setting forth the nature of the scheme and the amount of Capital necessary to carry it out, and inviting persons to become subscribers. Sometimes the *prospectus* is issued before any company has any legal existence; at other times the promoters or their friends do what is necessary to create the company as a legal body and issue the prospectus after the company has been created. In either case the *prospectus* is a very important document; for on the faith of it persons are intended to apply, and do in fact apply, for shares in the company to be formed or already formed as the case may be.

Promoters.

The relation between the promoters of a company on the one hand and the company and its members on the other is extremely complex, and will be examined hereafter; but in order to understand that relation it is necessary to explain the mode in which companies are formed and the doctrines of agency as applied to them. These subjects will be dealt with in Books I. and II.; and the relation of promoters to their companies will be discussed in Book III.

CHAPTER I.

AGREEMENTS TO TAKE SHARES.

SECTION I.—APPLICATIONS FOR AND ALLOTMENT OF SHARES.

AGREEMENTS to take shares in a company about to be formed (or if technically formed already having its capital still unsubscribed), are usually entered into by an application for shares on the one hand and by an acceptance of such application on the other.

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In practice, the application is generally a printed form of request, addressed to the secretary or directors of the company, or to persons named by the projectors, and expressing an agreement on the part of the applicant to take a certain number of shares in the company, or such smaller number as may be allotted to him. The form is signed by the applicant, and he generally pays to the bankers of the company or projected company a small deposit on each share applied for, and obtains from the bankers a receipt for the payment. The payment is usually made before or at the time when the application is sent in.

Application for
shares.

The application for shares, in whatever form it is made, and whether accompanied by the payment of a deposit or not, is only an offer to take the shares applied for, and may, like any other offer, be retracted before it has been accepted (*a*). Nor is this right to revoke excluded by the insertion in the application of words to the effect that the applicant agrees to accept the shares applied for, or any less number that may be allotted to him, and consents to be registered in respect of them; for

Application for
shares revoked
before allotment.

(*a*) *Ritso's case*, 4 Ch. D. 774, where the applicant was a director; *Gledhill's case*, 3 De G. F. & J. 713; *Ramsgate Victoria Hotel Co. v. Montefiore*, and *Same v. Goldsmid*, L. R. 1 Ex. 109. See, also, *Chapman's case*, 2 Eq. 567; *Hebb's case*, 4 Eq. 9; *Pentelow's case*, 4 Ch. 178; *Slatery's case*, 7 Ir. R. Eq. 245.

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such words themselves only amount to an offer and do not constitute an agreement until the offer they express has been accepted (*b*). But a revocation received after notice of acceptance has been posted is too late (*c*), even though the letter of revocation is written and posted before the letter of application is received (*d*).

Letter of allotment.

If the application for shares is acceded to, a letter of allotment is usually sent to the applicant, informing him that so many shares have been (or will be) allotted to him, and that a certain sum, by way of deposit on each share, must be paid to the bankers of the company.

Stamp.

A letter of allotment requires a penny stamp (*e*).

Agreement complete by allotment and notice.

In order that the application and acceptance may constitute a binding agreement the acceptance must be by persons who can bind the company (*ee*); and must be notified to the applicant.

But, unless under special circumstances, notice of allotment must be given to the applicant or his agent in order to bind the allottee (*f*). Notice by post is sufficient (*g*), even if the notice should fail to reach the allottee or his agent, either owing to the default of the allottee (*h*) or to some casualty in the post office establishment (*i*). It is not, however, necessary to prove express formal notice of the allotment, it is sufficient to show that the allottee in fact knew of it (*k*).

(*b*) See *Ward's case*, 10 Eq. 659, and *Best's case*, 2 De G. J. & Sm. 650; *Chapman's case*, 2 Eq. 567.

(*c*) See *Harris' case*, 7 Ch. 587.

(*d*) *Byrne v. Van Tienhoven*, 5 C. P. D. 344; *Stevenson v. McLean*, 5 Q. B. D. 346.

(*e*) 33 & 34 Vict. c. 97, § 3. Formerly this was not so. See *Tollans v. Fletcher*, 1 Ex. 20; *Moore v. Garwood*, 4 ib. 681.

(*ee*) *Infra*, Bk. ii. c. 2, and *Ex parte Smith*, 39 Ch. D. 546.

(*f*) *Gunn's case*, 3 Ch. 40; *Robinson's case*, 4 ib. 322; *Wallis's case*, ib. 325, note; *Hebb's case*, 4 Eq. 9; *Shackleford's case*, 1 Ch. 567; *Ward's case*, 10 Eq. 659, where the allottee had signed a blank transfer; *Sahl-*

green's and Carrall's case, 3 Ch. 323. See, also, *Pellatt's case*, 2 Ch. 527; *Shackleford's case*, 1 Ch. 567.

(*g*) *Household Fire Insurance Co. v. Grant*, 4 Ex. D. 216; *Harris's case*, 7 Ch. 587; *Wall's case*, 15 Eq. 18.

(*h*) *Townsend's case*, 13 Eq. 148.

(*i*) *Household Fire Insurance Co. v. Grant*, 4 Ex. D. 216 (overruling on this point *British and American Tel. Co. v. Colson*, L. R. 6 Ex. 108; *Reidpath's case*, 11 Eq. 86); *Harris' case*, 7 Ch. 587.

(*k*) *Levita's case*, 3 Ch. 36; *Crawley's case*, 4 ib. 322. In both of these the allottee had acted as a shareholder. See also *Richards v. Home Assurance Association*, L. R. 6 C. P. 591, where the allottee became

Moreover, an applicant may dispense with notice of allotment or preclude himself from objecting to its non-receipt (*l*). Bk. I. Chap. I.
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Notice of allotment sent to the allottee to the address given by him will be sufficient, although, owing to the insufficiency of the address, the notice never reaches him (*m*).

If no time is fixed for the acceptance of the application, and it is not accepted within a reasonable time, it will be considered as having been declined (*n*). What is a reasonable time must depend on the circumstances of each particular case; and a prudent applicant who does not receive an answer in what he considers reasonable time, should revoke his application. Time for allotment.

The acceptance by a company of the offer contained in an application for shares may, it is conceived, be evidenced otherwise than by an actual allotment. Sometimes the offer by the company precedes the application, so that the application is in truth an acceptance of a prior offer; and where this is the case an allotment is not necessary to complete the contract, although it may be necessary to constitute the applicant an actual shareholder (*o*). But allotment is the ordinary evidence of acceptance; and where there has been no allotment, acceptance will not be inferred from the mere facts that the applicant paid a deposit on the shares at the time he applied for them; that he obtained a receipt for the amount of his deposit, and that the money has not been returned to him (*p*); nor from the fact that as a director he ought to have had shares (*q*). Acceptance without allotment.

manager. Compare *Pollatt's case*, 2 Ch. 527, where a demand for calls was held not notice.

(*l*) As in *Bloxam's case*, 33 Beav. 529, aff. on appeal, 4 De G. J. & Sm. 447. This case is regarded as having turned on its own special circumstances, and has not been followed. See the cases referred to above. See, also, as to directors, *Harvard's case*, 13 Eq. 30; *Lecke's case*, 6 Ch. 469.

(*m*) *Townsend's case*, 13 Eq. 148.

(*n*) *Ramsgate Hotel Co. v. Montefiore*, and *Same v. Goldsmid*, L. R. 1 Ex. 109; *Ex parte Bailey*, 3 Ch. 592, and 5 Eq. 428; *Carmichael's case*,

17 Sim. 163; *Mathew's case*, 3 De G. & Sm. 234. See, too, *Onion's case*, 1 Sim. N. S. 394; *Conway's case*, 5 De G. & S. 150; *Sharp and James's case*, 1 De G. Mac. & G. 565; *Ex parte Roberts*, 1 Drew. 204.

(*o*) See *Adams' case*, 13 Eq. 474, where one company transferred its business to another; *Bird's case*, 4 De G. J. & Sm. 200.

(*p*) *Best's case*, 2 De G. J. & Sm. 650. See, also, *Ramsgate Victoria Hotel Co. v. Montefiore*, and *Same v. Goldsmid*, L. R. 1 Ex. 109.

(*q*) See *Chapman's case*, 2 Eq. 567. *Abercorn's case*, 4 De G. F. & J. 78,

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Unconcluded
agreements.

In order that an application for shares and an acceptance of it (by allotment or otherwise) may constitute a concluded agreement between the applicant and the company or its directors, it is essential that the acceptance shall be in strict conformity with the application, and not depart from it in any material respect. If it does, the acceptance, even if in the form of a letter of allotment, must be regarded as a new offer, which the applicant for shares is at liberty to accept or decline; and there will be no concluded agreement until the new offer has been accepted (*r*). This has been decided where shares were applied for and those allotted were "not transferable" (*s*); so where the allotment was made subject to forfeiture on non-compliance with certain conditions (*t*); so where 100 shares were applied for and only 25 were allotted (*u*); so where 20*l*. shares were applied for and 40*l*. shares were allotted (*x*). So where the secretary of a company wrote to a provisional committee-man to say that shares had been allotted to him, and asking whether he would accept them; and in answer, the allottee requested that the shares in question might be "reserved for him," an issue was directed to try the question whether the answer amounted to an acceptance of the offer or not (*y*). There are several other cases illustrating the same principle, to which however it is unnecessary more particularly to allude (*z*).

and others of that class noticed hereafter under the head Contributories.

(*r*) See the next four notes, and compare with them *Harris' case*, 7 Ch. 587; *Peck's case*, 4 Ch. 532, where the term as to payment was held no qualification.

(*s*) *Duke v. Andrews*, 2 Ex. 290. See, too, *Wontner v. Shairp*, 4 C. B. 404; *Vollans v. Fletcher*, 1 Ex. 20, and compare *Hutton v. Uppill*, 2 H. L. C. 674.

(*t*) *Jackson v. Turquand*, L. R. 4 H. L. 305, affirming *Addinell's case*, 1 Eq. 225; *Oriental Inland Steam Co. v. Briggs*, 8 Jur. N. S. 801, and 4 De G. F. & J. 191. Compare these with *Barrett's case*, 2 Dr. & Sm. 415, and 3 De G. J. & Sm. 30,

where the new term was accepted by payment, and with *Perrett's case*, 15 Eq. 250, where repudiation came too late.

(*u*) *Ex parte Roberts*, 1 Drew. 204; *Re Barber*, 15 Jur. 51. The common form of application now in use, is for a certain number of shares, or such smaller number as may be allotted.

(*x*) See *Gustard's case*, 8 Eq. 438, where the bargain as to the 20*l*. shares was held binding, but there was no bargain for 40*l*. shares.

(*y*) *Onion's case*, 1 Sim. N. S. 394. See, too, *Mainwaring's case*, 2 De G. M. & G. 66.

(*z*) See *infra*, book iv., under the head Contributories.

Moreover, in cases of this kind, the facts that shares have been allotted to the applicant, and that he has been registered in respect of them and has applied for certificates, do not conclusively show an acceptance by him of the new terms (*a*). Bk. I. Chap. I.
Sect. I.

Again, if an offer is made to take shares conditionally or upon unusual terms, a clear acceptance of these conditions or terms must be proved in order to constitute a binding agreement: and the mere fact that shares have been placed in the applicant's name is not sufficient to bind him. Thus, in *Shackelford's case* (*b*), a person applied for shares upon the terms that he should have the refusal of certain contracts and pay for the shares in goods and not in cash. There was no distinct evidence that this offer was accepted. The shares applied for were, however, in fact allotted to him and placed in his name; and although no notice of the allotment was sent to him, there was evidence to show that he was aware that shares had been given to him. It was nevertheless held that no concluded agreement had been entered into, and that the applicant had not become a shareholder. Conditional offers.

Shackelford's case.

The conditions, moreover, must be assented to by those who are competent to bind the company (see Book II., c. 2). Therefore, where a person applied for shares upon certain terms which were assented to by the manager and two directors, when by the constitution of the company three directors were required to bind the company, it was held that there was no binding agreement, although the board of directors had delegated the allotment of shares to the manager and the two directors in question (*c*).

It is a necessary consequence of the same principle that if the conditions are such that the company cannot lawfully assent to them there is no binding agreement (*d*).

An application for shares upon terms not assented to must not be confounded with an application for shares upon conditions which are assented to but are not performed. In the

(*a*) *Beck's case*, 9 Ch. 292. See, also, *Wynne's case*, 8 Ch. 1002. (*d*) See *Bank of Hindustan v. Alison*, L. R. 6 C. P. 54 & 222;

(*b*) 1 Ch. 567. See, also, *Rogers' case*, 3 Ch. 633. *Stace and Worth's case*, 4 Ch. 682; *Pellatt's case*, 2 Ch. 527; *Bann's case*, 2 De G. F. & J. 275.

(*c*) *Howard's case*, 1 Ch. 561.

Bk. I. Chap. 1. first case, there is no agreement at all; in the second case,
 Sect. 1. there is a concluded agreement, and its effect with reference to
 the question whether the applicant has become a member or
 not, turns on other considerations; viz., 1. Has the condition
 been performed? if not, then 2. Is the condition precedent
 or subsequent with reference to becoming a member? if
 precedent, then 3. Has the performance of it been waived?
 These matters will be more fully discussed when membership
 is being examined.

Effect of an
 agreement to
 take shares.

Forming and
 formed com-
 panies.

Agreements to take shares can be enforced by action; but it
 is a well settled principle of the Law of Partnership (*c*) that an
 agreement to share profits does not create a partnership so
 long as anything remains to be done before the right to share
 them accrues. It consequently follows that neither the pro-
 jectors of, nor the subscribers to, a company in course of
 formation are partners (*f*): nor are they, simply by reason of
 their position as projectors or subscribers, liable for each
 other's acts as if they were partners (*g*). It becomes therefore
 important to distinguish clearly a company which is formed
 from one which is being formed; and this is by no means
 always an easy matter (*h*). When indeed a company is incor-
 porated by special act of Parliament, by charter, or by regis-
 tration, the moment of its formation is coincident with the
 date of its incorporation, and is accurately determinable; but
 where a company is not incorporated it is often difficult to fix
 the time at which the agreement to form it became replaced by
 a contract of present partnership. The test is whether any-
 thing still remains to be done before the relation of partners is
 created (*i*).

(*c*) Part. 20 *et seq.*

(*f*) Ib. and *infra*, Bk. II. c. 1,
 sec. 1.

(*g*) Ib. and *infra*, Bk. II. c. 1,
 sec. 1.

(*h*) As to when the formation of

a company can be said to have been
 commenced, see *Baker v. Plaskitt*, 5
 C. B. 262.

(*i*) Part. 23 *et seq.* and *infra*,
 Bk. II. c. 1.

SECTION 2.—OF THE PROSPECTUS AND DEPARTURES FROM IT.

One of the first steps in the formation of a company is the publication by its projectors of a prospectus, setting forth the nature and objects of the proposed company, the number and value of the shares intended to be created, and the amount of capital supposed to be required. The public is invited to subscribe to the company thus proposed to be formed: in other words, persons are invited by advertisements, circulars, &c., to enter into an agreement to take shares in a company, such as that described, when the same shall have been formed. Those who sign such an agreement, whether by themselves or by their agent (*k*), become subscribers to the undertaking in the proper sense of the word (*l*).

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Prospectus.

The prospectus issued to the public must, in the absence of evidence to the contrary, be regarded as the basis of the agreement which results from an application for shares by a person who has seen the prospectus, and an allotment to him (*m*). Hence, if a person applies for shares in a company upon the faith of a prospectus issued by its promoters or directors, and he receives in answer to his application an allotment of shares in a company to which the prospectus does not apply, he is at liberty to decline to accept such shares; for they are not in truth what he asked for. Nor will even payment of a deposit by him upon the shares allotted be conclusive evidence against him of an assent by him to take the shares allotted; for he is entitled to assume that he has received what he applied for; and unless it can be shown that when he paid the deposit he did not act on that assumption, he is, notwithstanding such payment, entitled to say he has entered into no binding contract (*n*).

Prospectus not
alluded to.

Effect of paying
for shares allot-
ted when diffe-
rent from those
asked for.

(*k*) *Re Whitley Partners Ltd.*, 32, Ch. D. 337.

(*l*) *Burke v. Lockmere*, L. R. 6 Q. B. 297; *Thames Tunnel Company v. Sheldon*, 6 B. & C. 341, decided that a person who had signed nothing, but had applied for shares and had paid a deposit on those allotted to him, was not a subscriber within

the meaning of an act incorporating the subscribers to a projected company.

(*m*) See *Pulsford v. Richards*, 17 Beav. 87; *Jennings v. Broughton*, ib. 234; *Fox v. Clifton*, 6 Bing. 776, *infra*. Compare *Gerhard v. Bates*, 2 E. & B. 476.

(*n*) *Downes v. Ship*, L. R. 3 H.

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Sect. 2.

Merionethshire
Slate Company.

The following are leading cases on this head.

The prospectus of the *Merionethshire Slate and Slate Slab Company* stated the objects of the company to be to work a particular slate quarry in Wales. The company was formed for the purpose of working not only that quarry, but any slate quarry in Great Britain or Ireland. It was held that a person who had applied for shares on the faith of the prospectus, and had on his application agreed to execute the company's deed of settlement, and had had shares allotted to him, and had paid a deposit upon their allotment, was nevertheless not bound to take such shares. He never had, in fact, agreed to take shares in such a company as was ultimately formed (*o*).

Scottish Finance
Bank.

The prospectus of the *Scottish and Universal Finance Bank* described the objects of the company to be general banking purposes, and the purchase, importation, and exportation of specie. The objects of the company as formed went far beyond this, and included, amongst other things, obtaining concessions for the construction of railway and other works, and the leasing or working such undertakings, and the transaction of the business of a merchant, contractor, and capitalist, as principal or agent in any part of the world. It was held, first by the V.-C. Wood, and afterwards by the Court of Appeal, that a person who applied for shares on the faith of the prospectus, and to whom shares were allotted, had not agreed to become a member in the company; he never having been aware that the company was formed for purposes so materially different from those stated in the prospectus (*p*).

Russian Iron
Company.

The prospectus of the *Russian Vyksounski Iron-works Company* stated that the objects of the projected company were to acquire, work, and extend certain specified iron-works in Russia. The objects of the company as formed were to acquire and work iron mines and works in Russia generally, and to work mines, build ships, forge, cast, and roll iron, to construct wrought and cast iron work, and to manufacture all kinds of engines and engineering work. It was held, in this case also,

L. 356, 358, and *Blackburn's case*, 3
Drew. 409, noticed *infra*.

(*o*) *Rye's case*, 3 Jur. N. S. 460,
V.-C. S.

(*p*) *Ship's case*, 2 De G. J. & Sm.
544, and *Downes v. Ship*, L. R. 3 H.

L. 343.

that applicants for shares on the faith of the prospectus, and to whom shares had been allotted, but whose attention had never been drawn to the variance between the objects of the company as formed and those advertised, were at liberty to repudiate their shares on discovering the variation (*q*).

The prospectus of the *Scottish Petroleum Company* named G. and R. as two of the directors. Anderson, on the faith of this statement, applied for shares in the company, but before any shares were allotted to him both G. and R. had refused to be appointed directors. It was held that Anderson under these circumstances was at liberty to repudiate the shares allotted to him (*r*).

Many cases under the older winding-up acts illustrate the same principle and may still be usefully referred to where the right to repudiate is not lost by reason of the winding up of the company (*s*).

Other illustrations of the same principle are afforded by those cases in which the liability of subscribers to projected companies for debts contracted by the directors has been discussed. These cases establish that persons who agree to become members of a company to be formed upon certain terms and for certain purposes are not liable for debts contracted by the directors before the company is formed as contemplated; unless the subscribers have rendered themselves liable to such debts otherwise than by their agreement to take shares.

Thus in *Fox v. Clifton* (*t*), it was held that the defendants who had applied for shares in a company, had had them allotted, and had paid a deposit in respect of them, were not

(*q*) *Stewart's case*, 1 Ch. 574; *Webster's case*, 2 Eq. 741. *case*, 16 Beav. 262; *Meyer's case*, ib. 383.

(*r*) *Anderson's case*, 17 Ch. D. 373; and see *In re Scottish Petroleum Co.*, 23 Ch. D. 413. And compare *Smith v. Chadwick*, 20 Ch. D. 27, and 9 App. Ca. 187; *Hallors v. Fernie*, 3 Ch. 467, where the directors resigned after the shares had been allotted.

(*s*) *Coe's case* and *Naylor's case*, 4 K. & J. 308 & 314; *Goldsmid's*

(*t*) 6 Bing. 776. See, also, *Bourne v. Freeth*, 9 B. & C. 632; *Pitchford v. Davis*, 5 M. & W. 2; *Vice v. Anson*, 7 B. & C. 409. *Perring v. Houe*, 4 Bing. 28, so far as it decided that persons become partners by subscribing to an inchoate company, must be regarded as overruled by *Fox v. Clifton*.

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Sect. 2. —

The Scottish
Petroleum
Company.
Anderson's case.

Companies
starting too
soon.

Fox v. Clifton.

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partners with the projectors of the company, inasmuch as the company in which alone the defendants had agreed to become partners was never in fact formed. The capital was never subscribed, only a few shares were ever taken up, the deed was only signed by a comparatively few persons, and by one only of the defendants. The time fixed for its execution had elapsed, and it was expressly declared in the prospectus of the company, and which prospectus was held to form the basis of the contract into which the defendants had entered, that every person who should neglect to execute the deed within the time fixed should forfeit all share and interest in the company. In answer to the argument that the defendants had become shareholders in a *de facto* existing company by payment of the deposits, it was observed by the Court :—

Effect of paying
deposit.

“the paying of the deposits must undoubtedly be taken to imply an assent to the terms of the advertisement ; that is, an assent to become partners in a company raising a capital of 600,000*l.* consisting of 12,000 shares, and to be governed by a deed which should contain the clauses and conditions to be agreed on in future ; but we think it implies nothing more, and that it cannot be construed as an assent to the terms of a partnership already formed. When, therefore, instead of an allotment of 12,000 shares, the utmost that were ever allotted scarcely exceeded 7500 ; when, out of that number, no more than 2300 ever paid the first instalment ; when not half the latter number paid the second instalment, and only sixty-five subscribers signed the deed ; we think the subscribers were at liberty to say, This was not the trading company upon which we paid our deposit ; neither the capital nor the number of shares bearing any reasonable proportion to the original plan and project. And this the more especially, because, by the terms of the advertisement, they were taught to expect that the utmost risk which they encountered was the loss of all share and interest ‘in the concern’ upon their refusal to execute the deed ; which loss they appear to have submitted to.”

Change of
scheme autho-
rised or ratified.

The foregoing cases must be carefully distinguished from those in which the applicant has authorised or sanctioned an allotment of shares to him, with notice of a difference between the objects of the company as described in its prospectus and its objects as ultimately fixed by the instrument creating the company.

Change of
scheme autho-
rised by special
agreement.

Where there is a special agreement to take shares, and the company as described in the agreement differs in character or purpose from that described in the prospectus, the agreement

must, in the absence of fraud, be regarded as expressing the contract into which the parties have entered; and to the extent to which the agreement and prospectus differ from each other the terms of the prospectus must be considered as excluded by those of the agreement (*u*).

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Persons who subscribe to projected companies which are to be incorporated by act of Parliament or by charter, frequently give the managers very extensive powers, and bind themselves to take shares in almost any company which the managers may be able to induce the legislature or the Crown to incorporate, and which is not altogether of a different nature from that proposed. When this is the case, and a company is formed, the subscribers will be bound to take shares, and will be converted into shareholders, if the act or charter so declares, although the company actually formed differs both in object and constitution from that to which they subscribed (*x*).

Change of
scheme autho-
rised by form of
application.

In the *Midland Great Western Railway Company v. Gordon* (*r*), a prospectus was issued for the formation of a company to construct a railway from Dublin to Mullingar and thence to Athlone. The directors were authorised to apply to Parliament for an act, and to do all that was necessary for forming a railway as proposed. Scrip certificates for shares were issued, and the defendant subscribed for ten shares. The directors obtained an act incorporating the company, authorising it to make a railway from Dublin to Mullingar only, and to purchase a canal existing between Mullingar and Athlone, and to work such canal. The act provided that every one who should have subscribed to the undertaking or should be otherwise entitled to a share, and whose name should be entered on the register, should be a shareholder. The defendant had sold his scrip, but he was nevertheless registered by the company as a shareholder, and he was held to be a shareholder notwithstanding his contention that the company actually formed was materially different from that to which he had subscribed (*y*).

Midland, &c.,
Rail. Co. v.
Gordon.

(*u*) *London and Continental Assurance Soc. v. Redgrave*, 4 C. B. N. S. 524, and the next note.

(*x*) 16 M. & W. 804.

(*y*) *Nixon v. Brownlow*, 2 H. & N. 455, and 3 ib. 683, and *York and*

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Sect. 2.

Norman v.
Mitchell.

Again, where a banking company was projected with a capital of 1,000,000*l.* to be trebled if necessary, and the subscribers signed an agreement reciting that application had been made to the Crown for a charter and nominating certain persons with power to arrange the terms of the charter in such manner as they should think necessary in compliance with the requisitions of the Crown, and to narrow or extend the objects of the company as might be necessary, it was held that a charter incorporating the subscribers with a capital of 644,000*l.* with power to increase it to 1,000,000*l.*, with the consent of the Lords of the Treasury, was one which the directors had authority to accept, and that the subscribers were bound by it (*z*).

Change of
scheme autho-
rised by act of
Parliament.

Even where the subscribers' agreement is less general in its language, the terms of the act of Parliament incorporating the company may be such as to convert the subscribers to a company of a particular description into shareholders in another company materially different from it. A construction of the act leading to such a result is to be avoided if possible; but if its language is clear and precise no court can lawfully decline to give effect to it, nor hold that a person expressly made a shareholder by the legislature is not a shareholder to all intents and purposes (*a*). When two companies are amalgamated by an act of Parliament which enacts that the shareholders of the old companies shall be entitled to shares in the new company, nothing more is required to make them members thereof (*b*).

Change of
scheme subse-
quently assented
to.

A person who has applied for shares and has had them allotted to him under circumstances which entitle him to reject them, may nevertheless elect to retain them; and this election may be evidenced not only by an express agreement but by conduct. It need hardly be added that if a person knowing the circumstances which entitle him to reject

Youghal Rail. Co. v. Paterson, 18 C. B. 414, are similar cases.

(*z*) See *Norman v. Mitchell*, 5 De G. M. & G. 648; and 19 Beav. 278.

(*a*) See *Kidwelly Canal Co. v. Roby*, 2 Price, 93; *Cromford and*

High Peak Co. v. Lacey, 3 Y. & J. 80; *Scott v. Berkeley*, 3 C. B. 925.

(*b*) *Spackman v. Lattimore*, 3 Gilf. 16; and see *Cork and Youghal Rail. Co. v. Paterson*, 18 C. B. 414.

shares which have been allotted to him retains them without objection, and acts as if he were a shareholder, it will be too late for him afterwards to repudiate them upon the ground that they were not what he applied for, or upon the ground that the terms of the company's prospectus have not been adhered to (*c*).

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But although a person may acquiesce in a change in the objects of a company, yet, where those objects are changed after an application for shares and before the allotment of them, and the attention of the applicant is not drawn to the change, and he is really ignorant of it, the mere fact that he receives the shares and pays the deposit on them, will not preclude him from denying that he ever agreed to take them (*d*).

Allotment with
alleged notice
of change in
scheme.

The same principle applies to registered companies; and it has been decided that the mere circumstance that the applicant receives a letter of allotment or certificate stating that the shares are to be held subject to the company's memorandum and articles of association is not enough to call his attention to a material difference between the prospectus on the faith of which he applied for shares, and the memorandum of association which fixes the objects of the company (*e*).

But the strong tendency of modern decisions is that as regards companies formed under the Companies Act, 1862, an allottee of shares who does not inform himself of the contents of the memorandum of association within a reasonable time, and who keeps the shares allotted to him without taking the trouble to ascertain whether there is any discrepancy between the prospectus and the memorandum of association, cannot

Delay in repu-
diation.

(*c*) See *Tredwen v. Bourne*, 6 M. & W. 461; *Peel v. Thomas*, 15 C. B. 714; *Steigenberger v. Carr*, 3 Man. & Gr. 191; *London and Continental Assurance Co. v. Redgrave*, 4 C. B. N. S. 524. Compare these cases with those on p. 21, note (*t*).

(*d*) *Blackburn's case*, 3 Drew. 409. This case was reversed on appeal (8 De G. Mac. & G. 177); but the principle on which it was decided

by the Vice-Chancellor remains unimpeached. On the appeal additional evidence was adduced and the Court was satisfied that when Blackburn paid his deposit he must have known what shares he was taking.

(*e*) *Webster's case*, 2 Eq. 741; *Ship's case*, 2 De G. J. & Sm. 544. See, also, *Beck's case*, 9 Ch. 392, where the allottee was registered.

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afterwards repudiate the shares (*f*). In the application, however, of this rule, it is important to distinguish cases in which the allottee repudiates his shares before the company is being wound up from those in which he does not (*g*). The following cases, which arose before any winding-up had commenced, may be usefully referred to on this head.

Repudiation in
time.

Stewart's case.

In *Stewart's case* (*h*) the application to be removed from the list was successful although twelve months had elapsed since the allotment of shares, and the allottee had in the interval tried to sell them, and had attended a meeting called for the express object of altering a clause in the articles relating to the increase of capital beyond the amount stated in the prospectus: but both the V.-C. Wood and the Court of Appeal held that these circumstances did not preclude the shareholder from having his name removed, it being clearly proved that he, in fact, knew nothing of the great change which had been made in the objects of the company (*i*).

Webster's case.

In *Webster's case* (*k*), which was another in the same company, the allottee had exchanged the banker's receipt for a certificate that he was the proprietor of fifteen shares "subject to the provisions of the memorandum and articles of association:" but even this and the lapse of one year after the allotment, and ten months after the receipt, were held not to deprive him of his right to be removed.

Nichols' case.

Nichols' case (*l*). A prospectus of a projected company stated (in effect) that its objects were to rear poultry, and to enable consumers to buy eggs and poultry at half the usual price. The prospectus stated that the articles of association might be seen at the company's office; but neither the prospectus nor the articles referred to the memorandum of asso-

(*f*) See the judgments in *Peel's case*, 2 Ch. 674; *Lawrence's case* and *Kincaid's case*, ib. 412; *Wilkinson's case*, ib. 536; also in *Downes v. Ship*, L. R. 3 H. L. 343, and *Oakes v. Turquand*, 2 ib. 325.

(*g*) Compare with the cases referred to in the next notes, *Peel's case*, 2 Ch. 674; *Hare's case*, 4 Ch.

503.

(*h*) 1 Ch. 574, *ante*, p. 21. See also *Wynn's case*, 8 Ch. 1002, and *Beck's case*, 9 ib. 392.

(*i*) Compare *Ex parte Briggs*, 1 Eq. 483.

(*k*) 2 Eq. 741.

(*l*) W. N. 1867, 77.

ciation. On the faith of this prospectus, application was made by Nichols for shares, and they were allotted to him. Shortly afterwards the company was registered, and by its memorandum of association its objects were stated, to be not only to rear poultry and deal in poultry and eggs, but also "the dealing in game and wild birds, the cultivation and growth of vegetables, fruit, and agricultural produce, the acquisition, use, or sale of inventions for artificial hatching, the preservation of poultry or meat, and any other purpose connected with the business of the company, and the carrying on the businesses of poulterers, egg merchants, dealers, market gardeners, and farmers." Nichols took no part in the proceedings of the company, and did nothing whatever except pay for the shares on allotment. A year after the allotment he, for the first time, became acquainted with the objects of the company as formed, and he at once repudiated his shares. The V.-C. Wood removed his name from the register of shareholders, being of opinion that there was nothing to put Nichols on inquiry, and that under those circumstances the time which had elapsed since the allotment of shares was immaterial.

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In *Baily's case (m)*, a person applied for shares, and paid the deposit on them; the company was afterwards registered, and it issued another prospectus, materially differing from the first; the shares were then allotted, but this was some months after the application for them; the allottee declined to accept them, and asked for his money back; nothing further was done for eighteen months, when a call was made upon him; he then applied to have his name struck off the register of shareholders, and it was ordered to be struck off. This case is instructive, not only on the effect of delay after repudiation (n), but as showing, that even although the memorandum of association and the prospectus may not vary, still a material departure by the company from the prospectus on the faith of which shares are applied for, entitles the applicant to decline to accept them.

(m) *Ex parte Baily*, 3 Ch. 592, 503, where the company was being and 5 Eq. 428. wound up.

(n) Compare *Hare's case*, 4 Ch.

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Repudiation too
late.

On the other hand, where a person knowing the change of the objects of the company delays to repudiate his shares, he will be treated as electing to hold them, and any subsequent attempt to repudiate them will be unsuccessful; and a delay of four months has been held fatal, even although during that time the shareholder had done nothing which was inconsistent with his repudiation (*o*). But the onus of proving such knowledge is on the persons who made the misrepresentation, and proof by them that a letter containing a notice of the misrepresentation was sent to the registered address of the person seeking to repudiate his shares is not sufficient to fix him with notice of the misrepresentation, if in fact he had no knowledge of the letter (*p*). It need hardly be observed, that if after knowledge of the facts entitling a person to repudiate his shares he acts as a shareholder, *e.g.*, by attending meetings, paying calls, or attempting to sell his shares, his right to repudiate them will be at an end (*q*). Further, if a shareholder knowing of one ground of variance, or having his suspicions aroused, chooses to remain quiet, it will be too late for him afterwards to repudiate his shares, and he will be a contributory (*r*). So will delay be fatal after the right of the shareholder to repudiate his shares is denied (*s*).

Application for
shares after a
company is
formed.

In all the foregoing cases it will have been observed that the application for shares preceded the formation of the company. Where a company is actually formed, and a person afterwards applies for shares in it, and they are allotted to him, an agreement between him and the company is thereby concluded, and in the absence of fraud is binding on both parties. In such a case a definite thing is applied for, *viz.*, a share in an existing company, the objects of which are defined by the Company's act of Parliament or memorandum of association, with which he can make himself acquainted; the thing applied for is acquired; the contract, therefore, is complete and can only be impeached, if at all, for fraud (*t*).

(*o*) *Lawrence's case*, 2 Ch. 412; (*q*) See *Ex parte Briggs*, 1 Eq. *Kincaid's case*, *ib.* See, also, *Wilkinson's case*, 2 Ch. 536. 483.

(*r*) *Whitcomb's case*, 3 Eq. 790.

(*p*) *In re London and Staffordshire Fire Insurance Co.*, 24 Ch. D. 149.

(*s*) *Tait's case*, 3 Eq. 795.

(*t*) See Lord Cairns' judgment in

The subject of fraudulent prospectuses will be referred to hereafter (see Book I., c. 3).

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SECTION 3.—OF THE RETURN OF SUBSCRIPTIONS TO COMPANIES, ON
THE GROUND OF FAILURE OF CONSIDERATION.

Before leaving the subject discussed in the foregoing pages, it will be convenient to consider the circumstances under which an allottee of shares, who has paid a deposit upon them, has a right to have this deposit returned, upon the ground that the consideration for its payment has failed. His right to be relieved on the ground of fraud will be considered hereafter.

It has been decided by the House of Lords, that if a number of persons, meaning to join in a common undertaking, raise a common fund, eventually to be increased, but commencing by a deposit, and they put these deposits for a common object into the hands of a committee, with directions to them to do certain acts, it is not competent for any one or more of the subscribers against the will of the others to withdraw and say, "I think, or we think, you ought not to go any further." Any one subscriber who is not of that opinion has a right to say, "I gave my money upon the faith that we all embarked in one common undertaking, and till that has been done, which we agreed should be done, none have a right to withdraw and say you shall not go any further" (*u*). It follows from this, that no subscriber to a projected company can recover back his money on the ground that the consideration for his subscription has failed, until the formation of the company upon the

Subscriber to a
scheme not at
liberty to retire
from it.

Peel's case, 2 Ch. 684, and the judgments in *Kisch v. Central Railway of Venezuela*, 3 De G. J. & S. 122, and L. R. 2 H. L. 99; *Oakes v. Turquand*, ib. 325; and see as to the immateriality of altering the articles of association, *Lyon's case*, 35 Beav. 646.

(*u*) *Baird v. Ross*, 2 Macqueen, 61. See, too, *Burnes v. Pennell*, 2

H. L. C. 497; compare *Kent v. Jackson*, 14 Beav. 367, and 2 De G. Mac. & G. 49. As to the right of scrip holders to have the money subscribed by them applied to the purposes for which they subscribed it, see *Bagshaw v. The Eastern Union Rail. Co.*, 7 Hare, 114, and 2 Mac. & G. 389.

Bk. I. Chap. 1. terms assented to by him (*x*) has been abandoned or has
 Sect. 3. — become impracticable.

Unless it has
 failed.

But further, when a person applies for shares and has them allotted to him, a contract is entered into between him and others, and before any question as to failure of consideration can be discussed, the terms of this contract must be examined for the purpose of ascertaining precisely for what the deposit was paid (*y*). If the contract shows that the deposit was paid for a share in a company to be formed for certain purposes and upon certain conditions and no such company is formed, and the time for its formation (which, if no time is limited, must be taken to be a reasonable time) has elapsed, then the consideration for which the deposit was paid has failed, and the deposit is returnable, unless the original contract has been varied with the consent of the subscriber of the deposit. But if the contract shows that the deposit was made for some other purpose (*e.g.* for the purpose of being employed in attempting to start the company), then the circumstance that the company has not been and cannot be formed, is no reason why the deposit should be returned.

1. Subscribers
 to abortive com-
 panies not liable
 for expenses
 incurred in
 attempting to
 form them.
Nockells v.
Crosby.

The leading case in support of the first of these propositions is *Nockells v. Crosby* (*z*). There the defendants, in circulars published by them, had proposed to receive subscriptions of 10s. a week for the space of one year, and to invest these subscriptions and to divide the interest twice a year equally amongst the subscribers or the survivors of them. The plaintiff subscribed to this scheme, but there not being a sufficient number of other subscribers nothing was ever invested, and the defendants came to a resolution to proceed with it no further, and to return to each subscriber the amount of his subscription, less a per-centage for expenses incurred. The plaintiff demanded to

(*x*) See *Johnson v. Goslett*, 18 C. B. 728, and 3 C. B. N. S. 569, and see also *Wilson v. Church*, 13 Ch. D. 1, and S. C. under the name of *National Bolivian Navigation Co. v. Wilson*, 5 App. Ca. 176.

(*y*) Hence in an action for the recovery back of the deposit, the letter allotting the shares in respect

of which the deposit was paid, must be produced, *Clarke v. Chaplin*, 1 Ex. 26. The defendants will, if necessary, be ordered to produce the agreement between them and the plaintiff, *Steadman v. Arden*, 15 M. & W. 587.

(*z*) 3 B. & C. 814.

have the whole amount subscribed by him returned, and he brought an action against the defendants for its recovery and was held entitled to a verdict. He had subscribed his money for one purpose only; it had not been applied, nor was there any longer any intention to apply it for that purpose, and it was therefore the duty of the defendants to return it to him in full. The judgment of Littledale, J., upon the right of promoters of abortive schemes to charge the subscribers with expenses is particularly valuable, and was as follows:—

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“I also am of opinion that the plaintiff is entitled to recover, upon this general principle, that if persons set a scheme afoot, and assume to be the directors or managers, all the expenses incurred before the scheme is in actual operation, must in the first instance be borne by them. When it is in operation, the expenses and charge of management should be borne by the concern, and then it may be fair that the preliminary expenses should be paid in the same way, for then the subscribers have the benefit of them. The prospectus put forth by these defendants stated that the money subscribed was to be placed out at interest. The plaintiff’s sole object in paying the money must have been to have it so placed out, but during eighteen months it remained idle at the bankers. Suppose there had been no subscribers, the projectors must have paid all the expenses. If, then, one person only subscribes, are all those expenses to be cast upon him? The hardship and injustice would be monstrous, yet that would be the consequence in such a case were we now to hold that the plaintiff was liable to a proportion of the expenses incurred by these defendants. With respect to the supposed partnership, it is plain that there could be none until the money was laid out in execution of the proposed scheme. I am, therefore, clearly of opinion that the plaintiff was entitled to recover.”

This case has been constantly recognised and followed (*a*). Other cases. The principle applies, whatever the object of the company when established may be; and to companies formed on the cost-book system as well as to the others (*b*). Moreover, if an allottee of shares undertakes to sign some deed which is referred to, and that deed is not in existence; but a deed, said to be the one referred to, is afterwards prepared, he is not

(*a*) See *Walstab v. Spottiswoode*, 15 M. & W. 501; *Moore v. Garwood*, 4 Ex. 681; *Ashpittel v. Sercombe*, 5 Ex. 147; *Coupland v. Challis*, 2 Ex. 682; *Owen v. Challis*, 6 C. B. 115; *Ward v. Londesborough*, 12 C. B. 252; *Mowatt v. Londesborough*, 3 E. & B. 307, and 4 ib. 1.

(*b*) *Johnson v. Goslett*, 18 C. B. 728, and 3 C. B. N. S. 569. In this case the company was actually at work, and its formation had never been abandoned. But its formation, on the terms originally agreed upon was abandoned, and the plaintiff had not assented to any others.

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bound to execute that, if it is inconsistent with the contract into which he has already entered. Consequently, where a person applied for shares in a projected railway and paid his deposits, and undertook to sign the parliamentary contract and subscribers' agreement, and a deed was afterwards prepared authorising the promoters of the company to apply the deposits in defraying preliminary expenses, it was held, that this was not such a deed as it was obligatory upon the allottee to execute, and that, the company having proved abortive, he was entitled to recover his deposits although it would have been otherwise had he executed the deed (*c*).

No lien for deposit.

Even where, upon the foregoing principles, a subscriber is entitled to have his deposit returned he has no lien for it and cannot restrain other creditors from attaching it (*d*).

Calls on subscribers to abortive companies.

It need hardly be observed that, if a person has agreed to pay a deposit in respect of certain shares, and the consideration for his agreement has failed, he is not compellable to pay the deposit (*e*). But if a person undertakes to pay deposits by a certain day, it is no defence to an action for not paying them on or before that day, that since that day the projected company has become abortive; for, perhaps, that would not have been its fate if the subscriptions had been paid as promised, and *ex hypothesi*, the promise was broken before the circumstances relied on as an excuse for its breach occurred (*f*).

2. Deposits not returnable when paid to cover preliminary expenses.

In the cases referred to above, the deposits were held returnable upon the ground that they had been paid for one purpose only, and that such purpose had become unattainable. In those about to be referred to, the deposits were held not returnable, although the company subscribed to had proved abortive; for the contract of the parties showed that the deposits were properly applicable in discharge of the expenses incidental to the attempt to form the company (*g*).

(*c*) *Ashpitel v. Sercombe*, 5 Ex. 147.

(*d*) *Moseley v. Cressey's Co.*, 1 Eq. 405.

(*e*) *Duke v. Andrews*, 2 Ex. 290.

(*f*) *Duke v. Dice*, 1 Ex. 36; *Duke v. Forbes*, ib. 356; *Aldham v. Brown*,

7 E. & B. 164, and on appeal, 2 E. & E. 398; see *Woolmer v. Toby*, 10 Q. B. 691, as to who ought to sue in such cases.

(*g*) See *Baird v. Ross*, 2 L. Queen, 68, 69.

Garwood v. Ede (h) is a case of this description. There the plaintiff had paid deposits on shares in a projected railway, and had signed a deed which authorised the promoters to defray the expenses incidental to the undertaking out of the deposits paid for shares (*i*). Under these circumstances it was held that, although the scheme for the railway proved abortive, the deposits paid by the subscribers for shares in it were not returnable.

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—
Garwood v. Ede.

Clements v. Todd (k) was decided on the same principle; for although the plaintiff had not signed any such deed as that signed in the last case, there was a deed which he had undertaken to sign, and he had accepted scrip certificates which stated that he had signed it. He was therefore held to have authorised the application of his deposits in the discharge of preliminary expenses, as mentioned in the deed.

Clements v. Todd.

Jones v. Harrison (l) is another instance of the same kind, only the authority to defray preliminary expenses out of the deposits was conferred by the terms of the letter of allotment, and not by any deed intended for execution after the allotment was made.

Jones v. Harrison.

Upon precisely the same principle it was held in the more recent case of *Aldham v. Brown (m)*, that where a person had covenanted to pay a deposit which was to be applicable, amongst other things, to the discharge of the expenses of forming a company, he was bound by his covenant, and was liable to an action upon it, although, before the action was brought, the formation of the company had become impossible.

Aldham v. Brown.

The cases of *Garwood v. Ede (n)*, and *Watts v. Salter (o)*, which decided that a person who had paid deposits and executed a deed authorising their application in payment of

Cases in which deposits have been held returnable, although the company's deed has been signed.

(*h*) 1 Ex. 264; see, too, *Watts v. Salter*, 10 C. B. 477; *Fane v. Cobbold*, 1 Ex. 798; *Atkinson v. Pocock*, ib. 796.

Edgworth, 2 De G. & Sm. 73.

(*i*) Meaning the preliminary expenses. See *Willey v. Parratt*, 3 Ex. 211; *Baird v. Ross*, 2 M'Queen, 69.

(*l*) 2 Ex. 52; see, too, *Willey v. Parratt*, 3 Ex. 211; *Baird v. Ross*, 2 M'Queen, 61.

(*k*) 1 Ex. 268; compare *Askipitel v. Sercombe*, 5 Ex. 147; *Sibson v.*

(*m*) 7 E. & B. 164, and 2 E. & E. 398; see, too, *Duke v. Dive*, 1 Ex. 36; *Duke v. Forbes*, ib. 356.

(*n*) 1 Ex. 264.

(*o*) 10 C. B. 477.

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preliminary expenses, could not recover the deposits so paid, are not to be regarded as authorities for the proposition that the execution of such a deed necessarily, and under all circumstances, precludes the recovery back of the deposits. If the execution of the deed has been induced by fraud, the right to recover the deposits is unaffected by such execution (*p*); and although it was said in *Watts v. Salter* that in the absence of fraud, the deed, and that alone, regulated the rights of the contracting parties, yet this doctrine has not altogether met with approbation: and in a later case, where the promoters of a railway company had in their circulars and letters of allotment expressly undertaken to return the deposits in full, if the necessary act of Parliament could not be obtained, it was held, first by the Court of Queen's Bench, and afterwards by the Exchequer Chamber, that the deposits paid were recoverable in full, even by persons who had executed a deed whereby it was expressly stipulated that the promoters should be indemnified out of the funds of the company and by the subscribing shareholders against all expenses (*q*). The promoters, in order to induce persons to take shares, to pay deposits, and execute the deed, promised to return all deposits in full in a given event: and it could never have been intended that a person by executing the deed should lose the benefit of that promise.

Evidence in
actions for the
recovery back
of deposits.

Before leaving this subject, it may be as well to observe that in order that an action for the recovery back of deposits may be successful, the plaintiff must prove that the money he seeks to recover was paid to the defendants or to their agents. For, in the absence of such proof, however clear the right of the plaintiff may be to have his money back, he will have established no case against the individual from whom he seeks to recover it.

Evidence of the
receipt of the
money by the
defendants.

In *Nockells v. Crosby*, *Walstab v. Spottiswoode*, and the cases of that class already referred to (*p*. 30, *et seq.*), the plaintiff

(*p*) *Wontner v. Shairp*, 4 C. B. 404; *Jarrett v. Kennedy*, 6 C. B. 319; compare *Vane v. Cobbold*, 1 Ex. 798; and *Atkinson v. Pocock*, ib. 796; *Watts v. Salter*, 10 C. B. 477.

(*q*) *Mowatt v. Lord Londesborough*, 3 E. & B. 307, and 4 ib. 1. In this case interest on the deposit had been demanded, and was recovered, from the time of the demand.

proved that he had paid his deposits to the bankers appointed by the defendants to receive them, and this was quite sufficient (r). But it must be borne in mind that the promoters of companies are not partners (s), and that in order that any particular promoter may be liable to return deposits paid into a bank to the account of the company, it must be shown that he authorised the bank to receive the deposits on the account to which they have been paid.

Thus in *Watson v. The Earl of Charlemont* (t), the plaintiff brought an action against three persons to recover deposits paid by him for shares in an abortive company. The three defendants were members of the committee of management. The letter of allotment sent to the plaintiff was signed by the secretary to the company, and contained a list of banks into any of which deposits might be paid. The plaintiff had paid his deposits into one of these banks, and had received from the bankers a receipt on account of certain persons as trustees for the company. Only one of the defendants was amongst the persons on whose account the receipt of the money was thus acknowledged; and it was held that this evidence was insufficient to show a receipt by all the defendants, and the action therefore failed.

(r) See, too, *Hayes v. Stirling*, 14 Ir. Com. Law Rep. 277; *Maitland's case*, 4 De G. M. & G. 769.

(s) See Partnership, p. 23, and *infra*, book ii. c. 1, sec. 1.

(t) 12 Q. B. 856. See, also, *Burnside v. Dayrell*, 3 Ex. 224; *Drouett v. Taylor*, 16 C. B. 671.

CHAPTER II.

OF MEMBERSHIP.

SECTION I.—WHO CAN BE MEMBERS.

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Sect. 1.

EVERY person who is capable of contracting is capable of becoming a member of a company (*a*). A company may no doubt be formed on terms which expressly exclude certain persons or classes of persons from becoming members of it; but regulations to this effect do not affect the legal capacity of the persons excluded. Such capacity depends on the general law of the country, not on the regulations of any particular company. But notwithstanding the general proposition above stated, a few observations are necessary with reference to 1. Aliens; 2. Convicts; 3. Infants; 4. Lunatics; 5. Married women; and 6. Corporations and companies.

1. *Aliens*.

Alien friends.

There is nothing to prevent an alien, not an enemy, from holding shares in a company (*b*). But a public minister of a foreign state, accredited to and received by the Queen, cannot be sued here even in respect of commercial transactions in which he may have engaged; and if, therefore, such a person holds a share in a company, he cannot, while so accredited and received, be sued here, either for calls or in respect of the debts and liabilities of the company (*c*).

(*a*) Partn. 71; as to the clergy, see 1 & 2 Vict. c. 106, §§ 29–31, and 4 Vict. c. 14.

(*b*) A ship may be registered in the name of a company, although some of its members are foreigners.

R. v. Arnaud, 9 Q. B. 806; and 17 & 18 Vict. c. 104, § 18. See, generally, as to aliens, 33 Vict. c. 14.

(*c*) *Magdalena Steam Nav. Co. v. Martin*, 2 E. & E. 94.

Alien enemies stand in a very different position from alien friends. For when two supreme powers are at war all persons, who for the time being are the subjects of either, become, in contemplation of the civil tribunals of both, hostile to the subjects of the other; and so long as the war lasts, the subjects for the time being of the one country are incapable of entering into any valid contract with the subjects of the other; and all remedies available for the one against the other in respect of transactions before the war are suspended (*d*). Consequently while war lasts an agreement by an alien enemy to become a member of an English company cannot be enforced. The effect of a person who is a member of a company becoming an alien enemy by a declaration of war has never been decided; but *Ex parte Boussmaker* (*e*) tends to show that such a person would not *ipso facto* cease to be a member: but rather that his rights and liabilities would be suspended during the war, and might be enforced upon the restoration of peace (*f*).

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Alien enemies.

It is to be remembered that whether a person is or is not to be considered as an enemy depends, not on whether there is war between this country and his native land, but upon whether there is war between this country and the country in which he is voluntarily resident (*g*). A foreigner resident in this country and holding shares in an English company would not therefore be affected as regards his shares by a war between this country and his own (*h*).

With reference to the legality of trade and commerce, a company ought, it is conceived, to be treated as resident not only where its principal place of business is, but wherever it has any place of business (*i*). It has, however, been determined,

Residence of
company.

(*d*) *Albrecht v. Sussman*, 2 V. & B. 323; *Willison v. Patteson*, 7 Taunt. 440; *Ex parte Boussmaker*, 13 Ves. 71; *Potts v. Bell*, 8 T. R. 548. See the note to *Clemontson v. Blessig*, 11 Ex. 141.

(*e*) 13 Ves. 71.

(*f*) Subject to being barred by the Statute of Limitations. Whether peace operates retrospectively, see *New York Life Ins. Co. v. Statham*, 3 Otto, 24 (Amer.).

(*g*) *Albrecht v. Sussman*, 2 Ves. & B. 323; *Willison v. Patteson*, 7 Taunt. 440; *Houriet v. Morris*, 3 Camp. 303; *Bell v. Reid*, 1 M. & S. 726.

(*h*) See *Wells v. Williams*, 1 L. Raym. 282; 1 Salk. 46; and the cases in the last note.

(*i*) See *Carron Co. v. MacLaren*, 5 H. L. C. 416, and *Lewis v. Baldwin*, 11 Beav. 153, from which it appears that for some purposes at all events

Bk. I. Chap. 2. that for the purpose of deciding whether a company dwells
Sect. 1. — within a particular district, regard ought to be had rather to the place where its business is principally carried on than to the situation of its subordinate offices (*k*).

A registered company does not necessarily dwell where its registered office is situate (*l*).

A note on the subject of foreign companies will be found in the Appendix.

2. *Convicts.*

The old law by which the property of felons was forfeited to the Crown was abolished by 33 & 34 Vict. c. 23 (*m*). The Crown, however, is empowered to commit the custody and management of the property of any convict (*i.e.* a person sentenced to death or penal servitude) (§ 6) to an administrator (§ 9) in whom all the convict's property then becomes vested (§ 10), and who can dispose of the same as he may think fit (§ 12). A convict cannot alienate any of his property nor make any contracts, nor maintain any action for the recovery of any property, debt, or damage (§ 8), except when lawfully at large under a proper license (§ 30). Provision is also made for the appointment by a justice of the peace of an interim curator of a convict's property (§ 21).

Position of the administrator.

There have not as yet been any decisions on the application of this act to convict shareholders. But several important questions are suggested by it: *e.g.* Is the administrator, himself a shareholder, liable to pay calls and to be a contributory in the event of the company being wound up? or is he entitled to sell and transfer the convict's shares without becoming a shareholder himself? Sect. 10 is so worded that it may possibly be held to make the administrator a shareholder simply by virtue of his office; but when the section is applied to the

companies may be considered as resident in more places than one.

(*k*) See *Jones v. Scottish Accident Insurance Co.*, 17 Q. B. D. 421; *Brown v. Lond. and N. W. Rail. Co.*, 4 B. & Sm. 326; *Shield v. Great N. Rail. Co.*, 7 Jur. N. S. 632; *Adams v. Great W. Rail. Co.*, 6 H. & N.

404; *Taylor v. Crowland Gas Co.*, 11 Ex. 1.

(*l*) *Cesena Sulphur Co. v. Nicholson*, 1 Ex. D. 428; *Calcutta Jute Mills Co. v. Nicholson*, *ib.*; *Keynsham Blue Lias Co. v. Barker*, 2 H. & C. 729.

(*m*) Partn. 73.

shares of any particular company, the company's act, charter, or regulations may enable the administrator to dispose of the shares vested in him without himself becoming a shareholder, and incurring personal liability as such (see also § 12).

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3. *Infants.*

An infant may be a member of a company, but he can repudiate his shares whilst he is an infant or on coming of age (*n*).

An infant, however, cannot hold shares and decline to pay the calls in respect of them. He may, if he chooses, repudiate his shares and so get rid of his liabilities (*o*); but if he does not repudiate the shares, he must pay calls like any other shareholder (*p*). *Qui sentit commodum sentire debet et onus*.

If a company's memorandum of association is signed by an infant, his signature is by no means inoperative. The incorporation of the company is not affected by it: and he becomes a member until he repudiates his share (*q*).

An infant who has had shares in a company transferred to him, may be rejected as a shareholder by the company on ascertaining the fact of his infancy (*r*); but the transfer is voidable only and not void, and unless repudiated by the company or the infant will be held good (*s*).

The Infants' relief act, 1874 (*t*), which renders invalid pro-

(*n*) *Co. Lit.* 380*b*; *Dublin and Wicklow Rail. Co. v. Black*, 8 Ex. 181; and see *Mitchell's case*, 9 Eq. 363; and *Ebbett's case*, 5 Ch. 302, and others of that class. If a company is being wound up and is insolvent, of course it will be for the benefit of an infant shareholder to repudiate his shares, and so avoid being made a contributory. See *Revl's case*, 24 Beav. 318; and *infra*, book iv., under the head Contributories.

(*o*) *Lond. and N. W. Rail. Co. v. McMichael*, 5 Ex. 114; *Newry and Enniskillen Rail. Co. v. Coombe*, 3 Ex. 565, and the cases referred to in

book iv., under the head Contributories.

(*p*) See *Cork and Brandon Rail. Co. v. Cazenove*, 10 Q. B. 935; *Leeds and Thirsk Rail. Co. v. Fearnley*, 4 Ex. 26; *North West Rail. Co. v. McMichael*, 5 Ex. 114. *The Birkenhead, Lancashire, &c., Rail. Co. v. Pilcher*, 5 Ex. 24, is not opposed to these; see *S. C.* ib. 121.

(*q*) See *Nassau Phosphate Co.*, 2 Ch. D. 610.

(*r*) See *Symon's case*, 5 Ch. 298, and *infra*, in book iv.

(*s*) *Lumsden's case*, 4 Ch. 31.

(*t*) 37 & 38 Vict. c. 62.

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mises made by persons of age to pay debts contracted during their minority, does not apparently affect the position of persons who become shareholders before they are twenty-one, and retain their shares after they come of age.

The position of infant shareholders on the winding up of companies will be alluded to hereafter when treating of contributories.

4. Lunatics.

Although contracts with lunatics are not necessarily void, and lunatics not known so to be may become liable in damages for goods supplied to them (*u*), yet a lunatic cannot be compelled specifically to perform a contract, nor can he obtain a judgment for specific performance against other people (*x*). But a lunatic may become a shareholder without his insanity being known; and if he does he cannot repudiate his shares (*y*); whence it follows that he is entitled to dividends, and is liable to calls in respect of them.

A lunatic who is so found by inquisition, and whose property is under the care of a duly appointed committee, is not in a position to bind himself by contracts or to deal with his own property. Shares belonging to him remain his, and he is liable to calls and to be a contributory in respect of them; but his rights in respect of them can only be exercised by his committee.

By the Lunacy regulation act (16 & 17 Vict. c. 70) (*z*), the committee can sell and transfer them without himself becoming a member in respect of them; and this power is usually exercised if the holder of them is under any liability to have calls made upon him.

By the Trustee act, 1850 (13 & 14 Vict. c. 60, § 5), shares standing in the name of a lunatic trustee may be transferred by a person appointed by the Lord Chancellor for the purpose.

(*u*) See *Drew v. Nunn*, 4 Q. B. D. 661; *Baxter v. Earl of Portsmouth*, 5 B. & C. 170. As to lunatics so found, see *Snook v. Watts*, 11 Beav. 107.

(*x*) See Fry on Spec. Perf.

(*y*) See *Moulton v. Camroux*, 2 Ex. 487; and 4 ib. 17; *Beavan v. McDonnell*, 9 ib. 309; and 10 ib. 184.

(*z*) See §§ 2, 116, 120, 123, 140-144.

5. *Married women.*

As regards married women, it is necessary in the first place to distinguish those who have separate estate from those who have none.

A married woman without separate estate cannot, except in No separate estate. a few cases (*a*), contract as a principal. She cannot be compelled to take shares which she may have applied for; nor can she be compelled to pay for them. Nor, apart from statute, is she liable to pay any calls in respect of any shares which may have been in fact allotted to her and are standing in her name (*b*). Whether her husband is a shareholder or is liable to calls in respect of such shares depends on the nature of the company. But if, as often happens, he cannot be regarded as a member of the company consistently with its regulations or with the statutes by which it is governed, he will not be liable in respect of them (*c*).

A married woman having separate estate which she is not Separate estate. restrained from anticipating is, as to such estate, in the position of a *feme sole* (*d*). She can invest it in shares, and make herself liable to pay for them and to pay calls upon them to the extent of such separate estate (*e*); and on the winding up of the company she will be a contributory in respect of her shares to the like extent (*f*). Her husband is not liable in respect of such shares (*g*).

A married woman entitled to fully paid-up shares for her

(*a*) *Viz.* 1, When her husband is a convicted felon; 2, when he is judicially separated from her; 3, when she has obtained a protection order against him; 4, when he is an alien enemy abroad; 5, when the wife is trader in the city of London. See Partn. 77.

(*b*) But see 45 & 46 Vict. c. 75, §§ 6 & 7, referred to below.

(*c*) See as to his non-liability to be made a contributory, *Angas' case*, 1 De G. & Sm. 560; *Ex parte Rhodes*, 7 W. R. 510. Compare *Luard's case*, 1 De G. F. & J. 533;

and as to his non-liability to *sci. fa.*, *Ness v. Angas*, 3 Ex. 805; *Dodgson v. Bell*, 5 ib. 967.

(*d*) 45 & 46 Vict. c. 75, § 1.

(*e*) *Ib.*

(*f*) *Ib.*, §§ 6 & 7; and see *Mattherman's case*, 3 Eq. 781; *Lond. and Bombay Bank*, 18 Ch. D. 581.

(*g*) See 45 & 46 Vict. c. 75, §§ 1, 6, 7; as to shares standing in her name before marriage, see *infra*; *Luard's case*, 1 De G. F. & J. 533, seems no longer law except as regards such shares.

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separate use can compel the company to register them in her name (*h*) ; but she cannot do so if the holding of the shares involves liability, and there is anything in the company's act or regulations which entitles the company to decline to accept her as a shareholder (*i*).

By the Married woman's property act, 1882, shares standing in the sole name of a married woman are deemed to belong to her for her separate use unless the contrary be proved (*k*).

Feme sole share-
holder marrying.

If a *feme sole* is a shareholder and marries, the law now is that the shares are her separate estate and, subject to a qualification, to be mentioned presently, she is alone liable in respect of them (*l*). Formerly, both she and her husband were liable (*m*) ; and even now he is liable to calls made on his wife's shares, whether before or after the marriage, if he has in fact obtained by the marriage property of his wife to the value of such calls (*n*). Further, in the event of the company being wound up and his wife becoming a contributory, he is liable to be put on the list himself (*o*). His liability to calls is confined to the continuance of the marriage (*p*), but not to the amount of the property acquired from his wife (*q*).

The Married woman's property act, 1882, § 17, enables the husband or the wife or the company to obtain a decision as to his or her title to shares, by summons or otherwise, in a summary way, before a judge of the High Court (*p*).

Date of marriage.

It is necessary to mention that the date of marriage is sometimes material ; but on this point it is sufficient to refer the reader to the Married woman's property act, 1882 (45 & 46 Vict. c. 75).

(*h*) *Ib.*, §§ 6, 7 ; *R. v. Carnatic Rail. Co.*, L. R. 8 Q. B. 299.

(*i*) *Ib.*, § 7.

(*k*) *Ib.*, §§ 6 & 7.

(*l*) 45 & 46 Vict. c. 75, §§ 6 & 13.

(*m*) See *Luard's case*, 1 De G. F. & J. 533 ; *Burlinson's case*, 3 De G. & Sm. 18 ; *Sadler's case*, *ib.* 36 ; *Khlul's case*, *ib.* 210 ; *White's case*, *ib.* 157 ;

Ex parte Hatcher, 12 Ch. D. 284.

(*n*) 45 & 46 Vict. c. 75, § 14.

(*o*) Companies act, 1862, § 78 ;

Ex parte Hatcher, 12 Ch. D. 284 ; see also *Bell's case*, 4 App. Cas. 550.

(*p*) See the section.

(*q*) See *Ex parte Hatcher*, 12 Ch. D. 284 ; decided on the Married woman's property act, 1874.

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6. *Corporations and Companies.*

There is no general principle of law which prevents a corporation from holding shares in a company except the principle that a corporation cannot lawfully employ its funds for purposes not authorised by its constitution. It has been assumed by the legislature, in many of the statutes relating to companies, that corporations may lawfully be shareholders (*r*), and at common law one corporation may be a member of another (*s*). Accordingly it has been held that where the above principle does not apply one company may hold shares in another (*t*); although not in a benefit building society (*u*). Practically, however, it may be said to be *prima facie ultra vires* for one company to hold shares in another: *i.e.*, power so to do must be shown to be expressly or impliedly given to it (*x*).

SECTION II.—WHAT CONSTITUTES MEMBERSHIP.

Generally speaking, some condition has to be performed, some formality to be observed, before a person entitled to become a member actually becomes one, and before a person entitled to retire actually ceases to be a member. What these conditions or formalities are in any particular case can only be ascertained by examining the act of Parliament, charter, deed

Who are members of companies.

(*r*) See for example the Companies' act, 1862, § 23, and the interpretation put on it in the cases cited in note (*t*); the Industrial and Prov. Soc. act, 39 & 40 Vict. c. 45, § 12 (4); 7 Wm. IV. and 1 Vict. c. 73, §§ 6 & 10; 7 & 8 Vict. c. 110, §§ 3 & 7, (*s*), and § 50.

(*s*) Grant on Corporations, p. 5.

(*t*) *Ex parte Contract Corp.*, 3 Ch. 105; *Royal Bank of India's case*, 4 Ch. 252, and 7 Eq. 91.

(*u*) *Dobinson v. Hawks*, 16 Sim. 407. A corporation cannot be trea-

surer of a friendly society, *Ex parte Swansea Friendly Society*, 11 Ch. D. 768.

(*x*) See *Great W. Rail. Co. v. Metrop. Rail. Co.*, 9 Jur. N. S. 562; *Ex parte Contract Corp.*, 3 Ch. 105; *Ex parte British Nation, &c., Ass.*, 8 Ch. D. 679, where it was held that a society to which shares in another society had been transferred by an act *ultra vires*, could not be placed on the list of contributories of that society.

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Sect. 2. or other instrument by which the company is governed; and
care therefore must be taken in applying decided cases to
attend to the constitutions of the companies to which they
relate (*y*).

Necessity of
observing
formalities.

No person can, properly speaking, be said to be a member of or shareholder in a company so long as he has only a right to become such; nor can a person who has become a member or a shareholder be properly said to have ceased to be one so long as he has only a right to retire.

If a person who is not a shareholder omits to do what is necessary to render himself a shareholder, he remains a non-shareholder, although very little may be wanting to render him a shareholder. On the other hand, if a person who is a shareholder already omits to do what is necessary to retire, he continues to be a shareholder whatever intention he may have had of withdrawing from the company, and whatever preliminary steps he may have taken for that purpose. In these cases that which is necessary to change an existing state of things has not happened: the right to enter or leave the company has not been exercised; and until such right has been exercised membership in the proper sense of the word has not been created in the one case, and has not ceased in the other. Subject then to the qualifications to be mentioned presently, before a person entitled to become a member actually becomes one, all necessary conditions must be fulfilled.

There are many cases in the books illustrating this principle, and to which it may be convenient shortly to refer.

7 & 8 Vict.
c. 110.

The repealed act 7 & 8 Vict. c. 110, defined a shareholder to mean any person entitled to a share, *and* who had executed the deed of settlement, or a deed referring to it (*z*); and it was held that no person was a shareholder within the meaning of

(*y*) As to the construction of acts of Parliament, apparently making payment by an allottee (or some qualification) a condition precedent to his becoming a shareholder, see *East Gloucestershire Rail. Co. v. Bartholomew*, L. R. 3 Ex. 15; *McEuen v. West Lond. Wharves, &c., Co.*, 6 Ch. 655, and *Portal v.*

Emmens, 1 C. P. D. 201 & 664; and as to allotting shares before any business can be carried on, see *Ex parte Ward*, L. R. 3 Ex. 180.

(*z*) See 7 & 8 Vict. c. 110, § 3; this definition did not apply to mutual insurance societies: see the section.

the act if he had not signed the deed, although he might be 1 k. I. Chap. 2.
entitled to shares and be registered and returned as a share- Sect. 2.
holder (a).

Other cases, in which the non-execution of the company's deed has been held to prevent a person entitled to shares in a Non-execution
company from being a shareholder therein, will be found in of deed.

Again, by the repealed Joint-stock companies act, 1856, it 19 & 20 Vict.
was declared that every person who had accepted shares in a c. 47.
registered company, and whose name was entered in the register, and no other person (except a subscriber to the memorandum of association in respect of the shares thereby subscribed for by him), should for the purposes of the act in question be deemed to be a shareholder (c); and in the articles which, in the absence of other regulations applied to companies registered under the act, it was declared that no person should be deemed to have accepted any share unless he had testified his acceptance thereof, by writing under his hand in such form as the company from time to time should direct (d). Under these provisions it was held that a person who merely agreed to take shares, but did not testify his acceptance of them in the particular form required, did not become a shareholder, although he was registered as such (e).

Upon precisely the same principle a purchaser of shares in Purchasers of
a company is not a shareholder in it until he has made himself shares.
such by complying with its regulations as to the admission of members (f); and, on the other hand, a shareholder who has

(a) *Baily v. Universal Prov. Life Assoc.*, 1 C. B. N. S. 557; *Moss v. Steam Gondola Co.*, 17 C. B. 180; *Wilkinson v. Anglo-Californian Gold Co.*, 18 Q. B. 728; *Stewart v. Sane*, ib. 736. The registrar's certificate that a person had been returned as a shareholder was *prima facie* evidence of his being so. *Turner v. Metropolitan Live Stock Co.*, 2 Ex. 567.

(b) *Irish Peat Co. v. Phillips*, 1 B. & Sm. 598; *Cardmarthen Rail. Co. v. Wright*, 1 Foz. & Fin. 282; *Galvan-*

ized Iron Co. v. Westoby, 8 Ex. 17; *Waterford, &c., Rail. Co. v. Pidcock*, 8 Ex. 279.

(c) 19 & 20 Vict. c. 47, § 19.

(d) 19 & 20 Vict. c. 47, table B, § 1.

(e) *New Brunswick, &c., Rail. Co. v. Muggeridge*, 4 H. & N. 160 and 580. Compare this case with *Bog Lead Mining Co. v. Montague*, 10 C. B. N. S. 481, where no particular form of acceptance was required.

(f) *Hay v. Willoughby*, 10 Ha. 242.

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Cestuis que
trustent.

Formalities
complied with
by the company.

Type of a
member.

sold his shares remains a shareholder until the purchaser has taken his place (*g*).

Again, where shares are held by A., whether as trustee for B. or simply as his agent, and B. has done nothing to render himself a shareholder, according to the terms of the company's regulations, and has never acted or been treated as a shareholder, he is not a shareholder, although A. may be insolvent (*h*). But as will be seen hereafter, a person cannot escape liability by assuming a fictitious name (*i*).

A person who has entered into a binding agreement with a company to take shares in it, cannot complain if the company acts on the faith of the agreement, and complies for him with those formalities which he has bound himself to observe. Upon this principle, where a person has agreed with a company to take shares in it and nothing remains to make him a shareholder except to register him as such (*k*), and the company registers him accordingly, he becomes a member, although he may have protested against such registration (*l*). But it need hardly be observed that persons cannot be made members without their consent; and if a company or some other person has placed shares in a person's name, and complied with all the formalities necessary to make him a member, he will nevertheless not be a member, unless he has by agreement or otherwise authorised the acts in question, or ratified them, and thereby assented to take the shares (*m*).

The type then of a member or shareholder of a company is

(*g*) See, for example, *Mid. G. W. Rail. Co. v. Gordon*, 16 M. & W. 804.

(*h*) See *United Kingdom Mutual Steam Assurance Association v. Nevill*, 19 Q. B. D. 110; *Barrett's case*, 4 De G. J. & Sm. 416; *Muir's case*, 4 App. Cas. 337; *Ex parte Bugg*, 2 Dr. & Sm. 452; *Newry Rail. Co. v. Moss*, 14 Beav. 64; *Jefferys v. Smith*, 3 Russ. 158, and other cases referred to hereafter in book iv. c. 1, under the head Contributories. Compare *Goddard v. Hodges*, 1 Cr. & M. 33, and *Cox's*

case, 4 De G. J. & Sm. 53.

(*i*) *Infra*, p. 59.

(*k*) This is essential, see *Waterford, Wexford, &c., Rail. Co. v. Pidcock*, 8 Ex. 279; *Cardarthen Rail. Co. v. Wright*, 1 Fos. & Fin. 282.

(*l*) *Midland Gt. West. Rail. Co. v. Gordon*, 16 M. & W. 804, and other cases of that class, noticed *ante* p. 23, and *post*. See, also, *Leishman v. Cochrane*, 1 Moo. P. C. N. S. 315.

(*m*) See, for examples, *Edwards v. Kilkenny Rail. Co.*, 14 C. B. N. S. 526; *Fox's case*, 3 De G. J. & S. 465; *Higgs's case*, 2 Hem. & M. 657.

a person who has agreed to become a member, and with respect to whom all conditions precedent to the acquisition of the rights of a member have been duly observed. Where all these circumstances are combined, there is membership in the fullest and most accurate sense. This, indeed, would be too obvious to require express statement were it not useful to have present to the mind a standard by which to judge of other cases. In practice difficulties are only presented where this standard is not reached; and the important question really is to what extent it can be departed from, and membership be nevertheless constituted.

In the first place, a person bound by agreement with a company to take shares in it, can be compelled specifically to perform his agreement, and on this principle he can often be treated as a member in equity (*n*). There are endless cases in the books in which persons not shareholders in the strict and proper sense of the word, have nevertheless been held to be contributories on the winding up of the company (*o*). But the equitable maxim that what has been agreed to be done is to be treated as done, is only a consequence of the more general principles applicable to the specific performance of contracts; and the maxim only applies as between the parties to an agreement of which specific performance can be decreed and their representatives. If therefore a person has agreed, not with the company or its agents, but with some one else, to take shares in the company, and such person does not perform those conditions which are necessary to render him a member thereof, then whatever his position and obligations may be as between himself and the other party to the agreement, he will not be a member of the company in equity any more than at law (*p*).

Secondly, the performance of conditions and observance of formalities may be dispensed with; and irregular, as distin-

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Membership in equity, though not at law.

(*n*) The subject of specific performance so far as it relates to shares will be discussed hereafter.

(*o*) These cases will be noticed hereafter. *Yelland's case*, 5 De G. & Sm. 395, illustrates the principle.

(*p*) See *Hay v. Willoughby*, 10 Ha. 242. See, also, *Humby's case*, 5 Jur. N. S. 215, and others of that class noticed hereafter under the head of Contributories.

Waiver of formalities.

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—
Estoppel by
conduct.

guished from void, transactions may be confirmed. Consequently, a person may become a shareholder to most, if not to all, intents and purposes, without complying with all the formalities prescribed in that behalf by the statute, charter, or deed of settlement constituting the company, and although there may have been irregularities in the issue of the shares to him; for if, notwithstanding these circumstances, he has been treated as a shareholder by the company, and has acted as a shareholder, both he and the company will be estopped from denying that he is a shareholder. So, if a shareholder, having a right to retire, has in fact retired and been treated by the company as if he were no longer a shareholder, both he and the company will be estopped from denying that he has ceased to be a shareholder, although he may not have retired regularly and properly. This doctrine of estoppel by conduct has been frequently recognised (*q*), but its application is attended with difficulty, and involves the important question to what extent prescribed formalities and conditions can be disregarded by companies, *i.e.*, by the persons who conduct their affairs, and whose obvious duty it is to observe what is prescribed. Upon this question opinions have differed, and the non-compliance of prescribed formalities has frequently been held to be conclusive upon the question of membership or no membership, notwithstanding an apparent waiver of those formalities by all parties. Moreover there are decisions which show that a person who, in an action for calls, is estopped from denying that he is a shareholder, may nevertheless show that he is not one when sued by a creditor of the company.

It becomes necessary, therefore, to subdivide the cases bearing upon the present subject-matter of inquiry, and to distinguish those in which the question of membership or non-membership arises between the company on the one part, and an alleged member on the other, from those in which the question arises between the alleged member on the one part, and the creditors of the company on the other.

(*q*) The leading authority on the subject of estoppel by conduct is *Carr v. Lond. and N. W. Rail. Co.*, L. R. 10 C. P. 307.

First, as between the company and an alleged shareholder.

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It has frequently been decided, even at law, that where a person has acquired a right to become a shareholder, and he has acted and been treated by the company as a shareholder, he is liable to calls at the suit of the company, although he may not have complied with all the formalities prescribed by the regulations of the company for the admission of members. Thus, in *Burnes v. Pennell* (r), the deed of settlement of a company required certain acts to be performed by every purchaser of shares, before he could become entitled to exercise the rights of a shareholder. A purchaser of shares did not comply with the terms of the deed, but he nevertheless paid some calls made on his shares, and he was registered as a shareholder. It was held that he could not resist an action for further calls on the ground that he was not a shareholder.

Effect of
waiver as be-
tween the com-
pany and the
shareholder.

Burnes v.
Pennell.

Again, in a case where an act of Parliament required that the shares in a company should be transferred by deed stating the consideration for the transfer; and a person purchased shares without taking a proper transfer, the transfer being in blank, with the consideration stated untruly, but he nevertheless signed a proxy paper describing himself as a shareholder, and transmitted it to the company, and was thereupon registered as a shareholder, it was held, that in an action for calls by the company he was estopped from denying the validity of the transfer (s).

Sheffield, &c.,
Rail. Co. v.
Woodcock.

So in *The Cheltenham and Great Western Union Railway Company v. Daniel* (t), an original subscriber to a projected railway company sold his scrip to the defendant. The company after its formation had notice of this sale from the defendant himself; he claimed to be registered in respect of the scrip which he had purchased, and he sent the certificates for such scrip to the company. The company gave him a receipt for the certificates and registered him as a shareholder.

Cheltenham, &c.,
Rail. Co. v.
Daniel.

(r) 2 H. L. C. 497.

&c., Rail. Co. v. Locke, 1 Q. B. 256;

(s) *Sheffield, &c., Rail. Co. v. London Grand Junction Rail. Co. v. Woodcock*, 7 M. & W. 574. See, *Graham*, ib. 271; *Cromford, &c., Rail. Co. v. Lacey*, 3 Y. & J. 80.

(t) 2 Q. B. 281.

Bk. I. Chap. 2. It was held that he was properly registered, and that he was
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never been formally transferred to him from the vendor as
required by the company's special act, and although the scrip
certificates purported to be not transferable before the obtaining
of the act.

Non-execution On the other hand, in *The Irish Peat Company v. Phillips (u)*,
of company's fifty shares, not numbered, nor distinguished from each other,
deed. had been allotted to the defendant. He had paid some calls
Irish Peat Co. v. upon these shares, and he was registered as holder of them,
Phillips. but he had received no certificates for them, and he had not,
as required, executed the company's deed. He had not done
anything as owner except pay calls. Further calls having been
made, he declined to pay them, mainly on the ground that the
terms contained in the company's prospectus and letters of
allotment had not been adhered to. Being sued for calls, the
Court of Queen's Bench, and also the Court of Exchequer
Chamber, held that the defendant was not liable for them ; but
the two Courts differed in their reasons for so holding.

The Court of Queen's Bench expressed a strong opinion
that neither the non-execution of the company's deed of set-
tlement, nor the non-fulfilment of the terms contained in the
company's prospectus and in the letters of allotment, afforded
any defence to the action ; but that Court thought that, the
shares not having been numbered, calls could not be made
upon them (x).

The Court of Exchequer Chamber did not express any
opinion upon the second point, and intimated considerable
doubt whether the fact relied upon by the Court of Queen's
Bench was material, but held that the non-execution by the
defendant of the company's deed of settlement afforded a com-
plete defence to the action.

Assuming that in the case in question the conduct of the
defendant was not such as to preclude him from denying that
he was a shareholder, the non-execution by him of the com-
pany's deed was a sufficient answer to the action (y) ; but it is

(u) 1 B. & Sm. 598.

3 Ex. 15 ; *Ind's case*, 7 Ch. 485.

(x) See, as to this, *East Gloucester-
shire Rail. Co. v. Bartholomew*, L. R.

(y) As in *Waterford, Wexford, &c.,
Rail. Co. v. Pidcock*, 8 Ex. 279 ; *Car-*

conceived that the mere fact that a person has not executed a deed is not sufficient to exclude the application to him of the doctrine of estoppel by conduct where that doctrine would otherwise apply.

It is true, that in the cases cited below (z), and in all of which the defendant was held precluded by his own conduct from denying that he was a shareholder, it would seem that the company had no deed of settlement which shareholders were required to execute; but the same observation does not apply to *The Cromford and High Peak Railway Company v. Lacey* (a), which does not appear to have been cited in *The Irish Peat Company v. Phillips*. The Cromford and High Peak Railway Company was created by a special act, which in terms incorporated the defendant and other persons who were in effect recited in the act to have executed a certain deed which the defendant had not done. In an action for calls, it was held that the defendant was estopped by his conduct from denying that he was a shareholder, and the Court was particularly careful not to let it be supposed that the defendant had become a shareholder *volens volens*, by reason of the mere terms of the act. The defendant was held liable because, although he had not executed the company's deed as he ought to have done, he had with a full knowledge of all material facts acted and been treated as a proprietor of shares.

The foregoing authorities are sufficient to illustrate the doctrine of estoppel as applied against individuals. The same doctrine, however, is applicable against companies, as is shown by those cases in which it has been held that companies cannot treat, as continuing shareholders, persons who have transferred their shares irregularly and improperly, but who have nevertheless been dealt with by the company as no longer members of

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Irish Peat Co. v. Phillips.

*Cromford, &c.,
Rail. Co. v.
Lacey.*

Application of
doctrine against
companies.

Marthen Rail. Co. v. Wright, 1 Fos. & Fin. 282.

(z) *Sheffield Rail. Co. v. Woodcock*, 7 M. & W. 574; *Cheltenham Rail. Co. v. Daniel*, 2 Q. B. 281; *Birmingham Rail. Co. v. Locke*, 1 Q. B. 256; *Lond. Gr. Junc. Rail. Co. v. Graham*, 1 Q. B. 271. All of these

were actions for calls in which the defendant had not executed the deed of transfer. In *Burnes v. Pennell*, 2 H. L. C. 497, what the defendant ought to have signed was not a deed but a minute in the company's books.

(a) 3 Y. & J. 80.

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it (*b*). These cases show conclusively that companies cannot, any more than individuals, take advantage of the non-observance of formalities which they have not insisted upon, and have, tacitly at least, dispensed with (*c*) ; and they show further, that if the directors of a company, in transacting such business of the company as they are authorised to transact, neglect to observe the formalities prescribed by the regulations of the company, and treat an informal act as a formal one, and thereby induce others to do the same, the company is estopped from afterwards disputing the validity of what has thus been treated as valid by all parties. This proposition is also supported by many decisions upon the question, who are and who are not contributories under the winding up acts (*d*).

Distinction
between irregu-
lar and void
acts.

The proposition thus established is perfectly consistent with the doctrine that companies are not bound by the acts of their directors in matters as to which the directors are not the company's agents. The extent to which directors have power to bind their respective companies will be examined hereafter. It is sufficient to draw attention¹ in the present place to the distinction between irregular acts and acts which are altogether unauthorised and are incapable of being confirmed; and to warn the reader not to conclude from the decisions just adverted to, that a company is estopped from disputing the validity of acts done and treated as valid by its directors, if those acts are such as the directors have no authority to perform and the shareholders cannot ratify (*e*).

Illegal issue of
shares.

The cases which give rise to most difficulty are those in which a person has in fact acted and been treated as a shareholder in respect of shares which the company had no power to issue. If the shares can, under any circumstances, legally exist, then, however improper their issue may have been, the company and the holder of them may be estopped from denying

(*b*) *Bush's case*, L. R. 6 H. L. 37, and 6 Ch. 246; *Grady's case*, 1 De G. J. & Sm. 488; *Lane's case*, ib. 504. See, too, *Bargate v. Skortridge*, 5 H. L. C. 297; and *Taylor v. Hughes*, 2 Jo. & Lat. 24.

(*c*) As to how far a company is estopped by its own register, see

infra, pp. 57, *et seq.*

(*d*) See *Straffon's executor's case*, 1 De G. M. & G. 576, and the cases in the last note but one.

(*e*) See *Grady's case*, 1 De G. J. & S. 488, and *Lane's case*, ib. 504, and the cases in the next three notes.

their existence and the holding of them by him (*f*); but if they cannot legally exist, the person taking them cannot by estoppel or otherwise become a member in respect of them. A striking illustration of this is afforded by *The Bank of Hindustan v. Alison* (*g*), where one company had, in excess of its powers, amalgamated with another, and had, as part of the amalgamation scheme, issued new shares in excess of the authorised capital: the issue being held void, it was also held, that a person who had taken some new shares and paid on them, and had retained them for some time without objection was, nevertheless, not precluded from denying that he was a shareholder. This same principle has been recognised in equity as well as at law, as will be seen hereafter when treating of contributories and of the retirement of members (*h*).

In equity, the mere execution of a company's deed does not preclude a person from denying that he became a shareholder (*i*), and it is presumed that now the same doctrine will apply at law.

In connection with the doctrine of estoppel by conduct, it is important to consider the effect of ignorance of material facts. Upon general principles it is conceived that a person who induces others to act upon the faith of an untrue representation innocently made by himself, cannot, as against them, take advantage of his own want of information; as between them and him they ought not to be prejudiced by the circumstance that he would not have made the representation if he had been better informed. But except where a person has induced others to act on his own representations, ignorance of material facts on his part affords a sufficient reason for not holding him bound by what in such ignorance he may have said or done. Accordingly, it has been held that if a company, in ignorance of material facts, is induced to register an im-

(*f*) *Campbell's case* and *Hippisley's case*, 9 Ch. 1; *Challis's case*, 6 Ch. 266; *Hare's case*, 4 Ch. 503.

(*g*) L. R. 6 C. P. 54 & 222. The Court of Chancery took a different view of the facts of this case; (see 9 Ch. 1) for the reasons given in 9 Ch. 17.

(*h*) *Stace and Worth's case*, 4 Ch. 682; *Smith's case*, ib. 611; *Sparkman v. Evans*, L. R. 3 H. L. 171.

(*i*) *Coleman's case*, 1 De G. J. & Sm. 495. It was otherwise at law. See *Hull Flax Co. v. Wellesley*, 6 H. & N. 38.

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A Bank of Hindustan v. Alison.

Estoppel by deed.

Effect of ignorance of material facts.

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proper transfer of shares, it is not precluded from denying as against the transferee his title as a shareholder (*k*); although it cannot deny his legal title as against other persons who, on the faith of the company's register, or a certificate of his title, have *bonâ fide* bought his shares without notice of the impropriety in the transfer to himself (*l*).

Secondly, as between an alleged shareholder and a creditor.

Effect of waiver
as between
shareholders
and creditors.

Whether a person is liable, as a shareholder, to be proceeded against by the creditors of an incorporated or quasi-incorporated company depends upon the construction of the statute or charter which enables him to be proceeded against; and in cases of this kind which have generally arisen in courts of law, those courts have adhered very strictly to the language of the statute or charter (*m*). The doctrine of estoppel has not been applied in these cases, so as to enable a creditor to proceed against a person who, though not a shareholder, has been treated by the company as if he were one, or so as to prevent a creditor from proceeding against a person who has not ceased to be a shareholder according to the company's regulations, but who has been treated by the company's officers as no longer a shareholder in point of fact.

*Moss v. Steam
Gondola Co.*

In *Moss v. The Steam Gondola Company* (*n*), a person who had acted as a director of a company was held not to be liable to creditors as a shareholder as he had not executed the company's deed, which was necessary to render him a shareholder. Upon the same principle, where a married woman was a shareholder in a company, and her husband was not entitled to act as a shareholder until he had complied with certain regulations,

(*k*) *Simm v. Anglo-American Tel. Co.*, 5 Q. B. D. 188; *Hare v. London and North-Western Rail. Co.*, Johns. 722.

(*l*) See *Shropshire Union Rail. Co. v. R.*, L. R. 7 H. L. 496, reversing S. C. L. R. 8 Q. B. 420; *Ward v. South-Eastern Rail. Co.*, 2 E. & E. S12; *Bahia and San Francisco Rail. Co.*, L. R. 3 Q. B. 584; *Hart v. Frontino and Bolivia Mining Co.*,

L. R. 5 Ex. 111, and see also *Simm v. Anglo-American Tel. Co.*, 5 Q. B. D. 188.

(*m*) See *Portal v. Emmens*, 1 C. P. D. 201 & 664, and the cases there cited. Compare *Kipling v. Todd*, 3 C. P. D. 350, and *infra*, Bk. III, c. 6, § 7.

(*n*) 17 C. B. 180. See, too, *Bailey v. Universal Pror. Life Ass.*, 1 C. B. N. S. 557.

it was held that he was not liable to be proceeded against as a shareholder by creditors, as he had not complied with those regulations, although he had received his wife's dividends, and had voted at meetings, and otherwise acted as a shareholder (*a*). Bk. I. Chap. 2.
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These principles were carried to their utmost extent in another case, where a person who had, in fact, retired from a company, was sought to be proceeded against as if he were still a shareholder. The case in question is instructive, as it was litigated both at law and in equity, and was carried to the House of Lords; it moreover shows, better than any other, the different tendencies of the old Courts of law and equity to hold companies bound by the conduct of their managers and directors in matters of mere form. The case in question was decided at law under the name of *Bosanquet v. Shortridge*, in equity under the name of *Shortridge v. Bosanquet*, and in the House of Lords under the name of *Bargate v. Shortridge*.

In *Bosanquet v. Shortridge* (*p*), as it first came before the Court, the plaintiff, who had obtained judgment against the public officer of a banking company, sought to enforce that judgment against the defendant, who was alleged to be a member of the company. The defendant had been a shareholder, but he had sold his shares to another person, and the transfer thereof to him was registered in the company's register. By one of the rules of the company no person was to be registered as a shareholder without the consent of a board of directors, and in this case no such consent had been obtained; and some time after the transfer had been registered the directors declared the transfer void, and they put the defendant again on the list, and returned him as a shareholder. They did this for the express purpose of enabling the plaintiff, as a creditor, to proceed against him. It appeared that in point of fact transfers had been for years registered like the one in question, *viz.*, without the observance of the formalities required by the company's deed. The Court of Exchequer held that the defendant had not ceased to be a shareholder; that he still was a shareholder within the true *Bosanquet v.*
Shortridge.

(*a*) See *Ness v. Angas*, 3 Ex. 805; *Ness v. Armstrong*, 4 ib. 21.

(*p*) 4 Ex. 699.

Bk. I. Chap. 2. intent of the company's deed ; and that he was therefore liable
Sect. 2. to be proceeded against by the creditors of the company.

Shortridge v. In consequence of this decision, the suit of *Shortridge v. Bosanquet* (q) was instituted for the purpose, first, of having it declared that the plaintiff (i.e., the defendant at law) was no longer a shareholder in the company, that his name might be erased from its books, and not be returned to the stamp office as if he were a member ; and for the purpose, secondly, of restraining the creditor from proceeding to execution against the plaintiff. The Master of the Rolls held that, after what had taken place, the company could not insist that the plaintiff was still a shareholder, or that his transferee was not : and, it being established that the creditor was proceeding at the instigation of the company, an injunction was granted as prayed by the bill.

Bargate v. From this decree the creditor appealed to the House of
Shortridge. Lords, but the decree was there affirmed, upon the ground that the company could not take advantage of the non-observance by its own officers of formalities required by its own deed (r).

Taylor v. The decision thus affirmed is in conformity with a prior
Hughes. decision in Ireland in a case where it was held that a shareholder in a banking company had, as between himself and the company, ceased to be a member thereof, although he had retired irregularly ; and that, having ceased to be a member as between himself and the company, he was not liable to be sued as a member by a creditor of the company, instigated to sue him by its directors (s).

Observations on In both of these cases the creditor was suing at the instiga-
these cases. tion of the company. Had it not been for this circumstance there would have been no ground on which a Court of equity could have restrained him from exercising his legal rights. Nor is there any case in which a Court of equity has assisted a creditor against a person held at law not to be liable to be proceeded against as a shareholder. Indeed, except under

(q) 16 Beav. 84.

(r) *Bargate v. Shortridge*, 5 H. L. C. 297, decided by Lord St. Leonards, affirming the judgment of Sir John

Romilly, Lord Cranworth not concurring.

(s) *Taylor v. Hughes*, 2 Jo. & Lat. 24.

very special circumstances, a Court of equity would have had no jurisdiction in the matter. If, however, such a case as *Bargate v. Shortridge* were now to arise, the equitable principles on which it was ultimately decided would be applicable to the proceedings taken by the creditor.

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SECTION III.—OF REGISTERS OF SHAREHOLDERS AND CERTIFICATES OF TITLE TO SHARES.

With reference to the question whether a person is or is not a shareholder in a company, the state of its register of shareholders is of considerable importance.

Register of
shareholders.

Shares in companies being marketable commodities, transferable from one person to another, some method of registration is indispensable, in order that the persons who are at any given time members of the company may be known. But a register of shareholders would be of little use if it were not admissible in evidence both for and against every person whose name is upon it; and it is therefore necessary, not only to have a register, but to make it evidence in judicial proceedings. The simplest, and at the same time most just way of accomplishing this is, to compel every member either to write his name in a book kept by the company, or to give some officer of the company a written authority to insert his name therein. Another, but much more arbitrary way, is to make it the duty of every company, or of some official, to keep a register of shareholders, and to make that register evidence against any one whose name may be upon it, without the necessity of showing by what authority it was put there. The former of the modes is commonly had recourse to in mining districts where partnerships with transferable shares have long been known; but the latter mode has been adopted by the legislature, and prevails in most companies governed by acts of Parliament (*t*). A par-

Register as
evidence.

(*t*) The making of companies' books evidence against their members is not a new device, see *Bristol and Taunton, &c., Co. v. Amos*, 1 M. & S. 569.

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liamentary register of shareholders thus becomes a most important document; for, speaking generally, unless a person is on it, he is not entitled to the rights of a shareholder, whilst if he is on it, he is subject to all the liabilities of a shareholder, unless he can show that his name ought not to have been on the list. The acts of Parliament relating to registers of shareholders are unfortunately numerous and differently worded, and it is necessary, before determining the effect of being on or off the register of a particular company, to examine the provisions of the act which applies to it.

General rules on
this subject.

One or two general rules relating to these registers regarded as evidence of membership, may, however, be usefully adverted to:—

1. The rule that a register or official return shall be evidence in favour of a company keeping or making it, is contrary to general principles of evidence and is a great privilege, and in order to enjoy this privilege, the register or return must be kept or made as required by the statute making it evidence (*u*).

2. At the same time, if the provisions of the statute are substantially complied with, the register or the official return, as the case may be, will be admissible in evidence, although it may be in some respects inaccurate or informal, *e.g.*, if a shareholder's residence is omitted (*x*); if some of the amounts paid are not entered (*y*); if the numbers of the shares are omitted (*z*); if the heading of the return is not strictly accurate (*a*); if the return does not purport to be signed by the person whose duty it is to sign it (*b*); if it was signed at the wrong time (*c*). Moreover, inaccuracies as to some persons do

(*u*) *Bain v. Whitehaven, &c., Rail. Co.*, 3 H. L. C. 1.

(*x*) *Wills v. Murray*, 4 Ex. 843.

(*y*) *Bain v. Whitehaven Rail. Co.*, 3 H. L. C. 1; *Lond. and Grand Junc. Rail. Co. v. Freeman*, 2 Man. & Gr. 606; *Birmingham and Bristol Rail. Co. v. Locke*, 1 Q. B. 256; *Lond. and Grand Junc. Rail. Co. v. Graham*, *ib.* 271.

(*z*) *Ib. and East Gloucestershire*

Rail. Co. v. Bartholomew, L. R. 3 Ex. 15.

(*a*) *Bain v. Whitehaven Rail. Co.*, 3 H. L. C. 1; *Dosset v. Harding*, 1 C. B. N. S. 524; *Powis v. Harding*, *ib.* 533.

(*b*) *Harvey v. Scott*, 11 Q. B. 92; *Field v. Mackenzie*, 4 C. B. 705.

(*c*) *Henderson v. Royal British Bank*, 7 E. & B. 356; *Daniel v. Royal British Bank*, 1 H. & N. 681.

not prevent the register or return from being evidence against others as to whom there is no inaccuracy (*d*). But if what is called a register is only a rough memorandum, it cannot be regarded, although it is sealed (*e*). A share ledger, however, has been held sufficient (*f*).

3. A person who assumes a fictitious name or whose name is inaccurately stated, but whose identity can be established, cannot escape liability as a shareholder on the ground of the inaccuracy (*g*); and the use of a fictitious name only increases the difficulty of proving identity (*h*).

4. The register or return is no evidence of the membership of a person except at and after the date at which the register or return becomes official (*i*).

5. Unless the statute making the register or return evidence, clearly and indisputably makes it conclusive evidence, the register or return will be *prima facie* evidence only of the truth of the statements in it; so that not only may a person whose name is on the register or return show that his name ought not to have been there (*k*); but a person whose name is not on it may be shown to have been in fact a member when

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(*d*) *Southampton Dock Co. v. Richards*, 1 Man. & Gr. 448; *London and Brighton Rail. Co. v. Fairclough*, 2 ib. 674.

(*e*) *Wolverhampton New Waterworks Co. v. Hacksford*, 6 C. B. N. S. 336; 7 ib. 795, and 11 ib. 456, approved by the Exchequer Chamber in *Irish Peat Co. v. Phillips*, 1 B. & Sm. 638. See, too, *Birkenhead, Lancashire, &c., Rail. Co. v. Brownrigg*, 4 Ex. 426; *Cheltenham and Great Western Rail. Co. v. Price*, 9 C. & P. 55.

(*f*) *Weikersheim's case*, 8 Ch. 831.

(*g*) *Thomson v. Harding*, 1 C. B. N. S. 555; *Clowes v. Brettell*, 11 M. & W. 461; *Pugh and Sharman's case*, 13 Eq. 566; *Cor's case*, 4 De G. J. & Sm. 53.

(*h*) *Arthur v. Midland Rail. Co.*, 3 K. & J. 204.

(*i*) *Aylesbury Rail. Co. v. Thompson*, 2 Ra. Ca. 668; *Cheltenham Rail. Co. v. Price*, 9 C. & P. 55. Compare *Bosauquet v. Shortridge*, 4 Ex. 699.

(*k*) See *Portal v. Emmens*, 1 C. P. D. 212; *Hallmark's case*, 9 Ch. D. 329; *Povis v. Butler*, 3 C. B. N. S. 645, and 4 ib. 469; *Galvanized Iron Co. v. Westoby*, 8 Ex. 17; *Waterford, Wexford, &c., Rail. Co. v. Pilcock*, 8 Ex. 279; *Carmarthen Rail. Co. v. Wright*, 1 Fos. & Fin. 282; *Shropshire Un. Canal Co. v. Anderson*, 3 Ex. 401; *Bailey v. Universal Pror. Life Ass.*, 1 C. B. N. S. 557; *Moss v. Steam Gondola Co.*, 17 C. B. 180; *Wilkinson v. Anglo-Californian Gold Co.*, 18 Q. B. 728; *Stewart v. Same*, ib. 736; *Edwards v. Kilkenny Rail. Co.*, 14 C. B. N. S. 526; *Birch's case*, 2 De G. & J. 10.

Bk. I. Chap. 2. the register or return became official (*l*) ; so if no register has
 Sect. 3. been kept (*m*).

6. It follows that a company is not necessarily estopped by its own register. This was assumed by the Court of Exchequer in *The Waterford and Wexford Railway Company v. Pidcock* (*n*), where the defendant was held not to be liable to calls because, though on the register, he had been placed there before he had become a shareholder ; and because, notwithstanding the register, he was not entitled to exercise the rights of a shareholder (*o*). So where a company has, in ignorance of material facts, registered a forged or improper transfer, it is not estopped by its register from denying as against the registered transferee that he is a shareholder (*p*).

7. A person improperly registered as a shareholder in a company cannot be considered as holding himself out as a shareholder merely because he takes no steps to have his name removed (*q*). But as regards some companies, it is enacted that a person once properly registered as a shareholder is to be deemed a shareholder so long as his name remains on the register (*r*) ; and as will be seen hereafter, a person once put on the register with his consent may lose his right of repudiating his shares by delaying to have his name removed (*s*).

(*l*) See *Rastrick v. Derbyshire, &c., Rail. Co.*, 9 Ex. 149 ; *Prescott v. Buffrey*, 1 C. B. 41 ; *Bank of England v. Johnson*, 3 Ex. 598 ; *Holverhampton Waterworks Co. v. Hawkesford*, 6 C. B. N. S. 336 ; 7 ib. 795, and 11 ib. 546 ; *Whittell's case*, 2 De G. & J. 577. The question whether a person is a contributory or not in consequence of being on or off the register will be adverted to in a subsequent chapter.

(*m*) See *Portal v. Emmens*, 1 C. P. D. 201 & 664, which turned on the Companies Clauses Cons. Act and a special act.

(*n*) 8 Ex. 279.

(*o*) See, too, *Shropshire Union, &c., Co. v. Anderson*, 3 Ex. 401, and the other cases in notes (*k*) and (*l*).

(*p*) *Sinn v. Anglo-American Tel. Co.*, 5 Q. B. D. 188 ; *Hare v. Lond. and N.-W. Rail. Co.*, Johns. 722. But as to persons acting on the faith of the register, see *Ward v. S.-E. Rail. Co.*, 2 E. & E. 812 ; and *Hart v. Frontino and Bolivia Mining Co.*, L. R. 5 Ex. 111. See, also, *infra*, p. 64, note (*t*).

(*q*) See *Somerville's case*, 6 Ch. 266 ; *Bullock v. Chapman*, 2 De G. & S. 211 ; *Birch's case*, 2 De G. & J. 10.

(*r*) See *Ex parte Prescott*, Mon. & Ch. 611 ; *Harvey v. Scott*, 11 Q. B. 92. This subject will be reverted to hereafter.

(*s*) See *Oakes v. Turquand*, L. R. 2 H. L. 325, and other cases of that class.

Where a company or its officers are required to keep a register of shareholders, it is their duty to keep such register accurately, and if they refuse to insert the name of a person entitled to be registered, or to erase the name of a person improperly registered, in either case upon complaint being made to the proper tribunal, the company or its officers will be ordered to correct the register. Several modern acts of Parliament contain express provisions upon the subject of correcting registers, and these provisions will be noticed hereafter when treating of the companies to which they relate. But even where there is no statutory enactment expressly applicable to the case, a mandamus or an injunction will be granted to compel a company, required by statute to keep a register, to insert a name improperly excluded (*t*), or to compel the company to remove a name improperly inserted (*u*). A mandamus will not, however, go to compel a company to remove its seal from a register which it has sealed, although it may be shown that the register is incorrect, and that it has been sealed without authority (*r*).

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Correction of
register.

Mandamus and
injunction.

A person asserting his right to be on the register must prove his title to the shares in respect of which he claims to be registered (*y*), and his right to be on the register (*z*); but if he has already been registered, and he complains of being struck off, the onus is on the company to show its right to remove his name (*a*). It has been held that a mandamus will not be granted in favour of a person who seeks to become a registered shareholder for the purpose of being troublesome (*b*); nor in

(*t*) *R. v. Reg. of Jt. St. Companies*, 21 Q. B. D. 131; *Paris Skating Rink Co.*, 6 Ch. D. 731; *R. v. Carnatic Rail. Co.*, L. R. 8 Q. B. 299, a case of a married woman; *R. v. Shropshire Union Rail. Co.*, L. R. 8 Q. B. 420, reversed but not on this point, L. R. 7 H. L. 496; *Norris v. Irish Land Co.*, 8 E. & B. 512; *Ward v. S.-E. Rail. Co.*, 2 E. & E. 812.

(*u*) *Eustace v. Dublin Trunk Rail. Co.*, 6 Eq. 182; *Taylor v. Hughes*, 2 Jo. & Lat. 24; *Shortridge v. Bosonquet*, 16 Beav. 84. In *Bullock v.*

Chapman, 2 De G. & S. 211, the Court declined to interfere, the case not being sufficiently clear.

(*r*) *Ex parte Nash*, 15 Q. B. 92.

(*y*) *Daly v. Thompson*, 10 M. & W. 309.

(*z*) *British Sugar Co.*, 3 K. & J. 408.

(*a*) See *Ward v. S.-E. Rail. Co.*, 2 E. & E. 812; *East Wheal Martha Mining Co.*, 33 Beav. 119.

(*b*) See *Reg. v. Liverpool, Manchester, &c., Rail. Co.*, 21 L. J. Q. B. 284.

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Correction of
register.

favour of a person whose own negligence has occasioned the state of things which he seeks to have rectified (*c*). Moreover, where an important question, *e.g.*, liability to calls is actually pending between a person and a company, a summary application to rectify the register will not be entertained unless it can be shown that it is necessary to rectify the register in order that the real question in dispute may be fairly decided (*d*). But the mere fact that the application to have the register rectified involves the decision of an important and difficult question is not sufficient to induce the Court to refrain from ordering it to be rectified (*e*). Nor will the Court decline to order the name of a person to be struck off the register simply because his shares are marked forfeited, and his name has been already removed (*f*). The order to remove is a great security.

Where a register is rectified by order, it should so appear on the register (*g*).

Where a person on the register applies to have his name struck off, and the name is alleged not to refer to him but to some other person, the Court will not expunge the name until satisfied upon the question of identity (*h*).

The right of a married woman to be registered has been noticed already (*i*).

With respect to the registration of titles to shares, it has been held that a company is not bound to register complicated

(*c*) See *Ex parte Swan*, 7 C. B. N. S. 400, and *Swan v. North Brit. Australian Co.*, 7 H. & N. 603, and 2 H. & C. 175. The extreme diversity of opinion of the judges before whom this important case came renders it unsatisfactory as a guide for the future. Compare *Taylor v. Great India Peninsular Rail. Co.*, 4 De G. & J. 559; and see the observations of V.-C. Malins in 11 Eq. 319.

(*d*) *Anglo-French Porcelain Co. v. Harris*, 5 H. & N. 809; *British Sugar Refining Co.*, 3 K. & J. 408. These cases, however, turned on acts

of Parliament differently worded from the Companies act, 1862, as to which see *infra*.

(*e*) *Higg's case*, 2 Hem. & M. 657; *Los' case*, 6 N. R. 327.

(*f*) *Martin's case*, 2 Hem. & M. 669; *Los' case*, 6 N. R. 327.

(*g*) See *Iron Ship-Building Co.*, 34 Beav. 597.

(*h*) See *Webb's case*, 9 Jur. N. S. 856, where a person was removed from the list of contributories, but his name was left on the register of shareholders.

(*i*) *Ante*, p. 41.

deeds of transfer, *e.g.*, marriage settlements, by which shares are assigned to trustees upon the usual trusts for the husband and wife, and their children (*k*). Bk. I. Chap. 2.
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Companies are too frequently in the habit of altering their own registers by striking off the names of persons whom they do not wish to recognise as shareholders and by substituting other names in their places. Such proceedings cannot be too strongly reprobated (*l*). When once a person is registered as a shareholder, and his name has been since removed, the onus of justifying the removal is on the company; and it has been held, that even where his title is defective the company has no right to strike off his name unless his shares are claimed by a person establishing a better title to them (*m*). A company can however rectify its register in order to correct its own mistakes (*n*). Right of com-
pany to alter
its register.

A person entitled to be registered as a shareholder by a company can maintain an action against the company, or those of its officers whose duty it is to register him as a shareholder, if they wrongfully refuse to register him. In such an action it is no defence that the register is full, if it is so improperly (*o*); and if the plaintiff complains that, in consequence of his name not being registered, his shares have been forfeited without notice to him, it is no defence that the forfeiture is a mere nullity, and that the plaintiff has therefore sustained no damage (*p*). In like manner a person who has transferred his shares is entitled to maintain an action for damages against a company for improperly refusing to register the name of his transferee (*q*). The principles on which these decisions are based are, it is conceived, sufficient to support an action for damages by a person improperly inserted in a company's Actions for im-
proper exclusion
from or insertion
in register.

(*k*) *Reg. v. General Cemetery Co.*, 6 E. & B. 415; *Copeland v. North-E. Rail. Co.*, *ib.* 277.

(*l*) See the judgments in the cases below.

(*m*) See *Ward v. South-E. Rail. Co.*, 2 E. & E. 812; *Hart v. Frontino and Bolivia Mining Co.*, L. R. 5 Ex. 111. Compare *Hare v. Lond. and North-W. Rail. Co.*, Johns. 722.

(*n*) *Hartley's case*, 18 Eq. 542, and 10 Ch. 157; *Re Etna Ins. Co.*, Ir. Rep. 7 Eq. 264.

(*o*) *Daly v. Thompson*, 10 M. & W. 309.

(*p*) *Catchpole v. Ambergate, &c., Rail. Co.*, 1 E. & B. 111.

(*q*) *Skinner v. City of London Marine Insurance Corporation*, 14 Q. B. D. 882.

Bk. I. Chap. 2. register; but the writer is not aware of any case bearing
Sect. 3. directly on this point.

Right to register
a person against
his will.

It has been already seen that if a person is bound by agreement with a company to take shares in it, the company is entitled without more, to act on the agreement and to register him as a shareholder (*r*).

Certificates of
title.

In addition to the evidence of membership obtainable from registers of shareholders, many companies are required by statute to give every shareholder, on demand, a sealed certificate of his ownership of the shares, to which he is entitled. The object of this is to enable a shareholder to prove that he is such; and particularly to enable him, upon a sale of his shares, to prove his title to them to the satisfaction of a purchaser, and to show how much has been paid up in respect of them (*s*). The company cannot dispute the truth of the certificate as against a person who has bought on the faith of it (*t*). But the certificate applies only to the legal, not to the equitable title of the person named in it (*u*). No person is entitled to demand a certificate of title to shares in a company until he has done everything necessary to constitute himself a shareholder in the full sense of the word (*x*).

Admissions.

A person may be proved to be a member of a company by his own admissions. Thus it has several times been held that a person who has admitted himself to be a shareholder in a company constituted by deed, may be rendered liable as a shareholder without any evidence being given as to that deed (*y*).

(*r*) *Ante*, p. 46.

(*s*) See upon this subject, *Hare v. Waring*, 3 M. & W. 362; *Curling v. Flight*, 6 Ha. 41, and 2 Ph. 613; *Shaw v. Fisher*, 2 De G. & S. 11.

(*t*) *Burkinshaw v. Nicolls*, 3 App. Cas. 1004, affirming *British Farmers' Pure Linseed Cake Co.*, 7 Ch. D. 533; *Simm v. Anglo-American Tel. Co.*, 5 Q. B. D. 188; *Barrow's case*, 14 Ch. D. 432; *Shaw v. Port Philip Gold Mining Co.*, 13 Q. B. D. 103; *Bahia and San Francisco Rail. Co.*, L. R. 3 Q. B. 581; *Hart v. Frontino*

and Bolivia, &c., Mining Co., L. R. 5 Ex. 111. Comp. *ante*, p. 60, note (*p*).

(*u*) *Shropshire Union Rail. Co. v. R.*, L. R. 7 H. L. 496, reversing S. C. L. R. 8 Q. B. 420.

(*x*) *Wilkinson v. Anglo-Californian Gold Co.*, 18 Q. B. 728; *Stewart v. Ang.-Cal. Gold Co.*, *ib.* 736.

(*y*) *Harvey v. Kay*, 9 B. & C. 356; *Ralph v. Harvey*, 1 Q. B. 845; and see *Tredwen v. Bourne*, 6 M. & W. 461.

Admissions, however, are not necessarily conclusive, and little weight ought to be attached to them if it is shown that they were made under erroneous suppositions (z). This seems to have been the true ground of the decision in the much debated case of *Vice v. Anson* (a). There the defendant supposed herself to be a shareholder in a mine; she had in private letters and in private society written and spoken of herself as a shareholder; she had received certificates stating that her name was registered in the act-book of the mine, and that she was entitled to share the profits of it; and lastly, she had paid deposits on her shares. But Lord Tenterden held that she had not in point of fact any interest in the mine, and that as she never represented to the plaintiff that she was a shareholder therein, she could not be made liable to him simply because of her erroneous suppositions and admissions.

Bk. I. Chap. 2.
Sect. 4.

Vice v. Anson.

SECTION IV.—OF SCRIP.

In order to enable persons who do not desire to become Scrip. shareholders to acquire the right so to become and to transfer that right to others, recourse is had to what are called *scrip certificates*.

A scrip certificate is an acknowledgment by a company or its projectors that the person named in the certificate (or more commonly the holder) is entitled to a certain specified number of shares in the undertaking. The certificate represents a right to acquire, but not necessarily an obligation to take a share (b). The certificate must have a penny stamp (c).

(z) See *Ridgway v. Philip*, 1 Cr. M. & R. 415.

(a) 7 B. & C. 409, and Moo. & M. 98. See, on this case, *Owen v. Van Uster*, 10 C. B. 318, and *qu.* if it is law; for though the defendant had no legal interest in the mine, was

she not entitled as a partner to share the profits obtained by working the mine? and what more was necessary to make her liable to the supplier?

(b) *Eustace v. Dublin Trunk Rail. Co.*, 6 Eq. 182; *Ormerod's case*, 5 Eq.

(c) See note (c) next page.

Ek. I. Chap. 2.
Sect. 4.

Scrip companies.

Scripholders
converted into
shareholders.

In some companies nothing is required to convert scripholders into shareholders. Companies constituted upon this principle are called scrip companies, and in them scrip and shares are synonymous, there being in fact no difference between scripholders and shareholders (*d*).

Usually, however, a person entitled to scrip does not acquire the rights of an actual shareholder until his scrip certificates have been delivered up and exchanged for share certificates, nor until his name has been inserted upon the company's register of shareholders. Generally speaking, after a company is formed, its scrip is called in; *i.e.*, the holders of the scrip are required to exchange their certificates for share certificates, and to do whatever else may be necessary to render them members of the company, as distinguished from persons who have only a right to become members. In such cases as these, scripholders are not shareholders, nor are they partners either with each other or with the promoters of the company (*e*). This doctrine results from the distinction between agreements to form a future partnership and contracts for a present partnership (*f*); but as will be seen hereafter, it does not follow that a company which progresses no further than the issue of scrip cannot be wound up; nor that upon the winding up of such a company scripholders are not liable to be put upon the list of contributories (*g*).

Transfer of scrip.

The effect of a transfer of scrip will be alluded to hereafter, when treating of the transfer of shares. It may, however, be noticed here that scrip certificates are not negotiable instruments; but if they are proved to be so in any particular case, they cannot be recovered from a *bonâ fide* holder for value

110; *Ex parte Collum*, 9 Eq. 236; *Re Littlehampton Steam Ship Co.*, 34 Beav. 256, and 2 De G. J. & Sm. 521; *Jackson v. Cocker*, 4 Beav. 59. *Clark v. Newsam*, 1 Ex. 131, shows that to forge scrip was only a misdemeanour under 1 Wm. 4, c. 66. Compare 24 & 25 Vict. c. 98, § 23.

(*c*) 33 & 34 Vict. c. 97, § 3.

(*d*) As to the legality of scrip companies, see *infra*, ch. v.

(*e*) See the cases in note (*b*), and *Fox v. Frith*, 1 Car. & M. 502.

(*f*) As to which, see Partn., p. 20.

(*g*) See, on this subject, *Barclay's case*, 26 Beav. 177; *Re Aston*, 27 ib. 474, and 4 De G. & J. 320; *Grise-wood and Smith's case*, 4 De G. & J. 544, and the cases cited in note (*b*).

without notice of any infirmity in the title of the person from whom he has taken them (*h*). Lk. I, Chap. 2.
Sect. 4.

(*h*) See *Goodwin v. Roberts*, 1 App. Cas. 476 ; a case of a foreign government loan. In *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194, the scrip was that of a banking com-

pany, and the mercantile usage was proved. *Qu.*, how often will it have to be proved before the usage is judicially recognised?

CHAPTER III.

OF MEMBERSHIP INDUCED BY FALSE STATEMENTS.

HAVING now explained the doctrines relating to agreements to take shares, and what constitutes membership, it will be convenient to consider the position of persons who have been induced to enter into such agreements and to take shares by false, and, in many cases, fraudulent misrepresentations.

SECTION I.—EFFECT OF FALSE STATEMENTS APART FROM STATUTE.

1. *Requisites for Redress.*

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Sect. 1.

Mis-statements
in prospectus.

Nothing is, unfortunately, more common than the occurrence of serious mis-statements in a company's prospectus. These mis-statements are sometimes the result of ignorance and carelessness, but they are sometimes also the result of deliberate fraud. Whatever may be their moral aspect, their effect is to induce persons to take shares on the faith of their accuracy; and the question then arises whether the shares so taken can be repudiated, or what remedy, if any, is open to those who have been induced to take shares on the faith of the truth of the statements.

It will be convenient to consider first those requisites which must be proved in order to entitle the complainant to any redress at all, and then to consider what further is necessary to entitle him—1. To relief against the company by way of rescission of contract and indemnity; 2. to relief in the shape of damages against the individuals who have misled him.

Mis-statement
must be of
facts.

In the first place it must be observed that statements which are not statements of fact, but which are expressions of

sanguine expectations are not actionable, although they prove to be unfounded (a); nor, are extravagant expressions of opinion as to value (b).

In *Bellairs v. Tucker* (c) the prospectus stated that for reasons given a dividend of 50 per cent. was confidently expected; the reasons were unsatisfactory, and the company proved a total failure; but there was no actual mis-statement of any fact, and an action brought to recover damages from those who issued the prospectus failed.

It must not, however, be assumed that an expression of an opinion, or of an intention, or of a purpose, may not be a statement of fact within this rule. If an opinion, intention, or purpose is not in truth entertained, those who say the contrary mis-state a fact. Therefore, in *Edgington v. Fitzmaurice* (d), where a prospectus was issued inviting subscriptions to debentures for a purpose, which was not the true purpose for which money was wanted, a person who took debentures which proved worthless was held entitled to maintain an action against those who had fraudulently misled him.

Secondly, a mis-statement of fact must, in order to entitle a person to any relief in respect of it, be untrue when made; or, if then true, must be untrue when it is intended to be acted upon and is acted upon. It has already been seen (e) that if an application for shares is made on the faith of a statement which is true when made, but which is not true when shares are allotted to the applicant, he may refuse to take them. Further, a statement that an existing condition of things is likely to last, is not true if circumstances have occurred which will soon put an end to it; and a statement that a condition of things exists may be so expressed as to be intended to lead, and so as in fact to lead, to the inference that the condition not only exists now but will exist for some reasonable time to come. A statement to this effect is fraudulent if the person who makes the statement knows that permanence in the sense implied cannot be relied upon, or that the state of things has

(a) *Hallows v. Fernie*, 3 Ch. 467, and 3 Eq. 520.

(b) *Denton v. Macneil*, 2 Eq. 352.

(c) 13 Q. B. D. 562.

(d) 29 Ch. D. 459.

(e) *Anderson's case*, 17 Ch. D. 373, ante, p. 21. Compare *Hallows v. Fernie*, 3 Ch. 467, and 3 Eq. 520.

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Bellairs v. Tucker.

False statement
of intention.

Edgington v. Fitzmaurice.

Statement must
be untrue.

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ceased when its continuance is still believed in by a person acting on the faith of the statement (*f*). But in the absence of such knowledge the fact that what was true has ceased to be so, cannot entitle a person who is a shareholder to relief unless indeed there is some contract express or implied guaranteeing him against the consequences of change.

Concealment of
material facts.

By the law of this country the duty of a person bargaining with another to disclose all material facts known to himself is confined to a very limited class of contracts (*g*). In all contracts of buying and selling the maxim is *caveat emptor*; and contracts to take shares are apparently governed rather by this principle than by any other (*h*). At the same time, if persons issue prospectuses or make statements, and fraudulently suppress material facts which render the statements made untrue, an action for damages may be sustained against them (*i*). *A fortiori*, will such a concealment support an action for rescission of contract. But such an action cannot apparently be supported by a person induced to take shares by the concealment of a material fact unless there has been some untrue statement (*k*).

Intention with
which false
statement is
made.

Thirdly, the mis-statement of fact must have been made with a view to induce the person complaining of it or persons in general to act upon it. A mis-statement made by A. to B., but not intended to influence C., nor any class of persons of whom C. is one, does not entitle C. to redress, although he may have heard of it and acted upon it and suffered loss (*l*).

False statement
must be mate-
rial.

Fourthly, a mis-statement of fact in order to entitle a person to any relief in respect of it, must be material to the

(*f*) See *Traill v. Baring*, 4 De G. J. & S. 318; and *Brownlie v. Campbell*, 5 App. Cas. 950, *per* Lord Blackburn.

(*g*) See *Daries v. Lond. and Prov. Marine Ins. Co.*, 8 Ch. D. 469, a case of suretyship.

(*h*) See the next note. In *Twy-cross v. Grant*, 2 C. P. D. 469, reasons are given against this view.

(*i*) See *Peck v. Gurney*, L. R. 6 H. L. 377, and 13 Eq. 79; *Arkwright v. Newbold*, 17 Ch. D. 301.

(*k*) See the last note and the judgments in *New Sombbrero Phosphate Co. v. Erlanger*, 3 App. Cas. 1218, and 5 Ch. D. 73, a promoter's case; *Oakes v. Turquand*, L. R. 2 H. L. 325; *Pulsford v. Richards*, 17 Beav. 87; but see 5 App. Cas. 950, *per* Lord Blackburn.

(*l*) See *Peck v. Gurney*, *ubi supra*; and the note to *Chandelor v. Lopus*, 1 Sm. L. C.; compare *Cann v. Wilson*, 39 Ch. D. 39.

contract into which the statement induced him to enter. It must be a statement but for which he would not have entered into it. Mis-statements relating to trifling matters of detail, or statements which though not true when made were true before their untruth became important, are not sufficient to sustain either an action for damages or for rescission of contract (*m*).

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In *Ship v. Crosskill* (*n*) a prospectus stated that more than half the capital had been subscribed for. This was not true; but it was true soon afterwards, and before the plaintiff applied for shares. He was held not entitled to maintain an action for damages against the directors for misrepresentation.

Ship v. Crosskill L.

Fifthly, the person complaining of the mis-statement must in fact have acted on the faith of it (*o*). Further, if the statement on which he relies is fairly capable of two meanings, one true and the other false, he must show which meaning he attached to it, and that he understood it in the sense in which it was false. *Smith v. Chadwick* (*p*) is the leading case on this point. The statement there was—"The present value of the turnover or output of the entire works is over 1,000,000*l.* per annum." This was true in one sense but not in another; and the plaintiff would not say in which sense he understood it—in truth he evaded that question. The action was for damages, and it failed. If the action had been for rescission of contract the result would probably have been the same, for the plaintiff would have still failed to prove that he had been misled by the statement (*q*).

False statement must have been acted upon.

Ambiguous statements.
Smith v. Chadwick.

It is not, however, necessary for the person who seeks redress on the ground that he has been induced to take shares by a false statement to prove that such statement was the sole inducement which led him to apply for shares; it is sufficient for him to prove that the mis-statement materially tended to

False statement not the sole inducement to take shares.

(*m*) See *Pulsford v. Richards*, 17 Beav. 87, and cases of that class, noticed *infra*; *Hallows v. Fernie*, 3 Ch. 467, and 3 Eq. 520; *Smith v. Chadwick*, 9 App. Cas. 187, and 20 Ch. D. 27, as to several of the grounds relied on.

(*n*) 10 Eq. 73.

(*o*) See *infra*.

(*p*) 9 App. Cas. 187, and 20 Ch. D. 27.

(*q*) Lord Bramwell thought this was proved, but that there was no fraud on the part of the defendant.

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Edgington v.
Fitzmaurice.

Opportunity of
ascertaining the
truth not
material.

induce him to do so (*r*). In *Edgington v. Fitzmaurice* (*s*) a person relied on a mis-statement in the prospectus, but he was also influenced by a mistake of his own; he was nevertheless held entitled to redress.

A person who makes a statement to another in order to induce him to act upon it cannot complain if the statement is believed without further inquiry. The person making the statement may guard himself by saying that it must not be taken as true without inquiry; he may refer to others, or to books or documents, and leave the person with whom he is dealing to act on his own judgment (*t*). But unless this is done, the person to whom the statement is made is entitled to believe it and act upon it; and if it is false he is entitled to redress, although he might have found out the truth without much trouble or expense (*u*).

Unless all the above-mentioned requisites are established, a person who complains that he has been induced to take shares in a company by misrepresentation is without redress of any kind. But if he can establish them he will be entitled to redress of some sort either against the company or against the persons who made the misrepresentations, or against both them and the company, as the case may be, and as will be now explained.

(*a*) To rescind
the contract.

If he can show that the mis-statements have been made under such circumstances as to be imputable in point of law to the company (*x*), and he has obtained his shares directly from the company, he can rescind his contract and repudiate his shares, and obtain back from the company whatever money he may have paid to the company in respect of them (*y*), and further

Peek & Derry is under
discuss. in the House of Lords.

(*r*) ^{*}*Peek v. Derry*, 37 Ch. D. 541; *Western Bank of Scotland v. Addie*, L. R. 1 H. L. (Sc.), pp. 158 & 162; *Nicol's case*, 3 De G. & J. 387; *Clarke v. Dickson*, 6 C. B. N. S. 453; *Cleveland Iron Co. v. Stevenson*, 4 Fos. & Fin. 437.

(*s*) 29 Ch. D. 459, an action for damages.

(*t*) As in *Jennings v. Broughton*, 17 Beav. 234; and 5 De G. M. & G. 126; *Attwood v. Small*, 6 Cl.

& F. 232; and see *Redgrave v. Hurd*, 20 Ch. D. 1.

(*u*) See *Peek v. Derry*, 37 Ch. D. 541; *Rawlins v. Wickham*, 3 De G. & J. 304, and 1 Giff. 355.

(*x*) See as to this, *infra*, book ii.; *Nicol's case*, 3 De G. & J. 387; *Micer's case*, 4 ib. 575, noticed *infra*.

(*y*) *Kisch v. Central Rail. Co. of Venezuela*, 3 De G. J. & Sm. 122, and L. R. 2 H. L. 99, and others of that class referred to below.

compel the company to indemnify him against loss (z). More-
 over, to entitle him to this relief, it is not necessary to prove
 that the statements were false to the knowledge of those who
 made them (a). Bk. I. Chap. 3.
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With respect, however, to the repudiation of shares, two Loss of right to
rescind.
 points must be borne in mind, *viz.* : (1.) The right to repudiate
 will be lost if not promptly asserted after the facts are known, or
 might have been known, if reasonable diligence had been exer-
 cised (b); and *a fortiori* will be lost if the shareholder has so
 acted after he knew the facts as to have elected to keep the
 shares, and to have waived his right to repudiate them. (2.) The
 right to repudiate by any registered shareholder in a company
 being wound up, cannot be exercised after the commencement
 of the winding up of the company (c). This last doctrine
 turns on the provisions of the Companies act, 1862; and the
 cases under the older winding up acts in which shares were
 repudiated after the commencement of winding up proceedings,
 although valuable as illustrations of principles, are no longer
 authorities on the right to repudiate after winding up has
 commenced.

If the person defrauded cannot prove all that is necessary to (b) To recover
damages.
 repudiate his shares, or if he has lost his right to repudiate
 them, he may still be entitled to damages against those who
 issued the prospectus. But in order to entitle him to this
 relief, he must prove not only that the statements were untrue
 when made, but were untrue to the knowledge of the defen-
 dants, or at all events that the defendants, in publishing the
 statements acted recklessly, and without having reasonable
 grounds for believing them to be true (d).

The person aggrieved may both repudiate his shares and
 obtain damages if he can prove what is necessary to entitle him
 to this double relief.

(z) See *Newbigging v. Adam*, 34
 Ch. D. 582, and 13 App. Ca. 308.

(a) *Smith v. Reese River Co.*, L. R.
 4 H. L. 64, 2 Ch. 604, and 2 Eq.
 264; *Arkwright v. Newbold*, 17 Ch.
 D. 301; *Redgrave v. Hurd*, 20 Ch.
 D. 1. See Pollock on Contracts,
 cc. 9 and 10.

(b) *Sheffield's case*, Johns. 451, and
 others of that class noticed *infra*.

(c) *Oakes v. Turquand*, L. R. 2 H.
 L. 325; *Kent v. Frechold Land, &c.*,
Co., 3 Ch. 493, and 4 Eq. 588.

(d) See *Peck v. Derry*, 37 Ch. D.
 541, and the cases referred to below.

See Pollock on Torts, 236 *et seq.*

Peck v. Derry is under appeal in the House of Lords.

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Recovery of
damages against
the company.

With respect to actions for damages against companies as distinguished from actions for rescission of contract and indemnity, there is always the difficulty of establishing fraud against the company as a body. Many eminent men consider that on principle a corporate body cannot commit a fraud, and that consequently an action for fraud can never be maintained against an incorporated company; but the current of authority, and in the author's opinion sound principle also, are opposed to this view, and are in favour of such actions being maintainable. This difficult subject will be discussed hereafter (Bk. II., c. 3, § 3). It is however settled that such an action (or its equivalent, *viz.*, a claim for damages) cannot be supported against a company which is being wound up (*e*).

This doctrine is based upon the winding-up provisions of the Companies act, 1862, and upon the rights of creditors under winding-up proceedings, and has no application to actions against companies not being wound up, nor to actions against individual directors or other persons.

Having now stated the general principles applicable to the subject under consideration, it will be useful to notice some of the more important decisions illustrating, (1) The right to relief against the company by way of rescission of contract and indemnity; and (2) The right to redress against the individuals who have been guilty of fraud.

2. Remedy against the Company.

*Kisch v. Central
Railway Com-
pany of Vene-
zuela.*

In *Kisch v. Central Railway Company of Venezuela* (*f*), the prospectus in effect stated, (1) That the company had obtained a concession from a foreign government; (2) That the contractor had guaranteed a dividend of two-and-a-half per cent. on the paid-up capital during the construction of the works; and (3) That the foreign government had guaranteed a dividend of nine per cent. on the paid-up capital for twenty years.

(*e*) *Houldsworth v. City of Glasgow Bank*, L. R. 5 App. Cas. 317. See also *Cargill v. Bower*, 10 Ch. D. 502. Observe that these are cases of defrauded members. Claims for frauds on other persons are not affected by

these decisions.

(*f*) 3 De G. J. & Sm. 122; aff. L. R. 2 H. L. 99, under the name *Directors of Central Rail. Co. of Venezuela v. Kisch*.

The real facts were (1) That the company had for a large sum bought a concession made to another company; (2) The contractor's guarantee was limited to 20,000*l.*, the capital of the company being 500,000*l.*; (3) The government guarantee only came into operation in the event of the company failing, without any default of its own, to realise a profit of nine per cent. on its paid-up capital from its business. The memorandum of association empowered the company to purchase concessions, and the agreement for the purchase of the concession already obtained by others was referred to in the company's articles, but was not disclosed in them. The Court held that the misrepresentations in the prospectus were such as to entitle a person taking shares on the faith of it to rescind his contract, although he was not entitled to rely upon his own ignorance of the memorandum and articles of association, and of what was there disclosed.

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In *Smith v. Reese River Company* (*g*), the prospectus described some silver mines abroad which the company had contracted for, and proposed to work as extremely valuable, whereas in fact they were wholly worthless, and were afterwards given up by the company for others, which were more promising. The directors who issued the prospectus did not know that the mines referred to in the prospectus were worthless, they having themselves been duped; but the Court held that a person who had taken shares on the faith of the prospectus was entitled to rescind his contract, and to have the company restrained from suing him for calls (*h*).

*Smith v. Reese
River Company.*

In *Ross v. Estates Investment Company* (*i*), a prospectus was issued by the directors of a company after its formation, and the prospectus stated, falsely, that half the first issue of shares had been already subscribed for, and that the company had contracted for the purchase of two properties, on one of which the vendor had already spent 70,000*l.* A person who had been induced to take shares in the company on the faith of this prospectus, was held entitled to rescind his contract, to

*Ross v. Estates
Investment
Company.*

(*g*) L. R. 4 H. L. 64, 2 Ch. 604, directors that their statements were
and 2 Eq. 264. false, *ante*, p. 73.

(*h*) See, as to the immateriality of knowledge on the part of the (i) L. R. 3 Eq. 122, aff. 3 Ch. 683.

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Sect. 1. recover from the company the money he had paid to it for the shares, to have his name removed from the register of shareholders, and to have the company restrained from suing him for calls.

Henderson v. Lacon. In *Henderson v. Lacon* (*k*), the prospectus stated, falsely, that the directors and their friends had subscribed a large portion of the capital; and a shareholder who had applied for and obtained shares on the faith of this prospectus was held entitled to repudiate his shares and to have his money back, and to have his name removed from the register of members, and to be indemnified by the directors.

Moreover, in such cases as these, the plaintiff is entitled to relief, although a petition to wind up the company may be presented after action brought (*l*).

Fraud not material. These cases may be conveniently contrasted with the following, in which the misrepresentation relied upon was held not to be sufficiently material, or not to have been relied upon by the plaintiff so as to entitle him to relief.

Private arrangements by promoters.
Pulsford v. Richards. In *Pulsford v. Richards* (*m*), the projectors of a Belgian railway issued a prospectus for the formation of a company, stating that they transferred to the company the concession obtained from the Belgian government, and all the benefits arising from it, subject to certain specified reservations in favour of the promoters for reimbursement of preliminary expenses. The plaintiff, acting on the faith of this prospectus, applied for and accepted shares in the company, but afterwards filed a bill against the projectors for a return of all monies paid by him in respect of such shares with interest, offering to return the shares and all dividends received on account of them. The grounds on which the plaintiff sought to rescind his contract were substantially—(1) that an arrangement had been made by the promoters with an engineer, highly beneficial to him and detrimental to the company, and that this arrangement was in no way alluded to in the prospectus; and, (2) that the promoters had appropriated to themselves

(*k*) 5 Eq. 249.

(*l*) *Smith v. Reese River Co.*, and
Henderson v. Lacon, *ubi supra*.

(*m*) 17 Beav. 87. See, also, *Hey-*

mann v. European Central Rail. Co.,
7 Eq. 154; *Kennedy v. Panama, &c.*,
Mail. Co., L. R. 2 Q. B. 580.

20,000 shares in the company, in addition to the benefits expressly reserved to them in the prospectus. The Court, however, held that there was no such fraud as was sufficient to enable the plaintiff to rescind the contract into which he had entered, and his bill was dismissed with costs. As regards the shares, the Court was of opinion that the directors took the shares *bonâ fide*, and that the number of shares allotted by them to themselves and the engineer, was not a fact so material, that the knowledge of it was a matter which the directors were bound to communicate to the public, in order to enable them to come to a sound conclusion as to the probable success of the undertaking in which they were invited to take a part. As to the concealed arrangement with the engineer, the Court came to the conclusion that the services performed and to be performed by him, must have been performed by some one; that he was peculiarly well fitted to perform them; that supposing the remuneration agreed upon to have been excessive, still that would only entitle the shareholders to have the amount of excess paid by the directors themselves, and that the non-disclosure to the public of the agreement made with the engineer, was not the suppression of a fact which affected the intrinsic value of the undertaking, or consequently afforded a sufficient ground for a rescission by the plaintiff of his contract to take shares in the company.

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Pulford v.
Richards.

In *Jennings v. Broughton* (n), the plaintiff, who had taken shares in a mining company formed by the defendants, sought to rescind the contract on the ground that he had been induced so to do, by their representations. The misrepresentations consisted of exaggerated statements, as to the value and prospects of the mine, contained in the report of an engineer employed by the defendants, and which report was submitted by them to the plaintiff. The plaintiff, however, did not altogether rely on this report, but went and examined the mine himself more than once, before he purchased the shares in it. The mine had undoubtedly been described in too glowing

Statements not
relied on by
plaintiff.
Jennings v.
Broughton.

(n) 17 Beav. 234, and 5 De G. M. & G. 126. See, also, *Attwood v. Small*, 6 Cl. & Fin. 232, where the plaintiff also relied on his own judgment.

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colours, and it by no means came up to the expectations formed of it; but the Court was of opinion, upon the evidence, that the plaintiff had not relied on what was represented to be actually existing, that he not only had had the same means as the defendants of ascertaining the truth, but that he had availed himself of those means, and that his deception was as much owing to his own error of judgment as to anything else. His bill therefore was dismissed, and with costs, and an appeal by him was also dismissed.

Prospectus not
relied upon by
plaintiff.

Robson v.
Devon.

In *Robson v. The Earl of Devon* (o), the plaintiff, a stock-broker, was induced by the secretary of a company, first to advance him 500*l.* on the security of 1000 *l.* shares, on each of which *l.* was certified to have been paid up; and secondly, to purchase 1200 other shares. On the failure of the company, the plaintiff sought to have both transactions declared void, and to obtain back from the company his 500*l.*, and the money paid for the purchased shares. The plaintiff rested his case against the company upon the following, amongst other grounds, *viz.*: First, that the company's prospectus showed that no shares ought to have been issued before a certain amount of capital had been subscribed; and secondly, that nothing had ever been paid in respect of the shares on which the 500*l.* had been advanced. But it was held that the plaintiff was entitled to no relief on either of these grounds. For, first, it was by no means clear that the capital required by the prospectus to be subscribed, had not in fact been subscribed; secondly, the plaintiff had not parted with his money on the faith of the prospectus, so that it was immaterial to consider what was there stated; and thirdly, the shares on the security of which he lent his money, were, as between the holder and the company, to be taken as paid-up shares, and therefore it was of no consequence to the plaintiff, whether anything had actually been paid upon them or not.

Although the cases under the older winding up acts, in which persons induced by fraud to take shares in a company were held not to be contributories, can no longer be relied upon where the

(o) 3 Jur. N. S. 567, and 4 ib. 245.

point for determination is contributory or non-contributory, those cases throw great light on the questions discussed in this chapter, and the following notice of them may still prove useful.

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1. *Persons held entitled to repudiate their shares, having been induced to take them by the fraud of the company.*

Ginger's case (*p*) is an important Irish case, decided in winding up the Tipperary Bank. In that case the managing director of the bank, acting without authority, and in violation of the bank's deed of settlement, issued a number of shares, entered them in the share register book in the name of A., and debited him with their price. Of this proceeding A. was ignorant. In order to induce persons to take these shares, the director issued a flourishing report, prospectus, and balance-sheet, in which there was not a word of truth; he placed these documents in the hands of a friend, who did not know them to be false, and induced him to endeavour to sell the shares. The friend in question employed agents equally innocent with himself, to induce people to take shares, and such agents were furnished with the false and fraudulent documents above alluded to. Ginger was induced by one of these agents, and by the false documents produced by him, to purchase shares; and A. was induced by a trick on the part of the director to sign transfers to Ginger, who accepted the shares, and was registered as a shareholder in respect of them. Ginger was held not to be a contributory: first, because the shares transferred to him ought never to have been issued or transferred to him at all (*q*); and secondly, because he was induced to purchase them by a gross fraud, imputable to the company. Upon the question of fraud it was considered, that if shareholders choose to adopt, and seek to enforce, the contract of a director, and say that he was their authorised agent to enter into it, they cannot repudiate the frauds of the agent which led to the contract, and which are immediately connected with, and the foundation of, the very transaction which is sought to be enforced.

Brockwell's case (*r*), which arose in the course of winding up the Royal British Bank, was substantially as follows: The bank was formed in 1849 under 7 & 8 Vict. c. 113. Annual reports were made by the directors to the shareholders, and such reports were from the very first false, to the knowledge of most, if not of all, of the directors. In December, 1854, the company was hopelessly insolvent, and the directors knew it. They nevertheless prepared a report, and laid it before a general meeting of shareholders, held in February, 1855, and in such report represented the company to be in a flourishing condition. In this same month the directors, by false representations as to the state of the company, induced the Board of Trade to grant

Brockwell's
case.

(*p*) 5 Ir. Ch. Rep. 174.

(*q*) But see, as to this, *Richmond's case* and *Painter's case*, 4 K. & J. 305, where a person who had taken

shares issued without authority and fraudulently, was held a contributory.

(*r*) 4 Drew. 205.

Ek. I. Chap. 3.
Sect. 1. the company a supplemental charter, and to authorise the increase of its capital by the issue of new shares. The report made to the shareholders in February, 1855, was advertised in the newspapers, and was to be seen at the company's office, and there Mr. Brockwell saw it. Upon the faith of this report he took shares in the company from the company itself; he paid up his capital and received dividends. In September, 1855, the company was ordered to be wound up. The frauds committed by the directors, and the falsity of their reports and representations, were then discovered. It was admitted that Brockwell would have been a contributory had there been no fraud; but it was contended on his behalf, and held, that he had been induced to take shares in and from the company by the fraud of the company, and that he was therefore not a contributory, and his name was struck off the list, with costs to be paid by the company.

Observations on these cases. These cases are frequently regarded as inconsistent with, and in effect overruled by *Nicol's case* (*s*); indeed the V.-C. Kindersley, who decided *Brockwell's case*, appears himself to have regarded it as overruled (*t*). But all that *Nicol's case* decided was, that a company could not be affected by the use one of its directors might make of a report which had been laid before, and adopted by a meeting of shareholders (*u*). In so far as *Ginger's case* and *Brockwell's case* are opposed to this decision, they may be considered as overruled by it; but the broad principles on which they proceeded may, it is conceived, still be relied upon, and have been recognised and acted upon in other cases.

Bell's case. *Bell's case* (*x*). In this case the secretary of a company had, by the authority of its directors, issued circulars in which the affairs of the company were falsely and fraudulently represented to be in a flourishing state. Such circulars were issued for the purpose of inducing the public to take shares. Mr. Bell took shares on the faith of the statements contained in the circulars. He obtained such shares directly from the company, which was shortly afterwards ordered to be wound up. The fraud which had been committed was then discovered, and Mr. Bell repudiated his shares. He was held not to be a contributory, although he had executed the company's deed.

Ayre's case. *Ayre's case* (*y*). In this case *The Deposit and General Life Assurance Company* was desirous, in March, 1854, of issuing new shares. The company had a manager in London and an agent in Bristol. The Bristol agent applied to Mr. Ayre to take shares, and produced to him the company's deed of settlement, also a list of the original shareholders, who were described as holding 10,550 shares, and as being persons of considerable property, and also a report made by the directors of the company, and representing the affairs of the company to be in a flourishing state. This report was false. The list of shareholders also contained many material false statements. The documents shown to Mr. Ayre had been sent from London for the express purpose of being laid before him; and on the faith of those documents, and of the statements made to him both by the company's London manager and

(*s*) 3 De G. & J. 387, *infra*. See, also, *Miccr's case*, 4 ib. 575.

(*t*) *Burgett's case*, 2 Dr. & Sm. 415, *infra*.

(*u*) *Infra*.

(*x*) 22 Beav. 35.

(*y*) 25 Beav. 513.

by its Bristol agent, Mr. Ayre was induced to take 200 of the new shares, and to sign the company's deed in respect thereof. He afterwards, however, had reason to suspect that he had been imposed upon, and he then repudiated his shares and refused to pay a call made upon him. He further defended an action brought against him for such call, pleading fraud as a defence to the action; at the trial, however, the evidence adduced by him to prove the fraud was not satisfactory, and the company obtained a verdict, and he was compelled to pay the amount of the call, together with interest and costs. On the subsequent winding up of the company he succeeded in establishing the facts already mentioned, and it was accordingly held that he was not a contributory, and that the verdict of the jury was not conclusive upon the question of fraud. The judgment on this question deserves attentive perusal, and is an authority for the proposition that companies cannot be heard to say they did not know that their own reports were untrue.

Blake's case (z). There the secretary of the company sent to its brokers prospectuses of the company for distribution. The prospectus represented that several persons were directors of the company. The brokers were informed by the secretary that the shares taken by the directors and others exceeded the number set apart for persons in London and the neighbourhood, and that the London share list was closed; but that shares might still be had by persons residing in the country, and applying through country brokers. Advertisements to this effect were also published in the newspapers. This information was conveyed by the brokers to Blake, to whom they sent a prospectus. He bought some shares in the company on the faith of the above statements; but his suspicions being aroused by the low numbers on the scrip certificates sent to him, he made inquiries and discovered that the London share-list was still open, and that there was no difficulty in obtaining shares in London, and that three out of the eleven directors named in the prospectus had no shares in the company. Blake immediately repudiated his shares, and demanded back the money he had paid for his shares; and it was returned to him, and a line was drawn through his name on the register. Two calls were afterwards made, but he was not required to pay either of them. On the subsequent winding up of the company, he was held not a contributory. The decision proceeded on the ground—1, that Blake had been induced by fraud to apply for shares, and that such fraud affected the company; and 2ndly, that he had repudiated the shares as soon as he had discovered the fraud, and such repudiation had been acquiesced in by the company.

2. *Persons held not entitled to repudiate their shares.*

a) Fraud not imputable to the company.

Even where a person has taken shares in a company on the faith of a false and fraudulent report of the directors of the company, he will nevertheless be unable to repudiate his shares if such report was not issued or published

Fraudulent reports.

Pl. I. Chap. 3. by the directors, or by their authority, in order to induce persons to take
Sect. 1. shares in the company. The unauthorised production of such a report to a person in order to induce him to take shares in the company, is not such a use of the report by the company as to render the company guilty of a fraud upon him, even although the report may have been produced to him by a director or some officer of the company.

The leading authority on this head is *Nicol's case*, which may be regarded as an appeal from the decision in *Brockwell's case (a)*.

Nicol's case.

In *Nicol's case (b)*, Nicol had taken shares in the Royal British Bank, in March, 1855, on the faith of the same reports as had induced Brockwell to take his. Brockwell had seen the reports at the Bank. Nicol was shown them by a director, who made additional statements as to the flourishing condition of the bank. The Vice-Chancellor held Nicol not to be a contributory, he having been induced, by the fraud of the company, to take the shares in question. The Lord Chancellor dissented from this view, and expressed a strong opinion that companies are not responsible for the frauds of their directors; the Lord Justice Knight Bruce was not satisfied that the Vice-Chancellor's view of the case was correct; and the Lord Justice Turner, although differing in many respects from the Lord Chancellor, agreed with him in thinking that Nicol, having had no communication with the directors as a body, but having dealt with one of them only, was not in a position to say that he had been defrauded by the company. The whole Court, however, agreed that Nicol's name ought to be struck off the list of contributories, he having effected a valid transfer of his shares.

Holt's case.

Holt's case (d). The managing director of a company induced Holt to become a director, to take shares, and to sign the company's deed, by misinforming him as to the position and prospects of the company, and producing a flourishing but false prospectus. Holt was held a contributory.

Barrett's case.

Again, it was decided by the V.-C. Kindersley in *Barrett's case (e)*, that where directors made a false report to a meeting of shareholders, and the meeting adopted the report, and it was afterwards sent to each shareholder, no shareholder could treat that report as a fraud by the company on himself. Consequently a shareholder who, on the faith of such report, applied for and obtained more shares in the company, was held to be a contributory in respect of them.

In the following cases, persons who had been induced to take shares in a company by the fraud of some individual connected with the company, were held not to be entitled to repudiate their shares. After what has preceded they will be found to offer little difficulty.

Bernard's case.

Bernard's case (f). Bernard, being desirous of purchasing shares in a

(a) 4 Drew. 205, *ante*, p. 79.

(b) 3 De G. & J. 387. See, also, *Mirer's case*, 4 ib. 575.

(d) 22 Peav. 48. See, too, *Bigge's case*, 5 Jur. N. S. 7, *infra*, p. 84.

(e) 2 Dr. & Sm. 415, and 3 De G. J. & Sm. 30.

(f) 5 De G. & S. 283. The fraud here consisted in the payment of dividends out of capital, rather than in the statement of the manager. The Court does not seem to have been satisfied that there was any *dolus dans locum contractui*.

company, applied to the manager for information as to its circumstances, *Blk. I. Chap. 3, Sect. 1.* and was told, amongst other things, that dividends were being paid. He took fifty shares, which were in fact, although he did not know it, issued by the directors. He received dividends for three years, and was held a contributory, although the company was insolvent when he took the shares.

Gibson's case (g). In this case *Gibson* had been induced by a promoter of *Gibson's case.* a company to take shares in it, and to sign its deed of settlement in respect of such shares, upon the assurance of the promoter that two other persons would do the same. These two persons, however, refused to join the company, and *Gibson* then repudiated his shares. He was afterwards informed by the promoter, with whom he had dealt, that such shares had been transferred, which, however, was not true. *Gibson* was held to be a contributory. In this case there was in truth no fraud inducing him to take shares; for the persons who were stated to be willing to sign the deed and become directors were at the time believed to be willing to do so. Further, there was nothing to show that the promoter, with whom alone *Gibson* dealt, ever acted otherwise than in his individual capacity.

Woollaston's case (h). Dr. *Woollaston* was requested by one of the directors of an insurance company to become one of its medical referees, and was told that there would be only two. Dr. *Woollaston* applied for the appointment, and his application was accepted. The appointment appears to have been made without qualification, but to have been confirmed upon the condition that the appointee should sign the company's deed for 200 shares, and that the appointment should date from the day on which he signed it. The secretary of the company assured Dr. *Woollaston* that only two referees would be appointed; that every officer of the company had 200 shares in it; and that he must take a like number. On the faith of these representations Dr. *Woollaston* signed the deed for 200 shares. He acted for the company for some little time, but having afterwards discovered that two other referees had been appointed, he tendered his resignation, and demanded back the money he had paid for his shares. This demand, however, was not complied with. The statement made by the secretary as to the number of shares held by the other officers of the company was false; but it was held that there was no such fraud as to relieve Dr. *Woollaston* from his liability to be a contributory.

Ex parte Worth (i). In this case the shareholders of a company had resolved on issuing preference shares, which they had no right to do. A certain number were taken by a director, and he sold some of them to a lady, who accepted them, and signed the company's deed in respect of them. She was held to be a contributory, for there had been no dealing whatever

(g) 2 De G. & J. 275. *Kemp's case*, and *Hudson's case*, reported in the same place, are not distinguishable from *Gibson's*.

(h) 5 Jur. N. S. 617, affirmed on the point of fraud, 4 De G. & J. 437. On appeal, Dr. *Woollaston* was held

not a contributory, his shares having been forfeited.

(i) 4 Drew. 529, as to shares purchased from shareholders, and not obtained directly from the company, see the next page.

Bk. I. Chap. 3. between her and the company ; she was not induced to take any shares by
 Sect. 1. any representation made to her by the company, or made by the company
 to the public, and which she had a right to take advantage of as one of the
 public.

Frowd's case. *Frowd's case* (k) is another case of the same class. *Frowd* was induced to
 take shares by the representations of one of the company's clerks, and was
 held a contributory.

Sheffield's case. *Sheffield's case* (l) may be referred to as an authority, to the effect that a
 person who takes shares in a company, and signs its deed, is a contributory,
 although the effect of that deed may have been misrepresented to him by
 the officers of the company.

b) *Fraud by a person not a party to the contract.*

Case of person
 buying shares
 from a share-
 holder.

Inasmuch as a contract between two persons cannot be rescinded by
 either on the ground that he was induced to enter into it by the fraudulent
 representations of a stranger, it follows that if a shareholder in a company
 sell his shares to a person who accepts them, and is accepted by the com-
 pany as a shareholder in respect of them, the purchaser will be unable to
 repudiate his shares, although he may have been induced to buy them by
 false and fraudulent reports issued by the directors of the company (m).
 The fraud of the company is not imputable severally to each of the persons
 composing it ; and the purchaser cannot, therefore, repudiate his shares on
 the ground that he was induced to take them by the fraud of the seller.
 This explains several cases in which purchasers of shares in companies pay-
 ing large dividends when they were in fact insolvent, have, nevertheless,
 been held to be contributories (n).

c) *Fraud of the company not the cause of the contract.*

Case of person
 not induced to
 take shares by
 the fraud in
 question.

Bigge's case.

Although fraudulent reports may have been issued and published by the
 directors of a company, no person can rely upon them as a ground for
 repudiating shares taken by him in it, unless he was induced to take the
 shares by such reports. *Bigge's case* (o) may be usefully referred to on this
 head. There a young man of the name of *Bigge*, having money and nothing
 to do, was induced by his uncle and friends to become a director of a com-

(k) 9 W. R. 328.

(l) Johns. 451, and *infra*. See,
 too, *Blackburn's case*, 8 De G. M. &
 G. 177 ; *Conybeare v. New Brunswick*,
&c, Co., 7 H. L. C. 711.

(m) *Duranty's case*, 26 Beav. 182 ;
Ex parte Worth, 4 Drew. 529 ;
Sanderson's case, 3 De G. & S. 66 ;
Ex parte Oakes and Peck, 3 Eq. 576 ;
 and see the next note.

(n) *Bigge's case*, 5 Jur. N. S. 7 ;

Burnes v. Pennell, 2 H. L. C. 497.

Bernard's case, 5 De G. & S. 283, is
 partly but not wholly explicable on
 this principle, for fifty of the shares
 in respect of which Bernard was a
 contributory, were issued by the
 directors.

(o) 5 Jur. N. S. 7. See, too,
Longworth's case, 7 W. R. 483, where
 the shares were taken before the
 fraud was committed.

pany. He was told that to do so he must take a certain number of shares in it. His uncle was himself a director, and transferred to him the necessary number of shares. The company was paying dividends; it had issued reports which contained untrue representations of the state of its affairs; and it was, in fact, insolvent. But the shares were not taken on the faith of these reports, nor upon the faith of any representations attributable to the company, and Bigge was therefore held to be a contributory (*p*).

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d) Shares not repudiated when fraud was discovered.

A person induced to take shares in a company by the fraud of the company, will be unable to repudiate them if, knowing or having the means of discovering the fraud, he nevertheless continues to hold his shares. A leading case on this head is *Sheffield's case* (*q*).

Effect of not repudiating shares on discovery of fraud.

There a person had been induced to take shares in a company, on the assurance of its manager and its cashier that no risk would be incurred if he paid up his shares in full. He accordingly took shares, signed the company's deed, and paid up his shares in full. The deed, when he signed it, contained a clause limiting the liability of the shareholders to the amount of their unpaid-up capital. This clause had been fraudulently inserted in the deed, so as apparently to form part of it, and was fraudulently withdrawn from the deed before it was registered. He, however, never read the deed. The company carried on its business for several years, and the shareholder in question, who had never had his attention called to the difference between the deed as registered and the deed as signed by him, received dividends and attended meetings as a shareholder. After the lapse of more than four years, the company was ordered to be wound up, and it was then that the fraud above mentioned was discovered. The shareholder contended that he had never become a shareholder in the registered company; or that if he had, he had been induced to become so by the fraud of the company. But it was held that it was not open to him to say he did not know the contents of the registered deed; that other people were entitled to say they had acted on the faith of it; and that he could not escape from being made a contributory (*r*). The shareholder in this case was held liable, mainly upon the ground that he might have known, and, in fact, was bound to know, the contents of the registered deed. Treating him, therefore, as acquainted with those contents, although ignorant of the fraud which had been perpetrated, his acts amounted to an adoption of shares in the registered company.

(*p*) See, too, *Sanderson's case*, 3 De G. & S. 67, and 3 H. L. C. 698, where the company accepted a purchaser of shares as a shareholder, although it was on the eve of bankruptcy.

(*q*) Johns. 451. See, too, *Micer's case*, 4 De G. & J. 575; *Ex parte Briggs*, 1 Eq. 483; *Scholey v. Central Railway Co. of Venezuela*, 9 Eq. 266n.,

and *Ashley's case*, ib. 263.

(*r*) Other persons who had signed the deed whilst the limited liability clause was part of it, were held not to be contributories; but the circumstances distinguishing their cases from *Sheffield's* do not appear. See *Cox's case*, and *Naylor's case*, mentioned in 4 K. & J. 314.

Bk. I. Chap. 3. Sect. 1. The only question which could then arise would be, whether he was entitled to be indemnified by the company against loss, he having been told by the manager and one of the directors, that he would not be liable beyond the extent of his paid-up capital. Such a statement as this, however, could not affect the company; for, so far as the statement was true, it added nothing to what might have been learnt from the deed itself; and so far as it was false, it was made by persons who certainly were not the agents of the company to explain the legal effect of its deed of settlement.

Sheffield's case.

e) Effect of persons taking shares on faith of others being shareholders.

Effect of person taking shares on the faith that others are shareholders.

If a shareholder has been induced to take shares in a company by the fraud of the company, and since he took such shares other persons have taken shares on the faith of his being a shareholder, there are three alternatives, viz., 1, to hold that he, and consequently they, are entitled to repudiate their respective shares; 2, to hold that they, and consequently he, must be treated as shareholders; 3, to distinguish between his case and theirs, and whilst holding him at liberty to repudiate, to hold them bound.

Richmond's case.

Of these alternatives the last was adopted in *Richmond's case* and *Painter's case* (s). There persons had been induced to take shares in a company, the deed of settlement of which was materially altered after they had signed it. Other persons had taken shares in the same company, and had executed the deed in the state in which it ultimately remained, and whilst the persons first referred to were shareholders. The first set of shareholders were held not to be contributories; but the second set were held to be contributories, although it was contended on their behalf, that they had only agreed to join a company in which the first set were shareholders in reality as well as in appearance.

Painter's case.

Upon this case it is to be observed that there was no evidence showing that in point of fact the second set of shareholders had been induced to take shares in the belief that the first set were shareholders; for it does not appear that the shareholders held to be contributories, knew who, in particular, had signed the company's deed before they signed it themselves. If the facts had in this respect been different, *Sheffield's case* goes far to show that all the persons defrauded would have been contributories (t).

Farbury's case.

Such cases as those last adverted to must not be confounded with *Parbury's case* (u), in which it was held that a person induced to take shares in a company on the faith of its prospectus, which contained false and fraudulent statements, was nevertheless a contributory, inasmuch as it was reasonable to suppose that there were other persons, equally innocent with himself and with whom, therefore, he was liable to contribute. Now it is conceived that if these other persons had, like himself, been induced to take shares on the faith of the company's prospectus, the only consequence would be that they and he might all have repudiated their shares. If in such a case some of those deceived do not choose to exercise their right of repudiation, that

(s) 4 K. & J. 305.

& J. 284; *Bell's case*, 22 Beav. 35.

(t) *Ante*, p. 85. Compare the judgments in *Gibson's case*, 2 De G.

Brockwell's case, 4 Drew. 214.

(u) 3 De G. & S. 43.

ought not to prevent the others from so doing. If 100 persons have been equally cheated, and ninety-nine of them are content to abide by their bargain, that is no reason why the hundredth should be held to his (x). Moreover, under the older Winding-up acts (under which *Parbury's case* was decided), persons entitled to be indemnified by the company ought not to be contributories, simply because they may possibly be called upon to bear debts or losses, for which the company, as between them and it, is primarily responsible. *Parbury's case*, therefore, cannot be considered satisfactory. But this conclusion does not render it more easy to deal with such cases as *Richmond's* and *Painter's case*; for, *ex hypothesi*, in them, those persons who are equally innocent are not in the same position relatively to each other; some of them having become shareholders in the belief that the others had become so first. It is the right of the former against the latter which it is so difficult to determine, and which cannot yet be considered as finally settled by decision.

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3. Remedy against the individuals who made the statements.

Directors and others who publish false and fraudulent reports with a view to induce people to take shares incur serious criminal as well as civil responsibility. They are liable to be indicted and convicted for conspiracy at common law (y); and they are also liable to punishment under 24 & 25 Vict. c. 96, § 84, which will be found in the chapter relating to fraudulent accounts (z).

Criminal
responsibility.

In the notorious case of the Royal British Bank, the directors were indicted and convicted of the common law offence of a conspiracy to induce persons to become shareholders in and customers of the bank by issuing false and fraudulent reports respecting its condition and solvency (a); and in the equally notorious case of the Eupion Fuel and Gas Company, the directors were indicted and convicted of a conspiracy to defraud by fraudulently obtaining a settling day from the Stock Exchange Committee, with intent to induce persons to deal in shares of the company in the belief that it was duly formed and constituted (b).

(c) See 4 Drew. 214, in *Brockwell's case*, and 3 De G. & J. 425, in *Nicol's case*. in *Burnes v. Pennell*, 2 H. L. C. 497, p. 525.

(b) *R. v. Aspinall*, 1 Q. B. D. 730, and 2 Q. B. D. 48. See, also, *R. v. Timothy*, 1 Fos. & Fin. 39, and *R. v. Gurney*, Finlaison's Report, and for obtaining money under false pre-

(y) See below.

(z) *Infra*, book iii., c. 3, § 4.

(a) *R. v. Esdaile*, 1 Fos. & Fin. 213. See, also, *per* Lord Campbell

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civil liability.

Directors and others who circulate fraudulent prospectuses and reports, with a view to induce people to take shares are answerable in damages to those who take shares on the faith of such reports (*c*); and an action for misrepresentation is sustainable, although the prospectus or report relied on was not the sole inducement to the plaintiff to take shares (*d*); and although there may have been no immediate communication between the plaintiff and the defendant (*e*), and although the defendant may have been only a servant of the company (*f*). Such an action, moreover, is sustainable in Scotland and perhaps in England against executors for the fraud of their testator (*g*). But a director is not liable for the frauds of his co-directors or of any other agent of the company, *e.g.*, for a fraudulent prospectus issued by them, unless he has himself authorised what has been done (*h*).

Actions of this class are often brought on insufficient materials by shareholders whose expectations have been disappointed, and who seek without justice to throw the loss they have sustained on persons who are as innocent of fraud as themselves. But the law of this country is unquestionably very lenient to persons who act honestly, but who nevertheless put their names to statements on the faith of what they are told by others and the truth of which they too readily assume. Actions for negligent as distinguished from fraudulent misrepresentations are not encouraged; and the fiction of an implied warranty, which has been had recourse to in order to make agents liable for honest mistakes as to their own authority (*i*), has not been

tences, *R. v. Watson*, 4 Jur. N. S. 14; 24 & 25 Vict. c. 96.

(*c*) *Edgington v. Fitzmaurice*, 29 Ch. D. 459; **Peck v. Derry*, 37 Ch. D. 541; *Gerhard v. Bates*, 2 E. & B. 476; *Burnes v. Pennell*, 2 H. L. C. 497. See, also, *Denton v. Great Northern Rail. Co.*, 5 E. & B. 860; *Williams v. Swansea Harbour Trustees*, 14 C. B. N. S. 845; *Jury v. Stoker*, 9 L. R., Ir. 385.

(*d*) See *ante*, p. 71.

(*e*) *Clarke v. Dickson*, 6 C. B. N. S. 453; *Bedford v. Bagshaw*, 4 H. & N. 538; *Bale v. Cluland*, 4 Fes. & Fin.

117. Compare *Peck v. Gurney*, 1. R. 6 H. L. 377, and 13 Eq. 79, noticed *infra*.

(*f*) *Cullen v. Thompson*, 4 McQu. 424.

(*g*) *Davidson v. Tullock*, 3 McQu. 783; *Peck v. Gurney*, 1. R. 6 H. L. 377, and 13 Eq. 79; *New Sombbrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73, and 3 App. Ca. 1218.

(*h*) *W'cir v. Bell*, 3 Ex. D. 238, noticed *infra*.

(*i*) *Firbank's executors v. Humphreys*, 18 Q. B. D. 54; *Chapleo v. Brunswick Building Society*, 6 Q. B.

Peck v. Derry is under
al in the House of Lords

applied to other honest mistakes, although they may have seriously misled and injured other people. Actions against directors and others have constantly failed by reason of the evidence of fraud not being sufficient (*k*). Bk. I. Chap. 3.
Sect. 1.

The case which goes furthest in imposing liability for misrepresentations is *Peck v. Derry* (*l*). There the prospectus of a tramway company stated that the company had a right by their special act to use steam instead of horses. This was not true. The company were by their act authorised to use steam if the Board of Trade consented, but not otherwise; and the Board would not consent to the use of steam except on a very small portion of the company's line. When the prospectus was issued, the directors believed that they would have no difficulty in procuring the necessary consent; but they had not applied for it, and they had no reasonable grounds for their belief. It was held that notwithstanding their belief they were liable in damages to a person who had taken shares on the faith of the statement in the prospectus. Peck v. Derry.

By way of contrast with this decision, and as a strong illustration of the leniency above alluded to, reference may be made to *Weir v. Bell* (*m*). There the directors of a company were authorised by a general meeting to raise money by debentures. The directors, including Bell, authorised the secretary to employ a firm of brokers to obtain subscriptions for the debentures. The brokers issued a prospectus which contained serious misstatements of fact which were false to the knowledge of the brokers, and mentioning Bell and others as directors. The plaintiff subscribed for debentures on the faith of this prospectus, and, they proving worthless, sued Bell for damages. But there was no proof that Bell knew of or authorised these statements, and the jury found that he did not. It was therefore held that he was not liable. Cotton, L.J., dissented on Weir v. Bell

D. 696; *Weeks v. Propert*, L. R. 8 C. P. 427; *Cherry v. Col. Bank of Australasia*, L. R. 3 P. C. 24.

(*l*) See *Ship v. Crosskill*, 10 Eq. 73, *ante*, p. 71; *Smith v. Chadwick*, L. R. 9 App. Ca. 187, and 20 Ch. D. 27; *Bellairs v. Tucker*, 13 Q. B. D. 562.

(*l*) 37 Ch. D. 541. See, also, *Cann v. Wilson*, 39 Ch. D. 39.

(*m*) 3 Ex. D. 32 & 238; *Cargill v. Bower*, 10 Ch. D. 502. Compare *Peck v. Gurney*, 13 Eq. 79 & L. R. 6 H. L. 377; *Peck v. Derry*, 37 Ch. D. 541.

Bk. I. Chap. 3. the ground that it was Bell's duty as a director to know the
Sect. I. contents of a prospectus issued by persons authorised by him
to invite subscriptions for the company's debentures.

Shares not pro- In an action against directors for a fraudulent statement in a
cured from prospectus, it is always material to consider from whom the
company. plaintiff acquired his shares and from whom he obtained the
prospectus. The object of a prospectus is to induce persons
to apply to the company for shares, and not to enable persons
who have shares to sell them to other people. Accordingly it
was decided by the House of Lords in *Peck v. Gurney* (*n*) that
a person who had bought shares on the stock exchange on the
faith of a prospectus which was materially misleading, could
not maintain an action for damages against the directors with-
out proof of some direct communication between them and him.

Fraudulent Fraudulent concealment of a material fact will not support
concealment. an action for damages unless its effect is to make what is stated
untrue. This doctrine was distinctly laid down by Lord Cairns
in *Peck v. Gurney* (*o*), and has been often recognised since (*p*).
There is no doubt, however, that the commission of frauds in
the formation of companies is greatly facilitated by this limita-
tion of the circumstances necessary to sustain such actions.

Lapse of time. In an action for damages, lapse of time short of that
prescribed by the Statute of Limitations affords no defence (*q*).

Measure of The measure of damages in these cases is the difference
damages. between the price paid by the plaintiff for his shares and their
real value at the time. Their market value may, however, be
and practically always is dependent on the ignorance on the
part of the public of the frauds complained of. In order to
ascertain the real value of the shares subsequent events must
be looked at; and if these show that the shares were really
worthless, the whole of the money paid for them will be
recoverable. The circumstance that the plaintiff might have
sold his shares at a high price before the frauds were exposed
does not diminish the damages to which he is entitled (*r*).

(*n*) L. R. 6 H. L. 377.

(*o*) L. R. 6 H. L. 377; see *ante*, p. 70.

(*p*) *Arkwright v. Newbold*, 17 Ch. D. 301.

(*q*) *Peck v. Gurney*, L. R. 6 H. L. 377; overruling on this point S. C. 13 Eq. 79.

(*r*) *Peck v. Derry*, 37 Ch. D. 541; *Twyer v. Grant*, 2 C. P. D. 469;

* *Peck v. Derry* is under appeal in the House of Lords

SECTION 41.—STATUTORY ENACTMENTS.

Bk. I. Chap. 3.
Sect. 2.

30 & 31 Vict. c. 131, § 38.

In order the more effectually to protect shareholders (s) ^{Fraudulent prospectus.} from frauds on the part of the promoters of companies, every prospectus of a company, and every notice inviting persons to 30 & 31 Vict. c. 131, § 38. subscribe for shares in any joint stock company, is required to specify the dates and names of the parties to any contract entered into by the company or the directors, promoters, or trustees thereof before the issue of such prospectus or notice (t). The statute which renders this necessary is very badly worded and has given rise to much discussion and no little difference of opinion. In the first place it does not apply to all companies, but only to those formed under the Companies act, 1862. In the next place the information required to be given is practically worthless: the act only requires dates and names to be given: the nature and effect of the contracts to be referred to need not be stated; but it is obvious that this is what is most material to be known.

Compliance with the statute does not prevent a false prospectus from being treated as fraudulent if in truth it is so. The object of the statute is to enlarge, not to restrict, the doctrines relating to fraudulent prospectuses; and this object is sought to be attained by declaring that prospectuses shall be deemed fraudulent unless the dates and names of the parties to certain contracts are disclosed. The contracts referred to are not clearly defined, but it is obvious that only those can be meant which can be regarded as material to persons who may become shareholders. The result of the decisions on this extremely ill-expressed enactment seems to be as follows:—

1. The enactment is not confined to contracts to be performed by the company, but extends to all contracts (u) whether

Davidson v. Tulloch, 3 McQu. 790.
See, also, *Arkwright v. Newbold*, 17 Ch. D. 301, *per* Fry, J.

(s) Bondholders are not within the enactment, *Cornell v. Hay*, L. R. 8 C. P. 328.

(t) 30 & 31 Vict. c. 131, § 38. It

is printed in the Appendix.

(u) An understanding between the persons mentioned not amounting to a contract is not within the section, *Arkwright v. Newbold*, 17 Ch. D. 301.

Bk. I. Chap. 3.
Sect. 2.

in writing or not (*r*), entered into by the persons mentioned, and directly or indirectly affecting the formation, management, capital, or other property of the company, or the position of the directors or officers of the company with respect to the company, its promoters or vendors, and which might reasonably influence a person in determining whether to apply for shares or not (*r*).

2. The enactment does not extend to contracts by which the promoters themselves have become owners of the property which they afterwards sell to the company if such contracts in no way affect the company itself (*y*).

3. The words promoter, director, or trustee include persons engaged in forming the company, or engaged in inducing the public to take shares in it when formed (*z*): and perhaps even persons who are not so engaged when the contract with them is entered into, but who afterwards become promoters, directors or trustees (*a*).

4. A person who takes shares on the faith of a prospectus, not complying with the enactment in question, is not entitled, simply on that ground, to rescind his contract to take the shares (*b*); but is only entitled to maintain an action for damages against the promoters, directors, or trustees who knowingly issued the prospectus (*c*).

It has become customary to insert in prospectuses a clause to the effect that applicants for shares waive all claims against directors for infringements of § 38, but the validity of such clauses is very doubtful.

(*r*) *Arkwright v. Newbold*, 17 Ch. D. 301; *Capel & Co. v. Sin's Composition Co.*, W. N. 1888, p. 97.

(*s*) *Sullivan v. Mitcalfe*, 5 C. P. D. 455; *Twycross v. Grant*, 2 C. P. D. 469; *Jury v. Stoker*, 9 L. R., Ir. 385; *Cornell v. Hay*, L. R. 8 C. P. 328.

(*y*) *Sullivan v. Mitcalfe*, 5 C. P. D. 455 at p. 467; *Craig v. Phillips*, 3 Ch. D. 722; *Gover's case*, 1 Ch. D. 182, and 20 Eq. 114. See the ob-

servations of L. J. James on this last case, 5 Ch. D. 118.

(*z*) *Twycross v. Grant*, 2 C. P. D. 469. See *infra*, bk. iii., c. 2, § 1.

(*a*) *Sullivan v. Mitcalfe*, 5 C. P. D. 455; *Gover's case*, 1 Ch. D. 182, and 20 Eq. 114. *Sed quere*: see 5 Ch. D. 118.

(*b*) *Ib.*

(*c*) *Ibid.*, and *Twycross v. Grant*, *ubi sup.*

CHAPTER IV.

OF DIFFERENT CLASSES OF COMPANIES. *x* See additions & corrections lxxv

HAVING made the foregoing observations on companies in Bk. I. Chap. general, it is proposed to advert to the formation of different Formation of kinds of companies, and to the evidence by which a person companies. may be proved to be a shareholder in them.

It will be convenient to take them in the following order :—

CLASS I. Cost-book mining companies.

CLASS II. Companies incorporated or privileged by the Crown, viz. :—

1. Chartered companies.
2. Companies formed under the Letters patent act, 7 Wm. 4 & 1 Vict. c. 73.

CLASS III. Companies incorporated or privileged by some special act of Parliament, viz. :—

1. Companies not incorporated, but empowered to sue and be sued.
2. Incorporated companies.

CLASS IV. Companies incorporated or privileged by a general act of Parliament, viz. :—

1. Banking companies formed under 7 Geo. 4, c. 46.
2. Registered companies.

CLASS I.—COST-BOOK MINING COMPANIES.

Cost-book mining companies are sometimes represented as Cost-book differing essentially from ordinary partnerships ; but there is companies. no authority for this statement ; and it may be said with more truth that cost-book mining companies are mere partnerships governed by the general law of partnership, except so far as that law is excluded by local custom or by special agreement

Bk. I. Chap. 4.
Class 1.

Cost-book.

referring to and embodying such custom (*a*). A cost-book mining company is formed by agreement. A number of adventurers who have obtained permission to work a lode agree to share the enterprise in certain proportions. It is seldom that they agree on a fixed capital (*b*). They appoint an agent, commonly called a purser, for the purpose of managing the affairs of the mine, subject to the control of the shareholders. They write in a book called the "cost-book" the agreement into which they have entered; and in this same book are inserted from time to time the receipts and expenditure of the mine, the names of the shareholders, their respective accounts with the mine, and transfers of shares (*c*). The shares are transferable and may be relinquished; they may also be sold by the company for non-payment of calls; and these circumstances, rather than any other, distinguish cost-book mining companies from common partnerships (*d*).

Liability to
creditors.

Some persons imagine that the liability of shareholders in cost-book mining companies is limited; that both their past as well as their future liability is got rid of as soon as they have transferred their shares, and that they are in no case liable for the debts of the mine if they have paid the calls which may have been made upon their shares. All this is mere delusion; and although it is true that a shareholder can as between himself and co-shareholders get rid of his liability by transferring or relinquishing his shares (*c*), there is no authority whatever for saying that the liabilities of the shareholders to creditors were until lately governed by principles in any respect different from those which apply to ordinary part-

(*a*) See *Frank Mills Mining Co.*, 23 Ch. D. 52; *Prosper United Mining Co.*, 7 Ch. 286; and as to Cost-book mining companies, 32 & 33 Vict. c. 19, amended by 50 & 51 Vict. c. 43; the Readwin Prize Essay on the Cost-book, by Tapping; Collier on Mines, ed. 2, pp. 111, *et seq.* Batten's Stannaries Act, 1869.

(*b*) Mr. Batten in his useful little treatise, p. 31, says that a true Cost-book company never has a fixed capital.

(*c*) See 32 & 33 Vict. c. 19, § 9, and 50 & 51 Vict. c. 43, §§ 23 & 24. The rules and regulations must now be filed with the registrar of the Stannaries Court, 32 & 33 Vict. c. 19, § 9.

(*d*) 32 & 33 Vict. c. 19, §§ 16-23.

(*e*) *Fenn's case*, 4 De G. M. & G. 285; *Mayhew's case*, 5 ib. 837; *Bodmin United Mines*, 23 Beav. 370; *Birch's case*, 2 De G. & J. 10; *Loft-house's case*, ib. 69.

nerships (*f*). By the Stannaries act, 1869 (32 & 33 Vict. c. 19, s. 25), however, a past shareholder is not liable to contribute to the assets of the company if he has ceased to be a shareholder two years or upwards before the date of the winding-up order (*g*).

Whoever alleges that a cost-book mining company is in any respect governed by a local usage which excludes the application of the general law of partnership, must prove the existence of such usage (*h*); for the courts do not take judicial notice of what the cost-book principle is; and they invariably apply the general law of partnership to companies formed on that principle, unless it is proved that the application of such law is excluded as alleged (*i*).

The question whether a person is or is not a shareholder in a cost-book mining company must be determined in precisely the same way as the question whether a person is or is not a member of an ordinary partnership (*k*). The usual mode of proving that a person is a shareholder in a cost-book mine is by showing that he has signed the cost-book or an authority for the insertion of his name in it: and it has been said to be part of the cost-book principle that a register of shareholders should be kept, and that every member should sign either the book itself or an authority for the insertion of his name in it (*l*). At the same time, a person clearly may, as between himself

Bk. I. Chap. 4.
Class 1.

Mining customs
not judicially
noticed.

Proof of member-
ship in a cost-
book company.

Signing the
cost-book.

(*f*) Shareholders in a cost-book mine were held liable to creditors for goods supplied in *Tredwen v. Bourne*, 6 M. & W. 461; *Newton v. Daly*, 1 Fos. & Fin. 26; *Lanyon v. Smith*, 3 B. & Sm. 938; *Harvey v. Clough*, 2 N. R. 204. See, too, *Ellis v. Shmeck*, 5 Bing. 521; *Peel v. Thomas*, 15 C. B. 714; *Toll v. Lee*, 4 Ex. 230.

(*g*) *In re Wheal Unity Wood Mining Co., Chymoweth's case*, 15 Ch. D. 13, at p. 21.

(*h*) See *ante*, note (*a*), and the cases cited below.

(*i*) See *Hawkins' case*, 2 K. & J. 253; *Bodmin United Mines*, 23

Beav. 370; *Fenn's case*, 4 De G. M. & G. 285; *Hart v. Clarke*, 6 ib. 232, and 6 H. L. C. 633; *Sibley v. Minton*, 27 L. J. Ch. 53, V.-C. Kindersley. The purser can now sue a shareholder for calls. See 32 & 33 Vict. c. 19, § 13. See before this act, *Hybart v. Parker*, 4 C. B. N. S. 209.

(*k*) See *Peel v. Thomas*, 15 C. B. 714; *Tredwen v. Bourne*, 6 M. & W. 461; *Thomas v. Clark*, 18 C. B. 662.

(*l*) See *Tippett v. Johns*, Tapping's Essay, p. 187; *Toll v. Lee*, 4 Ex. 230. Such a register is now required, see 32 & 33 Vict. c. 19, § 9.

Bk. I. Chap. 4.
Class 1.

and third parties, incur the liabilities of a shareholder without signing the cost-book or any such authority as that referred to (*m*); and it is apprehended that a person may be a shareholder as between himself and the other members although he may not have signed the cost-book or any authority for the insertion of his name in it. Indeed there is reason for going further, and for denying that any such signature is essential; for an attempt to prove it to be so is reported to have failed, the evidence adduced amounting only to this, that it was *usual* for every member to testify his acceptance of shares by writing under his hand (*n*).

Vice v. Anson.

In *Vice v. Anson* (*o*), the Court seems to have thought that a person could not be a shareholder in a cost-book mining company unless he acquired some interest in the mine, treating it as land, and that some deed conveying him an estate in the land was requisite. But this opinion cannot be supported: and it seems clear that shares in a cost-book mining company are transferable by entries in the cost-book; and that a person who is entered therein as a shareholder in respect of shares accepted by him is a shareholder, although no deed or writing at all has been executed (*p*). Shares in cost-book mining companies are ordinarily transferred by a document in which the transferor acknowledges that he has transferred, and the transferee acknowledges that he has accepted the shares mentioned. This document is signed by both parties, is addressed to the purser, is sent to him by the transferee, and is the authority to the purser to register the transferee as a shareholder (*q*).

Transfer of
shares.

(*m*) See *Martyn v. Gray*, 14 C. B. N. S. 824, as to holding out; and see *Cox's case*, 4 De G. J. & Sm. 53, where a person entitled to shares tried to screen himself from liability by holding them in the names of other people.

(*n*) *Northey v. Johnson*, 19 L. T. 104, Q. B. 1852. That this is usual there can be no doubt; it is expressly required by the rules of most large mines.

(*o*) 7 B. & C. 409.

(*p*) See *Tippett v. Johns*, Tapping's Essay, p. 187; *Reynolds v. Bassett*, Collier on Mines, 124, note; *Viegan v. Moratt*, 8 L. T. Ex. 480; *Northey v. Johnson*, 19 L. T. 104; *Toll v. Lee*, 4 Ex. 230. Compare *Curling v. Flight*, 5 Ha. 242; 6 ib. 41; and 2 Ph. 643.

(*q*) *Toll v. Lee*, 4 Ex. 230; *Walker v. Bartlett*, 18 C. B. 845. See, as to parol transfers, *Northey v. Johnson*, 19 L. T. 104, Q. B. See, also, 32 & 33 Vict. c. 19, §§ 14, 15, and 35.

By 33 & 34 Vict. c. 97, s. 3; and schedule, title *Transfer*, a Bk. 1. Chap. 4.
6d. stamp duty is imposed upon "any request or authority to Class 2.
the purser or other officer of any mining company conducted Stamp.
on the cost-book system, to enter or register any transfer of
any share or part of a share in any mine; or any notice to
such purser or officer of such transfer" (*r*).

Companies engaged in working mines within and subject to Registration.
the jurisdiction of the Stannaries, need not be registered under
the Companies act of 1862 (*s*); but if their capital is fixed,
and if there are seven or more shareholders, they may be so
registered, with or without limited liability. If the capital is
not fixed, the company cannot apparently be registered as an
existing company with limited liability (*t*). The effect of regis-
tration under the Companies act, 1862, will be considered
hereafter (*u*). If not registered under that act, cost-book
mining companies working mines within the Stannaries are
subject to the provisions of 32 & 33 Vict. c. 19, and if working
metalliferous mines or tin streaming works, to the provisions
of 50 & 51 Vict. c. 43, which will be noticed in their proper
places.

CLASS II.—COMPANIES CHARTERED OR PRIVILEGED BY THE CROWN.

1. *Chartered companies.*

The Crown has at common law the power of incorporating Chartered companies.
by charter any number of persons who assent to be incorpo-
rated, and a chartered company is therefore formed as soon as
a charter is granted to, and accepted by, two or more indivi-
duals, enabling them, alone or with others, to trade as a body
corporate (*x*). The Crown, however, has no power to incorpo-

(*r*) The cost-book itself requires see *Lanyon v. Smith*, 3 B. & Sm.
no agreement stamp. See *Viegan* 938; and *Harvey v. Clough*, 2 N. R.
v. Mowatt, 8 L. T. Ex. 480. 204.

(*s*) 25 & 26 Vict. c. 89, § 4.

(*t*) See 25 & 26 Vict. c. 89, § 179,
cl. 3, and § 181.

(*u*) As to the effect of registration
with respect to retired shareholders,

(*x*) See, as to charters, Grant on
Corporations, pp. 9, *et seq.* As to
charters for a limited time, see 7
Will. 4 & 1 Vict. c. 73, § 29, and
47 & 48 Vict. c. 56.

Bk. I. Chap. 4.
Class 2.

rate persons against their will (*y*) ; nor can the Crown force a new charter upon a corporation after it is once established. A charter which has been confirmed by act of Parliament cannot be varied by the Crown (*z*) ; but a charter which has not been so confirmed may, without being formally surrendered (*a*), be varied by a subsequent and inconsistent charter (*b*), provided the new charter is accepted by the body corporate (*c*), *i.e.*, by a majority of the members composing it (*d*).

A chartered company is a corporation existing for the purposes for which it is created and no others ; and those persons only are members of it who are declared to be so by the charter, or who have been admitted in compliance with the charter and the bye-laws made in pursuance of it (*e*). The charter of a company is a law set to it and to the individuals composing it, and they have no power by any agreement amongst themselves to annul or legally do anything at variance with their charter (*f*). This subject will be adverted to hereafter.

Chartered company not a partnership.

A chartered company, being a corporation, is not a partnership, although the company may have gain for its object, and the members of the company may share profits.

Validity of charters.

A charter is not necessarily of any legal value ; for it may have been obtained from the Crown by misrepresentation, or it may have been granted by the Crown in excess of its prerogative, and in either case the charter will be void. A charter which has been obtained from the Crown by false and fraudulent statements may be formally annulled by *scire*

(*y*) Grant, pp. 13 and 18 ; *Dr. Askew's case*, 4 Burr. 2200, *per* Yates, J. ; and see *Rutter v. Chapman*, 8 M. & W. 1.

(*z*) *R. v. Miller*, 6 T. R. 268 ; but see *Royal Exch. Ass. Co. v. Vaughan*, 1 Burr. 155.

(*a*) *R. v. Lurwood*, 1 Salk. 168.

(*b*) *Ib.* ; and *R. v. Haythorne*, 5 B. & C. 410 ; *Royal Exch. Ass. Co. v. Vaughan*, 1 Burr. 155.

(*c*) Bull. N. P. 212, *c.* ; *R. v. Pasmore*, 3 T. R. 240.

(*d*) *R. v. Hughes*, 7 B. & C. 708. In *Ward v. The Society of Attorneys*,

1 Coll. 370, an injunction was granted to restrain the majority from accepting a new charter. See *Ex parte The Society of Attorneys*, 8 Ch. 163, for the grounds on which the grant of a supplemental charter can be successfully opposed.

(*e*) *Dr. Askew's case*, 4 Burr. 2200, *per* Yates, J.

(*f*) See *The Society of Practical Knowledge v. Abbott*, 2 Beav. 559. As to giving effect to the practice of the members and allowing that to control the charter, see *Somes v. Currie*, 1 K. & J. 605.

facias (g); but although a charter which has not been thus annulled is to be treated as valid until the contrary is proved, there is apparently no rule to the effect that its validity is not to be disputed except in a formal proceeding instituted for the purpose of procuring its cancellation (h). At the same time those persons who have accepted or acted on a charter and treated it as valid cannot, unless in a proceeding to annul it, object that it was obtained from the Crown irregularly, or by the misrepresentation of themselves or their fellow-members, or of their predecessors (i). Indeed, it is said, that neither those who have accepted a charter, nor their successors, can dispute its validity; but this is very doubtful (k). Bk. I. Chap. 1.
Class 2.

Charters are obtained by petitioning the Queen in Council. The petition and draft of the proposed charter are left at the Council Office, and are then referred to the Board of Trade. The Colonial Office, Foreign Office, and India Office are also referred to, if the proposed company falls within their departments. If it is determined that a charter shall be granted, it issues under the great seal (l). But charters are now very seldom granted to trading companies. Charters how
obtained.

A charter may be surrendered to the Crown; but a surrender is of no effect unless accepted and enrolled in the enrolment department of the central office of the Supreme Court of Judicature (m). After the surrender has been accepted and enrolled the corporation ceases to exist (n).

2. Companies formed under the Letters patent act, 7 Will. 4 & 1 Vict. c. 73.

Letters patent and charters are both *literæ patentæ* sealed with the great seal, and are, in fact, the same thing. But the Crown is empowered by the act 7 Will. 4 & 1 Vict. c. 73 (o), Companies
governed by the
Letters patent
act.

(g) *R. v. The Eastern Archipelago Co.*, 1 E. & B. 310; 2 ib. 856; and 4 De G. M. & G. 199. See, as to *sci. fa.* to repeal patents, 2 Wms. Samd. (ed. 1871), 251, *et seq.* Companies, p. 401, ed. 10; see, as to advertisements, 7 Will. 4 & 1 Vict. c. 73, § 32.

(h) See *R. v. Osbourne*, 4 East, 326, and Jud. (Officers) act, 1879, 42 & 43 Vict. c. 78, §§ 4, 6 and 12 and Ord. LXI.

(i) See *Macbride v. Lindsay*, 9 Ha. 574. (n) Grant, 46.

(k) See Grant, 20—22. (o) Repealing 6 Geo. 4, c. 91, § 2, and 4 & 5 Will. 4, c. 94.

(l) See Wordsworth on Joint Stock

Bk. I. Chap. 4. to grant by letters patent to any company or body of persons,
 Class 2. *although not incorporated* by such letters patent, any privileges which the Crown might at common law grant to any company or body of persons by any charter of incorporation. Letters patent under this act are obtained on application to the Queen in Council, and notice of the application must be inserted three times in the "London Gazette," and in one or more of the newspapers, circulating in the county in which it is proposed that the principal place of business of the company shall be established, at intervals of not less than one week (*p*).

Company's deed. Every company formed under this act, is required to be entered into by agreement under seal, in which are to be specified the number of shares in the company, the name of the company, the names of its members, the date of its commencement, the nature of its business, the place or principal place where such business is to be transacted, and also the names of two or more officers to sue or be sued on behalf of the company (*q*). Within three months after the grant of the letters patent, a return is to be made to the enrolment department of the central office (*r*) of all the above particulars, and of the date of the letters patent (*s*); and returns are required to be made of every change made in the company's principal place of business, and of every change amongst its shareholders (*t*), and of the officers by which it is to be sued (*u*). These returns are directed to be registered and to be open to the inspection of any person upon payment of a small fee (*x*). A certified copy of the return is made evidence both in civil and in criminal proceedings (*y*).

Such companies not corporations. Companies formed under this act are not corporations, but are essentially partnerships. Their privileges depend on the letters patent obtained by them. The possession of a common seal is taken for granted in the act itself (*z*); but there is nothing requiring the seal to be affixed to a contract, in order

(*p*) 7 Will. 4 & 1 Vict. c. 73,
 § 32.

(*q*) *Ib.* § 5

(*r*) In the case of an English company, see § 26, and 42 & 43 Vict. c. 78, §§ 4, 6 and 12, and Ord. LXI.

(*s*) *Ib.* § 6.

(*t*) *Ib.* §§ 7-10.

(*u*) *Ib.* § 13.

(*x*) *Ib.* § 17.

(*y*) *Ib.* § 18; see, too, §§ 20 and 21.

(*z*) See § 27.

to bind the company; and the act is express that the members of the company are to be liable to its debts and engagements, except so far as that liability may be limited by the letters patent (*a*). Bk. I. Chap. 4.
Class 3.

Who are to be deemed members is not stated; that question therefore must depend in each case upon the provisions of the deed of settlement, and of the letters patent by which the particular company in question may be governed; but when once a person has become a member, his liability as a member continues, until a return of the means whereby he has ceased to be one is registered (*b*). Members.

The act does not state with any precision how shares are to be transferred, but a transfer, by deed or writing, is evidently contemplated (*c*).

This act is seldom had recourse to; the modern registration acts have practically superseded it.

CLASS III.—COMPANIES INCORPORATED OR PRIVILEGED BY SOME SPECIAL ACT OF PARLIAMENT.

1. *Companies not incorporated, but empowered to sue and be sued.*

These companies are formed by agreement, and by the acts which privilege them (*d*). Whether a person is a member or not, depends, in the absence of any special provisions in the act of the company which may be in question, upon the principles applicable to ordinary partnerships. Companies empowered to sue and be sued.

Banking companies governed by the general act, 7 Geo. 4, c. 46, may be regarded as the type of companies empowered to sue and be sued, and the authorities which will be referred to hereafter, in connection with that act (*infra*, Class 4), may be

(*a*) See §§ 2-4 and 24.

(*b*) See § 21.

(*c*) See §§ 8 and 9.

(*d*) As to companies empowered by a colonial legislature to sue and

be sued by a public officer, see *Bank of Australasia v. Harding*, 9 C. B. 661; *Bank of Australasia v. Nias*, 16 Q. B. 717; *Kelsall v. Marshall*, 1 C. B. N. S. 241.

Bk. I. Chap. 4. usefully consulted upon questions arising upon special acts of
 Class 3. ————— a similar description.

2. *Incorporated companies.*

Companies in-
 corporated by
 special act of
 parliament.

A company incorporated by a special act of Parliament exists as an incorporated company by virtue of that act, and not otherwise. It is formed by the act, and by that alone, and those only are members of the company who are made so by the act.

Promoters not
 partners.

Persons associated together for the purpose of obtaining an act of Parliament to incorporate them into a company, are not partners, although the company, when formed, will have gain for its object, and although the shareholders will divide amongst themselves whatever profits may accrue to the company (*e*).

Parliamentary
 contract and
 subscribers'
 agreement.

It does not fall within the scope of the present work to detail the method of obtaining acts of Parliament, or to advert to the rules which have to be observed in compliance with the standing orders of the two houses (*f*). It may, however, be observed, that before an act can be obtained for the incorporation of a company, a deposit must be made of a certain proportion in some cases of the estimated expense of the undertaking, and in others of the capital it is proposed to raise. Formerly a contract had to be entered into by the subscribers, whereby each covenanted to pay a sum set opposite his name. This contract was commonly called the "parliamentary contract," by way of distinction from the "subscribers' agreement," *i.e.*, the agreement entered into by the allottees of shares for the formation of the company.

The special act.

The act which each company may succeed in obtaining for itself is called its "special act," and governs the company as to all matters specially provided for in it. But as to other

(*e*) See *infra*, book ii., c. 1, and Partn. pp. 23, *et seq.*

(*f*) The standing orders are published annually, and reliance is not to be placed on any except the last for the time being. See on this subject generally, Hodges on Rail-

ways, c. i. ed. 6; and as to the application of the deposit in payment of debts, *Bradford Tramways Co.*, 4 Ch. D. 18; *Lowestoft, Y., & S. Tramways Co.*, 6 Ch. D. 484; and *Birmingham and Lichfield Junction Rail. Co.*, 28 Ch. D. 652.

matters the company (if incorporated since the 8th of May, 1845) is governed by the Companies clauses consolidation act (*g*), which is a public general act passed in May, 1845, and is applicable to every English (*h*) company incorporated by act of Parliament since that time, save so far as its clauses and provisions may be expressly varied or exempted by the company's special act. In the present place it is proposed to notice such of the clauses of the act in question as relate to the constitution of the companies to which it applies, and to the evidence of membership therein.

A company is supposed to be incorporated by a special act, to have the amount of its capital fixed thereby, and to have the capital thus fixed, divided into shares of a certain number and amount, and numbered progressively from one upwards, so that each share may be distinguished by its appropriate number (§ 6). The company is then (by § 9) required to keep a book called the "register of shareholders," in which book are to be entered, (1), the names of the persons entitled to shares in the company; (2), the number of shares to which such persons are respectively entitled; (3), the distinguishing numbers of such shares; and (4), the amount of the subscriptions paid on them. This book is to be authenticated by the seal of the company (which is to be affixed at ordinary meetings), and is *primâ facie* evidence against a person registered therein as a shareholder that he is so in point of fact (see § 28); and the creditors of the company have a right to inspect it (§ 36). In addition to the "register of shareholders," the company is required to keep a "shareholders' address book" (§ 10), which is to be open to the inspection of every shareholder at all convenient times (*i*). On demand of the holder of any share, and on payment of a small fee, the company is required (§ 11) to deliver to him under its seal a certificate of proprietorship; and this certificate is (§ 12) required to be admitted in all

Bk. I. Chap. 4.
Class 3.

The Companies
clauses act.

Register of
shareholders.

Share certificate.

(*g*) 8 & 9 Vict. c. 16, amended by 26 & 27 Vict. c. 118; 32 & 33 Vict. c. 48; 38 & 39 Vict. c. 66; 47 & 48 Vict. c. 43, and 51 & 52 Vict. c. 48. The Lands clauses and the Railways clauses consolidation acts have no connection with the topics

discussed in this treatise.

(*h*) See *Wilson v. Caledonian Rail. Co.*, 5 Ex. 822.

(*i*) See as to inspection and taking copies, *infra*, book iii. c.1, § 3, & c. 3, § 4.*

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Class 3.

courts as *prima facie* evidence of the title of the person named in it, and of his executors, administrators, or assigns to the share therein specified (*j*). Provision is then made for the transfer of shares, for the registry of transfers, for the payment of calls, for the forfeiture of shares for the non-payment of calls, and for executing against shareholders judgments which have been obtained against the company; all of which matters will be noticed hereafter.

Who are shareholders.

The statute contains two definitions of the term shareholder:—

1. It is declared in § 3, that the word shareholder shall mean shareholder, proprietor, or member of the company; and,

2. It is declared in § 8, that every person who shall have subscribed the prescribed sum (*k*) or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, *and* whose name shall have been entered on the register of shareholders, shall be deemed a shareholder of the company.

Upon this section it has been decided that a person may be a shareholder although he has not paid for his shares, and although payment is a condition precedent to his exercising his full rights (*l*).

Effect of register. As regards the entry on the register, it is to be observed:—

1. The act nowhere says that a person not on the register is not a shareholder. A person made a member by the special act is clearly a shareholder although not registered (*m*); and it is conceived that other persons may be shareholders although not registered as such (*n*).

(*j*) The certificate only shows the legal title, *Shropshire Union Rail. Co. v. R.*, L. R. 7 H. L. 496.

(*k*) *i.e.*, the sum prescribed in the company's special act, see § 2.

(*l*) *East Gloucestershire Rail. Co. v. Bartholomew*, L. R. 3 Ex. 15, and see, also, *McEuen v. West Lond. Wharves Co.*, 6 Ch. 655.

(*m*) *Portal v. Emmens*, 1 C. P. D.

201 & 664, where no shares were ever issued, and no register was ever kept. Compare *Kipling v. Todd*, 3 C. P. D. 350, and see *O'Brien's case*, Ir. R. 11 Eq. 422.

(*n*) See the last note, and *Rastrick v. Derbyshire, &c., Rail. Co.*, 9 Ex. 149, and *Wolverhampton Waterw. Co. v. Hawkesford*, 6 C. B. N. S. 336, 7 ib. 795, and 11 ib. 456.

2. The register is *prima facie* evidence that a person whose name is on it is a shareholder. Bk. I. Chap. 4.
Class 3.

It follows from this, that the company may put anybody's name on the register, and throw upon him the burden of showing that he is not a shareholder (*o*). But the register is no evidence that a person whose name is not on it is a shareholder; and therefore where shares were allotted to "Brownrigg and Taylor," who were trustees for another person, and were described on the register as "Brownrigg and others," this entry was held to be no evidence against Taylor (*p*).

The leading case on the requisites of a register of shareholders in companies governed by the Companies clauses consolidation act, is *Wolverhampton New Waterworks Company v. Hawkesford* (*q*). It was there held that a sheet of paper on which were written the names of some shareholders, and the total number of shares held by them, and which paper was sealed with the seal of the company, was not a register at all. In this case the shares were not identified by numbers, and in this respect the register was substantially informal; and the Court relied much on this circumstance. But it would, perhaps, be going too far to hold that if a company issues unnumbered shares, and keeps a proper register of such shares, this register is altogether useless and inadmissible in evidence (*r*). And if the shares are numbered the register is admissible, although it does not contain the numbers of the shares (*s*).

A rough share book has been held inadmissible in evidence as a register under the act now in question (*t*).

If the register is in several volumes they are all admissible in evidence, although the company's seal is to be found in the

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| <p>(<i>o</i>) <i>Waterford, Wexford, &c., Rail. Co. v. Pidcock</i>, 8 Ex. 279; <i>Bain v. Hitchcaven Rail. Co.</i>, 3 H. L. C. 1; <i>West Cornwall Rail. Co. v. Morvatt</i>, 15 Q. B. 528.</p> <p>(<i>p</i>) <i>Birkenhead, Lancashire, &c., Rail. Co. v. Brownrigg</i>, 4 Ex. 426.</p> <p>(<i>q</i>) 6 C. B. N. S. 336, 7 ib. 795, and 11 ib. 456. Compare <i>Portal v.</i></p> | <p><i>Emmens</i>, 1 C. P. D. 201 & 664.</p> <p>(<i>r</i>) See the last case, and <i>Irish Peat Co. v. Phillips</i>, 1 B. & Sm. 638.</p> <p>(<i>s</i>) <i>East Gloucestershire Rail. Co. v. Bartholomer</i>, L. R. 3 Ex. 15.</p> <p>(<i>t</i>) <i>Birkenhead, &c., Rail. Co. v. Brownrigg</i>, 4 Ex. 426; <i>Cheltenham, &c., Rail. Co. v. Price</i>, 9 C. & P. 55.</p> |
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Bk. I. Chap. 4.
Class 3.

last of them only (*u*) ; and the register sealed with the seal of the company is admissible in evidence without proof of the time or place, or authority at or by which the seal was affixed (*x*). Moreover, the register is, if sealed and kept substantially as required, *primâ facie* evidence against any one whose name is on it, although he may prove that it has been kept irregularly, and is in many respects inaccurate and imperfect (*y*) ; but the sealed register is no evidence that a person whose name is on it was a shareholder at any given time anterior to the day on which the seal was affixed (*z*).

Register not
conclusive.

3. The register is not conclusive evidence that a person whose name is on it is a shareholder. It is competent for him to rebut the *primâ facie* case made against him by the register, by showing that the company inserted his name in it without any authority. An express authority from him is not, however, requisite ; for if he has entered into a contract with the promoters of the company to take shares in it, and if that contract is binding upon both parties, he may without more be properly registered as a shareholder, and the contract and the register will together be conclusive against him. But if he can show that no such contract was ever entered into, or that such a contract, if ever entered into, had terminated before his name was inserted in the register, then the *primâ facie* case raised against him by it will be at an end. The following cases illustrate these propositions :

Right of com-
pany to register.

1. As to the right of the company to register those who are entitled to shares. That a person who is bound to accept shares may be properly registered as a shareholder was decided in *The Midland Great Western Railway Company v. Gordon* (*a*).

(*u*) *Inglis v. The Great Northern Rail. Co.*, 1 Macqueen, 112.

(*x*) *North-Western Rail. Co. v. McMichael*, 5 Ex. 855.

(*y*) See *East Gloucestershire Rail. Co. v. Bartholomew*, L. R. 3 Ex. 15 ; *Bain v. Whitcharen Co.*, 3 H. L. C. 1 ; *Southampton Dock Co. v. Richards*, 1 Man. & Gr. 448 ; *London and Grand Junc. Rail. Co. v. Freeman*, 2 ib. 606 ; *London and*

Brighton Rail. Co. v. Fairclough, ib. 674 ; *Birmingham, Bristol, and Thames Junc. Rail. Co. v. Locke*, 1 Q. B. 256 ; *London and Grand Junc. Rail. Co. v. Graham*, ib. 271.

(*z*) *Cheltenham and Great Western Union Rail. Co. v. Prier*, 9 C. & P. 55.

(*a*) 16 M. & W. 804 ; see, too, *Burke v. Lechmere*, L. R. 6 Q. B. 297 ; *Nixon v. Brownlow*, 2 H. & N.

In that case a railway company was projected; the defendant agreed to take shares in it; he executed the subscribers' agreement; and he received scrip certificates. He sold the scrip before the company was incorporated. After it was incorporated the company placed his name on the register of its shareholders, and he was held to be a shareholder, although he had never authorised the insertion of his name in the register, except so far as his contract conferred an implied authority for such insertion (*b*). But a person who has never agreed to take shares, and who is only the holder of scrip transferable to bearer, ought not to be registered as a shareholder against his will (*c*).

2. As to the inconclusiveness of the register. A person whose name is on the register is not a shareholder unless he is also entitled to a share in the company; and in order to entitle a person to a share, he must have acquired such title by the company's special act (*d*), or he must have been an original subscriber for the share, or have obtained a title to it from or through an original member or subscriber. An original subscriber does not become a shareholder by being placed on the register unless he has acquired a right to be registered; and therefore if he has entered into a contract which gives him no right against the company to be considered a member thereof until he has performed certain conditions, *e.g.*, executed a deed, he does not become a shareholder by being registered as one before he has complied with those conditions; for as the registry would not be equivalent to a compliance with the conditions for one purpose, *e.g.*, as against the company if a dividend were claimed, so it is not equivalent to a compliance with them for another purpose, *e.g.*, against him who is registered, in an action for calls (*e*).

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Class 3.

Improper
registry.

455, and 3 ib. 686; *Cork and Youghal Rail. Co. v. Paterson*, 18 C. B. 414.

(*b*) In *Kidwelly Canal Co. v. Raby*, 2 Price, 93, an act of Parliament, incorporating the subscribers to a company, was held to have made the defendant a shareholder, he having been a subscriber, although,

before the act had passed, he retired from his contract so far as he lawfully could.

(*c*) *Eustace v. Dublin Trunk, &c., Rail. Co.*, 6 Eq. 182.

(*d*) As in *Portal v. Emmens*, 1 C. P. D. 201 & 664.

(*e*) *Waterford, Wexford, &c., Rail. Co. v. Pidcock*, 8 Ex. 279; *Carmar-*

Bk. I. Chap. 4. A person who is not yet entitled to share dividends, is not a
 Class 3. — shareholder in the company, and does not become one by
 — simply being put on the register, unless indeed the insertion
 of his name there is the only one thing remaining to be done
 to perfect his title (*f*).

Company not It follows from the above that the company is not estopped
 estopped by its by its own register (*g*). But when a person is put on the
 register. register, the company has no right to strike him off unless it
 can show proper grounds for so doing (*h*).

Correcting The Companies clauses consolidation act contains no pro-
 register. vision for the rectification of the register; but it may never-
 theless be rectified both by mandamus and injunction as already
 pointed out (*i*).

Estoppel by The doctrine by which individuals and companies are
 conduct. estopped by their own conduct from taking advantage of the
 non-performance of conditions precedent, and the non-
 observance of prescribed formalities, is applicable to com-
 panies of the class now in question, and to shareholders in
 them, as is shown by the cases of *Sheffield and Manchester*
Railway Company v. Woodcock (*k*), and *Cheltenham and Great*
Western Railway Company v. Daniel (*l*), which have been
 already noticed (*m*).

Transfers of Shares in companies governed by the Companies clauses
 shares. consolidation act are transferable by deed delivered (duly
 executed), to the secretary of the company (*n*); a form of
 transfer is given by the act (*o*); and in order that a company
 may be compelled to register an instrument of transfer, it

then Rail. Co. v. Wright, 1 Fos. & Fin. 282. See, also, *Irish Peat Co. v. Phillips*, 1 B. & Sm. 598, noticed *ante*, p. 50; and *Edwards v. Kilkenney Rail. Co.*, 14 C. B. N. S. 526.

(*f*) See *Shropshire Union Co. v. Anderson*, 3 Ex. 401.

(*g*) See the last case, and *Waterford, Wexford, &c., Rail. Co. v. Pilcock*, 8 Ex. 279. See, also, *ante*, p. 60.

(*h*) *Ward v. S.-Eastern Rail. Co.*, 2 E. & E. 812. Compare *Hare v.*

Lond. and N.-W. Rail. Co., Johns. 722.

(*i*) *Ante*, p. 61.

(*k*) 7 M. & W. 574.

(*l*) 2 Q. B. 281.

(*m*) *Ante*, p. 49.

(*n*) 8 & 9 Viet. c. 16, §§ 14 & 15; *Nanney v. Morgan*, 35 Ch. D. 598 and 37 ib. 346; *West v. West*, 9 L. R., Ir. 121.

(*o*) 8 & 9 Viet. c. 16, § 14, and Sched. B.

must be in a simple form, not differing substantially from the form prescribed (*p*). Bk. I. Chap. 4.
Class 4.

CLASS IV.—COMPANIES INCORPORATED OR PRIVILEGED BY A
GENERAL ACT OF PARLIAMENT.

1. *Banking companies formed under 7 Geo. 4, c. 46.*

Banking companies governed by 7 Geo. 4, c. 46, and formed before May, 1844, still exist, but no company can now be formed under that act (*q*). These companies are not mere partnerships, for they possess many privileges which ordinary partnerships do not (*r*). A company of this kind was formed by agreement, and the privileges alluded to were acquired by sending returns to the stamp office, of (*inter alia*) the names and residences of the members; and the names, residences, and titles of office of two or more members resident in England, who had been appointed public officers of the company, and by any one of whom the company might sue and be sued (*s*). The returns thus made are evidence that all persons named therein as members were members at the dates of the returns in which their names appear (*t*). Banking com-
panies, 7 Geo. 4,
c. 46.

The act contains no definition of the term shareholder or member; but it has been decided that no person is a member within the meaning of the act unless he has complied with all the conditions necessary to constitute a person a member according to the company's deed of settlement. Thus it has been held that the husband of a married woman who, with his consent had become a shareholder, was not himself liable to creditors as a member, he not being a member according to the company's deed (*u*). Who are share-
holders.

(*q*) *Copeland v. North-Eastern Rail. Co.*, 6 E. & B. 277; *R. v. General Cemetery Co.*, ib. 415.

(*r*) 7 & 8 Vict. c. 113, § 1.

(*s*) *Powles v. Page*, 3 C. B. 16; *Macintyre v. Connell*, 1 Sim. N. S. 225 & 252.

(*s*) 7 Geo. 4, c. 46, §§ 4 & 5; an irregularity in the returns does not deprive the company of the privileges conferred by the act; *Bonar v. Mitchell*, 5 Ex. 415.

(*t*) 7 Geo. 4, c. 46, § 6.

(*u*) *Ness v. Angus*, 3 Ex. 805;

Bk. I. Chap. 4.
Class 4.

Returns to the
stamp office.

The act requires that the returns to the stamp office shall be made out and be verified by the oath of one of the registered public officers, and shall be sent in once a year, between the 28th of February and the 25th of March (*x*). But it has been held that a certified copy of the return is admissible in evidence, although it may have been made out by a person calling himself "cashier," and there may be nothing to show that he was a public officer (*y*). It has also been held unnecessary to prove that the return was verified by the oath of a public officer, as required by the act (*z*); or that the return was made at the proper time (*a*). On the other hand, it has been held that returns proved not to have been made in compliance with the act are inadmissible; *e.g.*, when it is proved that they were not made until after the 25th of March (*b*).

Effect of return.

A person returned as a member will, until the contrary is shown, be presumed to have been a member at the time the return was made and subsequently (*c*); and if two successive returns contain the name of the same person, the presumption is strong that he was a member during the whole period between the times at which such returns were made (*d*).

There is nothing in the act which makes the returns conclusive, either one way or the other; and a person not returned as a member may be proved, not only to have become a member since the making of the last return, but to have been a member at the time of the making of that return (*e*).

The act is silent as to the mode in which shares are to be transferred.

see, *tqo*, *Dodgson v. Bell*, 5 Ex. 967; *Ness v. Armstrong*, 4 Ex. 21; *Bosanquet v. Shortridge*, 4 Ex. 699.

(*x*) 7 Geo. 4, c. 46, § 5.

(*y*) *Harvey v. Scott*, 11 Q. B. 92; *Field v. Mackenzie*, 4 C. B. 717.

(*z*) *Steward v. Dunn*, 12 M. & W. 655.

(*u*) *Bosanquet v. Woodford*, 5 Q. B. 310.

(*b*) *Prescott v. Buffery*, 1 C. B. 41;

compare this with the last case, where it was held that the act was directory only in this respect.

(*c*) *Steward v. Dunn*, 12 M. & W. 655; *Ex parte Prescott*, Mon. & Ch. 611; *Harvey v. Scott*, 11 Q. B. 106.

(*d*) *Bosanquet v. Shortridge*, 4 Ex. 699.

(*e*) See *Prescott v. Buffery*, 1 C. B. 41; *Bank of England v. Johnson*, 3 Ex. 598.

2. *Registered companies.*Bk. I. Chap. 1
Class 1.

By far the greatest number of joint-stock companies belong to this class. They are all now governed by the Companies acts, 1862, 1867, 1877, 1879, 1880, 1883 (*ce*), and 1886. These acts, like those which they supersede, require for their practical working, a public officer in each division of the United Kingdom. This officer (called the registrar of joint-stock companies) is appointed by, and, to a certain extent, is subject to the Board of Trade. His duty is to register the various documents required by the acts to be registered, and to allow such documents to be inspected by any one desirous of seeing them (25 & 26 Vict. c. 89, § 174).

These duties will, if necessary, be enforced by mandamus (*f*).

Registration incorporates the company (§§ 18, 191, and 192); and the registrar's certificate of registration, which he is required to give, is conclusive evidence that all the statutory requisitions have been complied with (§§ 18 and 192) (*g*). Even therefore if they have not, still the existence of the company as a corporate body cannot be denied in the face of the certificate (*h*); nor does the fact that a company was formed in fraud invalidate the certificate or deprive the company of its corporate character (*i*). There is, moreover, no provision for cancelling the registration of an improperly registered company; nor is it clear that there are any means of cancelling such registration (*k*).

But the registrar has no power to extend the acts to companies not within their scope; and in order that his certificate

Incorporation
of company.

Certificate of
registration
when not con-
clusive.

(*ec*) 46 & 47 Vict. c. 28 is repealed except as to Ireland by 51 & 52 Vict. c. 62.

(*f*) *R. v. Whitmarsh*, 15 Q. B. 600; see, also, *R. v. Registrar of Joint Stock Companies*, 10 Q. B. 839; *R. v. Same*, 21 Q. B. D. 131.

(*g*) *Peel's case*, 2 Ch. 674; *Oakes v. Turquand*, L. R. 2 H. L. 325 & 354-369; *Princess of Reuss v. Bos*, 5 ib. 176; *New Brunswick Rail. Co. v. Boore*, 3 H. & N. 249. See as to copies of certificates, 40 & 41 Vict. c.

26, § 6.

(*h*) See the last note, and *Glover v. Giles*, 18 Ch. D. 173; *Nassau Phosphate Co.*, 2 Ch. D. 610; *Banwen Iron Co. v. Barnett*, 8 C. B. 406; *Bird's case*, 1 Sim. N. S. 47.

(*i*) *Pillbrow v. Pillbrow's Atmospheric Co.*, 5 C. B. 440.

(*k*) *Princess of Reuss v. Bos*, L. R. 5 H. L. 176, 193, 197, 202. But see *Glover v. Giles*, 18 Ch. D. 180, as to *Quo warranto*.

Bk. I. Chap. 4.
Class 4.

may be conclusive evidence of the incorporation of a company formed and registered under them, it is essential that the company shall be one which may be duly registered; neither registration nor the registrar's certificate is of any avail in the case of a company to which the acts do not apply (*l*).

Evidence of
incorporation.

The registrar's certificate, although the best, is not the only admissible evidence of registration. Registration may be sufficiently proved by other evidence; for example, as against the company, by the production of certificates of shares sealed with its seal (*m*). But this sort of evidence cannot be relied upon when it is necessary to prove the incorporation of the company against persons not connected with it (*n*).

Name of com-
pany.

No two companies are to be registered by the same name, or by names so similar to each other as to be calculated to deceive (§ 20) (*o*). But if a registered company is being dissolved, and it consents to the assumption of its name by another company, the latter may be registered under the name borne by the former (§ 20) (*p*). In the event of two companies being inadvertently or otherwise registered by the same name or by two names so similar as to be calculated to deceive, the name of the company last registered may be changed (§ 20). And any registered company may change its name, with the sanction of a special resolution of its members, and the approval of the Board of Trade (§ 13). But the change of name is not

Power to change
name.

(*l*) See *Northumberland District Banking Co.*, 2 De G. & J. 357. See, also, *Baroness Wenlock v. River Dee Co.*, 38 Ch. D. 534, which turned on a similar provision in another act. Compare *Princess of Reuss v. Ros*, *ubi sup.* As to companies registered under part VII. of the act, see *Ennis v. West Clare Rail. Co.*, 3 L. R., Ir. 94, where the certificate was held conclusive. See § 192.

(*m*) *Mostyn v. Culcott Hall Mining Co.*, 1 Fos. & Fin. 334. See *Agricultural Cattle Insurance Co. v. Fitzgerald*, 16 Q. B. 432, as to actions by the company. The fact of registration is there stated to have been proved, but how does not appear.

The certificate, however, was not produced.

(*n*) See *R. v. Frankland*, L. & C. 276, as to the proof required in criminal cases, and compare *R. v. Langton*, 2 Q. B. D. 296.

(*o*) See *R. v. Registrar of Friendly Societies*, L. R. 7 Q. B. 741. As to one company restraining the registering of another in a name like its own, see below.

(*p*) Advantage is taken of this when it is desired to reconstruct a registered company. The company dissolves, and a new company is formed with a new constitution, but with the same name as the old company. See *infra*, bk. iv., c. 2, § 4.

complete until a new certificate of incorporation has been issued (*q*). Bk. I. Chap. 4.
Class 4.

It is further provided that such existing companies as register with limited liability, shall add the word limited to their former name (§ 183, cl. 3, and § 190). But except in cases specially provided for, a company once registered under a given name cannot require to be registered under a new name (*r*). But an unlimited company may be converted into a limited company (see the Companies act, 1879, 42 & 43 Vict. c. 76).

A mere change of name does not affect a company's rights or obligations (§§ 13, 20, and 194). But as will be seen hereafter, the consequences of registering an existing company under the acts are extremely important.

One company can restrain persons from registering another company under a name so like its own as to be calculated to deceive(s); so a company which has been already registered under such a name can be restrained from carrying on business under it (*t*). Rival companies.

The registrar may remove from the register the name of any company which has ceased to carry on business (*u*). Defunct companies.

With respect to the registration of companies under the act of 1862, it will be found that its provisions apply, first to all companies formed under it (*v*); secondly, to some companies existing when the act came into operation (*w*); and, thirdly, to some companies formed subsequently to that date, but not under the provisions of the act itself (*y*). It will further be seen that many companies may be wound up under it although not registered under it (*z*). Scope of act of 1862.

(*q*) *Shackleford v. Dungenfield*, L. R. 3 C. P. 407.

(*r*) *R. v. Registrar of Joint Stock Cos.*, 10 Q. B. 839.

(*s*) *Hendriks v. Montagu*, 17 Ch. D. 638.

(*t*) *Merchant Banking Co. of London v. Merchants' Joint Stock Bank*, 9 Ch. D. 560. See further as to one company suing another for taking its name with a colourable imitation, *Lee v. Haley*, 5 Ch. 155; *Braham v. Beacham*, 7 Ch. D. 848; *Lawson v. The Bank of London*, 18 C. B. 84; *The Colonial Life Assurance Co. v.*

The Home and Colonial Assurance Co., 33 Beav. 548; *The London Assurance Co. v. The London and Westminster Insurance Corporation*, 9 Jur. N. S. 843, V.-C. S.; *The London and Provincial Law Assurance Society v. The London and Provincial Joint Stock Life Ass. Co.*, 17 L. J. Ch. 37, N. S.

(*u*) 43 Vict. c. 19, § 7. *Cuckey Assurance Socy.* 34 Ch. D.

(*v*) See the first four parts of the act.

(*w*) See the sixth and seventh parts of the act.

(*y*) See § 180.

(*z*) See part eight of the act.

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Class 4.

Registration
when compul-
sory.

Registration is compulsory—

1. In the case of insurance companies completely registered under 7 & 8 Vict. c. 110 (see § 209 of the act of 1862) (*a*).

2. In the case of companies which ought to have registered under the repealed acts of 1856—1858, but which were not so registered (§ 209). This class includes, 1, all companies registered under 7 & 8 Vict. c. 110, except insurance companies (*b*); 2, all chartered banking companies formed under 7 & 8 Vict. c. 113; and, 3, Scotch and Irish banking companies formed under 10 Vict. c. 75 (*c*).

3. In the case of banking partnerships of more than ten persons, formed on or after the 2nd of November, 1862, unless formed under some other act of Parliament, or under letters patent (§ 4).

4. In the case of companies, associations, or partnerships of more than twenty persons (*d*) formed on or after the 2nd of November, 1862 (*e*), for the purpose of carrying on any other business (except banking) for gain by the company, &c., or the members thereof, unless they are formed under some other act of Parliament, or under letters patent, or unless they are companies engaged in working mines within and subject to the jurisdiction of the Stannaries (§ 4) (*f*).

Carrying on
business.

Associations of more than twenty persons carrying on business by agents are within the act (*g*). But persons who are only the *costuiis que trustent* of others who carry on business as principals, do not themselves carry on business within the meaning of the act (*h*).

For gain.

What amounts to carrying on business for gain has been

(*a*) This gets rid of *London Monetary Co. v. Smith*, 3 H. & N. 543, and *Lond. and Provincial Prov. Soc. v. Ashton*, 12 C. B. N. S. 709. The first of these cases was clearly wrong.

(*b*) See 20 & 21 Vict. c. 14, §§ 26 & 27. As to insurance companies, see the cases in the last note, and *Bank of London, &c., Ins. Assoc.*, 6 Ch. 421.

(*c*) See 20 & 21 Vict. c. 49, §§ 4 & 5.

(*d*) *I.e.* 20 when formed or by subsequent increase, *Ex parte Poppleton*, 14 Q. B. D. 379.

(*e*) As to older companies, see *Shaw v. Simmons*, 12 Q. B. D. 117.

(*f*) The jurisdiction was extended to Devonshire by 18 & 19 Vict. c. 32.

(*g*) See *Harris v. Amery*, L. R. 1 C. P. 148, and the next note.

(*h*) *Smith v. Anderson*, 15 Ch. D. 247, overruling *Sykes v. Beadon*, 11 Ch. D. 170.

much discussed (*i*) ; and it is now settled that mutual marine insurance companies (*j*) and mutual loan societies (*k*) are within the act ; but freehold land societies are not (*l*).

Registration appears to be impossible only in the following cases, viz. : Bk. I. Chap. 4.
Class 4.
Registration
when impossible.

1. In the case of companies and associations of less than seven members (§ 6).

2. In the case of companies and associations having the liability of their members limited by act of Parliament or letters patent, and not having a capital divided into shares or a transferable stock (§ 179, cl. 1, and § 181), *e.g.* mutual incorporated societies, and learned societies, such as the Royal Society.

3. In the case of Trade Unions (*m*).

4. In the case of foreign incorporated companies (*n*).

Companies which had been already registered under the repealed acts of 1856—8 need not register under the act of 1862, but they may do so ; and whether they do or do not register they are subject to its provisions, except that their own regulations remain unchanged (compare §§ 176, 177, 206, 208) (*o*). For some purposes (see §§ 176, 177) however, a distinction is made, in the case of non-re-registration, between companies formed and registered under the acts of 1856—1858 and those registered but not formed under them. The former class are placed substantially on the same footing as companies formed and registered under the act of 1862, the old regulations being preserved (§§ 176 and 206) ; whilst the latter class are placed on the same footing as other existing companies which have registered under the act of 1862 (§ 177).

The other clauses which authorise, but do not imperatively Registration
when optional.

(*i*) See the last note and the next three.

(*j*) *Padstow Total Loss Assoc.*, 20 Ch. D. 137 ; *Ex parte Hargrove*, 10 Ch. 542.

(*k*) *Jennings v. Hammond*, 9 Q. B. D. 225 ; *Shaw v. Benson*, 11 Q. B. D. 563 ; *Ex parte Poppleton*, 14 Q. B. D. 379.

(*l*) *Re Suddall*, 29 Ch. D. 1.

(*m*) 34 & 35 Vict. c. 31, § 5.

(*n*) *Bulkeley v. Schutz*, 3 L. R. P. C. 764 ; *Bateman v. Service*, 6 App. Ca. 386.

(*o*) See *Torquay Bath Co.*, 32 Beav. 581. Of course without re-registration such a company cannot be converted from an unlimited into a limited company.

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require, registration, are the 6th and the 180th. These apparently authorise any seven or more persons, associated for any lawful purpose, to form a company by registration with the exceptions above mentioned (*p*). The circumstance that the persons are foreigners and intend to carry on business abroad does not preclude registration (*q*).

Option to register with limited liability, or without.

With a few exceptions, every company capable of being registered may, at the option of its members or promoters, be registered either with or without limited liability (§§ 6 and 180); and, in the first case, with the liability limited either by shares or by guarantee (§§ 7 and 180). The exceptions are as follows:

1. No company, having the liability of its members limited by act of Parliament or letters patent, can register as an unlimited company, or as a company limited by guarantee (§ 179, cl. 2).

2. No company that has not a capital divided into shares, or a transferable stock, can register as a company limited by shares (§ 179, cl. 3, and § 181). This applies to most cost-book mining companies.

Further a company can be formed with limited liability, but with the liability of its directors or managers unlimited (*r*).

Having made these preliminary observations, it is proposed to consider the formation of registered companies and the evidence by which a person can be shown to be a member of them. For this purpose it is not necessary to distinguish limited from unlimited companies, but it is necessary to divide registered companies into

1. Companies formed and registered under the act of 1862.
2. Companies registered under that act, but not formed under it.

(*p*) The joint effect of § 179, cl. 1, and of §§ 180 & 181, seems to be that railway companies incorporated by act of Parliament, and having a capital divided into shares or a transferable stock, may be registered under the act. This was probably

not intended. See *Ennis v. West Clare Rail. Co.*, 3 L. R., Ir. 94.

(*q*) *Princess of Reuss v. Bos*, L. R. 5 H. L. 176, affirming *General Co. for Promoting Land Credit*, 5 Ch. 363.

(*r*) 30 & 31 Vict. c. 121, § 4.

1. *Companies formed and registered under the Companies act, 1862.*Bk. I. Chap. 4.
Class 1.

Any seven or more persons associated for any lawful purpose may form a company under this act (§ 6). It is not even necessary that gain shall be the object of the company (s).

A company is formed under the act of 1862, by the registration of a memorandum of association, bearing a deed stamp, and subscribed by seven or more persons, in the presence of, and attested by one witness at least (see §§ 8—11 and 17 and 18, and the forms in sched. 2).

Memorandum of
association.

This memorandum must contain, 1, the name of the proposed company; 2, the part of the United Kingdom in which the registered office of the company is to be; and 3, the objects for which the company is to be established (§§ 8—10, and sched. 2). If the company is to be limited by shares, the memorandum must also state, 4, that the liability of the members is limited; and, 5, the amount of proposed capital, and the shares into which it is to be divided (§ 8 and sched. 2, form A.). If the company is to be limited by guarantee, the memorandum must contain, in addition to the three things first above mentioned, a declaration that each member will, if necessary, contribute to a specified amount on the winding up of the company (§ 9, and sched. 2, forms B. and C.). If the company, whether limited or unlimited, has a capital divided into shares, each subscriber to the memorandum must write opposite his name, the number of shares he takes, and he must take one at least (§§ 8 and 14).

A statement of the amount of nominal capital to be raised by shares must be sent to the registrar and be stamped with a stamp duty of 2s. per 100l. of capital, see 51 Vict. c. 8, § 11.

The memorandum of association must, in the case of an unlimited company, and of a company limited by guarantee,

Articles of
association.

(s) See 30 & 31 Vict. c. 131, § 23. No questions, therefore, can arise under the act of 1862, similar to those which arose under 7 & 8 Vict. c. 110. See as to the application of that act to projected railway companies, *Abbott v. Rogers*, 16 C. B. 277; to companies not having gain

for their object, *R. v. Whitmarsh*, 15 Q. B. 600; *Beur v. Bromley*, 18 ib. 271; *Moore v. Rawlins*, 6 C. B. N. S. 289; to companies, the formation of which was commenced before 1st Nov. 1844, *Shaw v. Holland*, 15 M. & W. 136.

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Class 4. — and may in the case of a company limited by shares, be accompanied, when registered, by articles of association, prescribing regulations for the company (§ 14, and sched. 2, forms B. and C.). These articles must be printed and be stamped with a deed stamp, and be signed by the subscribers to the memorandum of association, in the presence of, and attested by one witness at least (§§ 14 and 16). In the case of a company having a capital divided into shares, and not being limited by shares, the articles must state the amount of the proposed capital; and in the case of a company not having such a capital, the articles must state the number of members with which the company proposes to be registered (§ 14).

Table A. The first schedule of the act, table A., contains a set of regulations which may be adopted, wholly or in part, by any company, and which apply to companies limited by shares, unless the contrary is expressed in their registered articles (§§ 14 and 15). These regulations closely resemble those contained in table B., in the repealed act of 1856. They have been framed with care, and they should be adopted, as far as possible, in all cases. The Board of Trade has power to alter them, but not retrospectively (§ 71).

Registration of memorandum and articles. The memorandum of association, and the articles, if any, are to be delivered to the registrar of joint-stock companies, who is required to retain and register them (§ 17). Certain fees are payable upon their registration (§ 17). After their registration, the registrar is required to certify that the company is incorporated, and in the case of a limited company, that it is limited; and his certificate is conclusive evidence that all the requisitions of the act, in respect of registration, have been complied with (§ 18) (t).

Construction of memorandum and articles. The memorandum of association and the articles of association ought to be consistent with each other, and they ought, if possible, to be construed so as to make them consistent (u). But if the two conflict, the articles must give way to the memorandum, for that is the more important document of the two, and cannot be altered except in certain particulars specified

(t) *Ante*, p. 111.

(u) See *Felgate's case*, 2 De G. J. D. 75; *South Durham Brewery Co.*, 31 Ch. D. 261.
& Sm. 456; *Anderson's case*, 7 Ch.

in the statutes (*e*). Many cases illustrating this general rule will be met with hereafter when considering the powers of directors and majorities, and the liabilities of the subscribers of the memorandum (*g*). Moreover, articles of association, which are inconsistent with the Companies acts, are invalid (*z*). Bl. L. Chap. L.
Class 4.

The articles of association may be varied by special resolution (§ 50), and the company cannot deprive itself of its power to alter them (*a*). Varying articles
of association.

The act in substance declares that the subscribers of the memorandum of association (§§ 18 and 23) (*b*), and all persons who have agreed to become members and whose names are entered in the register of members, shall be deemed members of the company (§ 23). It is conceived that persons who sign copies of the memorandum before it is registered are members under this act, as they were held to be under the act of 1856 (*c*). Who are mem-
bers.

Subscribers of
memorandum.

It is very difficult to see how any person who signs the memorandum of association can be held not to be a member. But in *Felgate's case* (*d*), a person who had signed the memorandum and articles of association was held not to be a contributory, as the articles he had signed had been tampered with before they were registered. He was held not to be bound by the articles, and not being bound by them he was held not bound by the memorandum.

With respect to other persons it is to be observed that no particular form of agreement is necessary (*e*); but a question Other member.

(*e*) See § 12 of the Companies act, 1862, and §§ 8, 9 & 21 of the Companies act, 1867, and § 5 of the Companies act of 1877, and the Companies act, 1879.

(*g*) See particularly *Guinness v. Land Corporation of Ireland*, 22 Ch. D. 349; *Asbury Rail. Carriage Co. v. Riche*, L. R. 7 H. L. 653; *Dent's case*, 8 Ch. p. 776.

(*z*) *Trevor v. Whitworth*, 12 App. Ca. 409, the case of an article empowering a company to buy its own shares.

(*a*) *Walker v. London Tramways Co.*, 12 Ch. D. 705.

(*b*) Signature by an agent is sufficient, *Whitley Partners Limited*, 32 Ch. Div. 337.

(*c*) *New Brunswick Rail. Co. v. Lowe*, 3 H. & N. 249.

(*d*) 2 De G. F. & J. 456. This case turned on the act of 1856, but there does not appear to be any difference between that act and the act of 1862, so far as this subject is concerned.

(*e*) This gets rid of *New Brunswick Rail. Co. v. Muggenridge*, 4 H. & N. 160 & 580. See *Bog Lead Mining Co. v. Montague*, 10 C. B. N. S. 481.

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Class 4.

may arise on this act, as on the Companies clauses consolidation act, whether a person may not be a member although his name is not on the register. In considering this question regard must be had to the right of companies to put persons on the register (*f*), to the provisions for its rectification (*g*), and to the extent to which a person may have acted and been treated as a member (*h*).

Several classes
of members.

There is nothing in the statute to prevent the existence of two or more classes of members (*i*), but as will be seen hereafter (in Book III.) the rights of each class must be respected, and this consideration may prevent the creation of another class with special privileges.

Certificate of
title.

A certificate under the seal of the company, stating that any shares or stock are held by a member, is *prima facie* evidence of his title to the shares or stock therein specified (§ 31) (*k*).

Register of
members.

Every company registered under the act is bound to keep at its registered office (§ 32) a register of its members, and a duplicate of any colonial register which it may keep under the provisions of the Companies (colonial registries) act, 1883 (*l*). The register must contain the names and addresses, occupations, and the number of the shares, if any, held by the members, and the amounts paid, or agreed to be considered as paid, in respect of such shares, and the dates at which the members were registered, and the dates at which they ceased to be members (§ 25). No notice of any trust is to be entered on the register (§ 30) (*m*). The register is *prima facie* evidence of all matters directed or authorised to be inserted therein (§ 37) (*n*).

Correction of
register, § 35.

The 35th section provides for the rectification of the register, and is extremely important (*o*). Its effect is that if the name

(*f*) *Ante*, p. 46.

(*g*) §§ 35 & 98.

(*h*) *Ante*, p. 47 *et seq.*

(*i*) *Winstone's case*, 12 Ch. D. 239, where there were shareholders and assurance members not shareholders.

(*k*) The right to demand this certificate is not given by the act, but only by Table A, Nos. 2 and 3. See as to these certificates, *ante*, p. 64.

(*l*) 46 & 47 Vict. c. 30.

(*m*) See as to this, *Bradford Banking Co. v. Briggs*, 12 App. Ca. 29.

(*n*) See, as to the register when fully paid-up shares have been replaced by share warrants transferable by delivery, 30 & 31 Vict. c. 131, § 31.

(*o*) See on the correction of registers generally, *ante*, pp. 61-63.

of any person is without sufficient cause entered in or omitted from the register of members, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, he or any member of the company or the company itself may obtain an order for the rectification of the register. The order may be obtained from any division of the High Court; or in the case of a colonial register from any competent court in the colony where such register is kept (*p*).

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Correction of
register under
§ 35.

A difference of opinion has been expressed as to the correct interpretation of this section. Some consider that under it the register may be rectified whenever it can be shown by any person who is on or off the register himself that some other person ought as between themselves to be in his place (*q*); whilst others consider that the section does not admit of so wide an interpretation, being confined to the cases specified in its commencement (*r*), viz. :—

1. To cases where the name of a person is without sufficient cause entered in or omitted from the register.

2. To cases where default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company.

The more restricted interpretation, it will be observed, renders the section inapplicable except where the company fails in discharging the duty imposed upon it of keeping a proper register.

It must be borne in mind that before a company is being wound up its register is much more readily rectified than after the winding up has commenced and the rights of creditors have to be considered. The rectification of the register in connection with the settlement of the list of contributories will be considered hereafter; in the present place those decisions only will be referred to which relate to the rectification of the register of a going company.

(*p*) 46 & 47 Vict. c. 30, § 3 (3).

(*q*) See *Ex parte Shaw*, 2 Q. B. 11, 463; *Ward and Garfit's case*, 4 Eq. 159; *Musgrave and Hart's case*, 5 Eq. 193; and the judgment of Turner, L. J., in *Ward and Henry's*

case, 2 Ch. 431.

(*r*) *Ex parte Ward*, L. R. 3 Ex. 180; *Shepherd's case*, 2 Ch. 16; and see Lord Cairns' judgment in *Ward and Henry's case*, 2 Ch. 431; *Marino's case*, 2 Ch. 596.

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The 35th section not only authorises the correction of mistakes but also the determination of important conflicting rights, going further in this respect than the corresponding section of the Companies act, 1856 (*s*). As however trusts are not noticed (§ 30) the title to be investigated is the legal title or the right to acquire it (*t*). If this legal title is clear, and there is no difficult question of fact to be investigated, the Court will rectify the register without directing any action to be brought (*u*); but the Court has a discretion as to whether it will interfere summarily under the act or direct an action, and will be guided by the nature of the facts in dispute and by the desirability of having them investigated by a jury (*x*). The circumstance, however, that the company has itself rectified the register does not preclude the Court from ordering it to be rectified; an order of the Court being often of great importance to the applicant (*y*).

Instances of
rectification.

Registers will be rectified at the instance of persons who have been registered as members without having entered into any contract to take shares (*z*); so where the contract they have entered into is void (*a*); so where the contract being voidable it has been duly avoided by the alleged shareholder. Thus registers have been rectified where persons have taken shares on the faith of a prospectus with which the company's memorandum of association does not correspond (*b*); so where a person applied for shares on the faith of particular persons

(*s*) As to which, see *British Sugar Refining Co.*, 3 K. & J. 408.

(*t*) *Ex parte Sargent*, 17 Eq. 273; *Ex parte Parker*, 2 Ch. 685.

(*u*) *Ex parte Shaw*, 2 Q. B. D. 463.

(*x*) See the last case; *Asker's case*, 9 Ch. 664, where an action was directed to try a question of fraud; *Simpson's case*, 9 Eq. 91, where a bill was directed to be filed. The difficulty here mainly turned on the construction of documents, and *qu.* the advantage of directing an action in such a case.

(*y*) *Martin's case*, 2 Hem. & M.

669.

(*z*) *Los' case*, 6 N. R. 327; *Higg's case*, 2 H. & M. 657; *Martin's case*, ib. 659, where the name had been removed already; *Baily's case*, 5 Eq. 428; 3 Ch. 592; *Somerville's case*, 6 Ch. 266, 271.

(*a*) *Starr and Worth's case*, 4 Ch. 682.

(*b*) *Stewart's case*, 1 Ch. 574; *Webster's case*, 2 Eq. 741; *Downes v. Ship*, L. R. 3 H. L. 343; and *Ship's case*, 2 De G. J. & Sm. 544; *Breckenridge's case*, 2 Hem. & M. 642. See *ante*, p. 19 *et seq.*

named in the prospectus being directors, and such persons refused to become directors (*c*) ; so where a person has been induced by the fraud of the company to become a member (*d*) ; so where the company refuses to register a transferee, to whom the company cannot object (*e*).

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Class I.

Again, where shares are transferred to an infant the infant can have the register rectified whilst he is an infant (*f*), or on his coming of age, providing he has not accepted the shares (*g*) ; and the company itself can obtain an order rectifying the register in such cases (*h*) if it has not accepted the infant as a shareholder knowing the facts (*i*). So where a person has by misrepresentation or fraud induced the company to register him as a shareholder, the register will be rectified at the instance of the company, if it applies promptly (*k*), and if third parties have not dealt with the person registered and have not acquired rights on the faith of his being a shareholder (*l*).

So where shares intended to be issued as fully paid up, have been inadvertently issued as not paid up, the register has been rectified under this section (*m*).

The question whether a vendor or a purchaser of shares is entitled to be registered in respect of them can also be determined upon an application to rectify the register (*n*).

On the other hand, a duly registered member cannot have his name struck off the register (*o*) ; and no person is entitled

Application to
rectify refused.

(*c*) *Anderson's case*, 17 Ch. D. 373.

(*d*) *Smith's case*, 2 Ch. 604, and 4 H. L. 64 ; *Parle's case*, 4 Ch. 497 ; *McNield's case*, 10 Eq. 503 ; *For's case*, 5 Eq. 118.

(*e*) See *Ex parte Parker*, 2 Ch. 685, and *infra*, Bk. III., c. 4, § 5, Transfer of shares.

(*f*) See *Mann's case*, 3 Ch. 459 n. ; *Copper's case*, *ib.* 458.

(*g*) See *Hart's case*, 6 Eq. 512 ; *Wilson's case*, 8 Eq. 240.

(*h*) See *Symon's case*, 5 Ch. 298.

(*i*) *Parson's case*, 8 Eq. 656.

(*k*) See *Ex parte Kintrea*, 5 Ch. 95.

(*l*) See, as to this, *Bahia and San Francisco Rail. Co.*, L. R. 3 Q. B. 584, and other cases of that sort

noticed *ante*, p. 54. Compare *Asken's case*, 9 Ch. 664, where an action was directed.

(*m*) *Darlington Forge Co.*, 34 Ch. D. 522 ; *Ex parte Shaw*, 18 Eq. 16 ; *Ex parte Thomas*, *ib.* 17 note. It seems that in these cases the company may rectify its own mistake ; *Hartley's case*, 18 Eq. 542, and 10 Ch. 157 ; *Re Etna Ins. Co.*, Ir. R. 7 Eq. 264. See as to shares issued at a discount, *Rail. Time Tables Pub. Co.*, W. N. 1888, 239.

(*n*) *Ex parte Shaw*, 2 Q. B. D. 463.

(*o*) *Ex parte Ward*, L. R. 3 Ex. 180.

(overruled 4 W. N. 1889 p. 44) *Ex parte Smith* 39 Ch. D. 546.

Bk. I. Chap. 4. to have his name put on the register until he has complied
 Class 4. with all conditions precedent, *e.g.*, proved his title to his shares in the manner required by the company's regulations (*p*); and where a company is required to register a transfer of shares on which it has a lien, that lien must be first discharged (*q*). Neither can a person who was entitled to be on the register have it rectified in his favour if he has allowed some one else to be registered in his place, and such person has transferred his share to a *bonâ fide* purchaser (*r*); and as will be seen hereafter, under the head "Contributories," delay in applying to the Court is often fatal to the application (*s*). Nor can a company which has, when prosperous, persistently refused to register a person, obtain an order to register him when the company is in difficulties (*t*).

Damages. If a person has suffered damage by reason of a company improperly excluding him from or retaining him on its register, the company will be ordered to pay it (*u*). But the company will not be liable to pay any special damage arising from unusual circumstances of which it had no notice (*x*).

Costs. So long as the company is a going concern, the Court has apparently no jurisdiction under the 35th section, to order costs to be paid by any one except by the company (*y*). But this observation does not apply to the costs of an appeal (*z*).

If the application is made after the liquidation has commenced, the Court has jurisdiction to order costs to be paid as it may think fit (*a*).

Stannaries. The jurisdiction conferred by this section on the Vice-Warden of the Stannaries to rectify the register of companies

(*p*) *East Wheal Martha Mining Co.*, 33 Beav. 119.

(*q*) See *London, Birmingham, &c., Bank*, 34 Beav. 332; *Stockton Mal-leable Iron Co.*, 2 Ch. D. 101.

(*r*) *London and Provincial Tele-graph Co.*, 9 Eq. 653.

(*s*) See *Scottish Petroleum Co.*, 23 Ch. D. 413.

(*t*) See *Sichell's case*, 3 Ch. 119; *Nicol's case* and *Tufnell and Pon-sonby's case*, 29 Ch. D. 421.

(*u*) *New Quebrada Co.*, 36 L. J. Ch. 903.

(*x*) *Skinner v. City of London Marine Ins. Corp.*, 14 Q. B. D. 882.

(*y*) *Ex parte Sargent*, 17 Eq. 273; *Ex parte Kintrea*, 5 Ch. 95.

(*z*) *Ex parte Shaw*, 2 Q. B. D. 463.

(*a*) See *Ex parte Kintrea*, 5 Ch. 95. In *Anderson's case*, 17 Ch. D. 373, and in *Wood's case*, 15 Eq. 236, the company was ordered to pay costs as between solicitor and client.

within the district of the Stannaries, does not exclude the jurisdiction of the High Court for the same purpose (*b*). Bk. I. Chap. I.
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Notice of an order rectifying the register must in most cases be given to the registrar (*c*).

By § 98 of the act of 1862 it is provided that when a company is being wound up, the Court winding it up shall have power to rectify the register of members; and this power is constantly acted upon (*d*). In determining who are contributories, the actual state of the register is therefore of much less importance than the state in which it ought to be. Correction of
register on
winding up of
company.

A company can correct its own register where a Court would compel it to do so (*e*).

Every person, whether a member or not, has a right to inspect the company's register, and to have a copy of it, or of any part of it, on payment of a small fee (§ 32). Every member is entitled to inspect the register gratis; other persons may be required to pay one shilling (§ 32). The register may be temporarily closed (§ 33). Inspection of
register.

The act does not expressly require the register to be sealed with the company's seal; and a book kept as required by § 25 may, it is conceived, be evidence under § 37, though not sealed (*f*). Observations on
register.

In addition to the register of members above referred to, every company having a capital divided into shares is bound under penalties to keep in a separate part of its register of members, and once a year at least to make out and transmit to the registrar of joint-stock companies, a list of its members and late members, and a summary showing the amount of the company's capital, and the number of shares into which it is divided, and the number of shares issued and forfeited, and the amount of calls made, received and unpaid (§§ 26 and 27, Annual list and
summary.

(*b*) *The Pendule and Lomax, &c.*, Co., 2 Ch. 398. than that conferred by § 35. See
Sickell's case, 3 Ch. 119; *Reese River*
Co. v. Smith, L. R. 4 H. L. 64.

(*c*) § 36.

(*d*) No special application to rectify the register is necessary in these cases; *Breckenridge's case*, 2 Hem. & M. 642. The power conferred by § 98 is not more extensive (*e*) *Hartley's case*, 18 Eq. 542, and
10 Ch. 157. See *ante*, pp. 63, 123.

(*f*) See *Cornwall, &c., Mining Co. v. Bennett*, 5 H. & N. 423, and see *ante*, pp. 57-60.

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and sched. 2, form E.) (*g*). And every company not having a capital divided into shares is bound to keep at its registered office a register of its directors and managers, and to send a copy of such register to the registrar of joint-stock companies, and to notify all changes amongst them to him (§§ 45 and 46). When share warrants transferable to bearer have been issued under the Companies act, 1867, the annual return must be varied as required by that act (*h*). And when any company has reduced its capital under the Companies act, 1880, the annual return must contain the particulars required by sect. 6 of that act (*i*).

Inspection.

These documents when registered are open to the inspection of every one on payment of a small fee (§ 174, cl. 5; see also as to their inspection, § 32).

2. *Companies registered under the Companies act, 1862, but not formed under it.*

Little need be said with respect to the formation of companies which may be registered under the act of 1862, but which are not formed under its provisions. Such companies, if created already, must have been formed either under acts now repealed, or in one of the various methods which have been considered in preceding pages; and companies, if created hereafter, but not under the act, must, as the law at present stands, be formed in one or other of the same methods, that is to say, under some special act of Parliament, or under a royal charter or letters patent, or, if for working mines in Cornwall or Devonshire, on what is called the cost-book principle.

It has been already seen that registration, under the act, of companies not formed under it, is in some cases compulsory, in some impossible, and in others optional (*k*). With respect to existing companies which are required to register, and which omit so to do, the consequences of non-registration are serious;

(*g*) See as to these sections and as to the powers of magistrates under § 27, *Briton Medical and General Life Assoc.*, 39 Ch. D. 61; *Gibson*

and *Barton*, 10 L. R. Q. B. 329.

(*h*) See 30 & 31 Vict. c. 131, § 32.

(*i*) 43 Vict. c. 19, § 6.

(*k*) *Ante*, p. 114 *et seq.*

for, first, such companies cannot sue (*l*); secondly, no dividends can be lawfully paid to their shareholders; and, thirdly, each of their directors becomes liable to a penalty of 5*l.* per day (§ 210) (*m*).

Companies not formed under the act but capable of being registered under it, may, subject to certain restrictions and qualifications (see §§ 179—188) (*n*), be registered either with or without limited liability (§ 180); and such liability, if limited, may be limited either by guarantee or by shares (§ 180) (*o*).

Every company when registered becomes incorporated under the act (§§ 191 and 192). The incorporation, however, does not deprive the company of its property or acquired rights (§ 193), nor discharge it from its debts or other liabilities (§ 194) (*p*). But after registration no execution upon a judgment against the company can be issued against its members (§ 195). The creditors, therefore of an existing company must, after its registration, proceed to wind up the company, if they cannot obtain payment of their debts by execution against the property of the company (*q*).

Upon compliance with certain requisitions mentioned in the

(*l*) Accordingly it was held in the case of the *Waterloo Insur. Co.*, 31 Beav. 586, that an insurance company could not petition to be wound up before it was registered.

(*m*) A company required to register under the act by § 209, and registered accordingly, is in the same position as if it had been registered voluntarily, *Ramsay's case*, 3 Ch. D. 388.

(*n*) § 182 is repealed, and a substituted section enacted by the Companies act, 1879, 42 & 43 Vict. c. 76, § 6.

(*o*) A company registered as unlimited may be afterwards registered as limited under the Companies act, 1879.

(*p*) See *Groux's Soap Co. v. Cooper*, 8 C. B. N. S. 800, where a surety to a company registered under 7 & 8

Vict. c. 119, and registered with limited liability under 18 & 19 Vict. c. 133, was held not to be discharged by such registration.

(*q*) The effect of registration on the liabilities of members will be considered hereafter. It has been held that § 194 does not affect the question who ought to be contributories on the winding up of the company, *Fountain's case*, 11 Jur. N. S. 553; and that § 195 does not prevent a shareholder in a cost-book mining company, who had retired before the registration, from being sued in respect of a debt contracted whilst he was a shareholder; *Lanyon v. Smith*, 3 B. & Sm. 938; *Harvey v. Clough*, 2 N. R. 204. As to what companies cannot register, see *ante*, p. 115.

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Registration of
existing com-
panies with
limited liability

Effect of
registration.

Bk. I. Chap. 4. act, and which need not be here specified (see §§ 109, 179, and
 Class 4. — 183—8), the registrar is required to certify that the company
 is incorporated under the act, and in the case of a limited
 company, that it is limited (§ 191); and his certificate is con-
 clusive evidence that all requisitions have been complied with,
 and that the company is authorised to be registered as a
 limited or unlimited company, as the case may be (§ 192) (*r*).

Change of name. An existing company cannot, apparently, change its name
 on registration, except by adding the word “limited” to its
 former name. (Compare § 183, cl. 3, and § 190.) After
 registration, however, it has the power of changing its name
 as if it were formed under the act. (See §§ 12, 13, 20, and
 196) (*s*).

Membership in these companies. The question who is a member in a company registered,
 but not formed under the act of 1862, depends upon the consti-
 tution of the particular company, and must be determined upon
 the principles which have been already considered (see § 196).
 With respect, however, to companies governed by the repealed
 acts of 7 & 8 Vict. c. 110, 7 & 8 Vict. c. 113, and 19 & 20
 Vict. c. 47, it may be useful to add a few observations.

7 & 8 Vict.
 c. 110. Companies formed under 7 & 8 Vict. c. 110, were incor-
 porated by registration, but before being so incorporated they
 passed through a preliminary state, viz., that of provisional
 registration, the object of which was to enable the public to
 ascertain the nature and objects of the proposed company and
 the persons who projected it. Provisional registration did not
 incorporate the company or its promoters (*t*), nor did it affect
 their liability for each other's acts (*u*). A certificate of com-
 plete registration was necessary to form and incorporate the
 company; and before this could be obtained a deed of settle-
 ment containing certain covenants and particulars specified by
 the act was required to be executed by at least one-fourth of
 the subscribers to the company. The certificate of complete
 registration was conclusive evidence that all the requisitions of

(*r*) See, as to this certificate, *ante*,
 pp. 111, 112.

(*s*) See as to changing name, *ante*,
 p. 112; and as to becoming limited,
 see the Companies act, 1879.

(*t*) See *R. v. Whitmarsh*, 14 Q. B.
 803.

(*u*) See *Reynell v. Lewis*, and
Wylde v. Hopkins, 15 M. & W. 517;
Walstab v. Spottiswoode, ib. 501.

the act had been duly complied with (*x*). The act defined a shareholder to mean any person entitled to a share, *and* who had executed the deed of settlement or a deed referring to it; and it was held that no person was a shareholder who had not executed such deed (*y*).

Chartered banking companies were formed under the repealed act of 7 & 8 Vict. c. 113, by letters patent and a deed of settlement set forth in it. This act contained no definition of the word shareholder, but persons whose names were returned as shareholders to the stamp office pursuant to the act were *prima facie* liable as shareholders (*z*).

Companies were formed under the acts of 1856–8, as under the act of 1862, by registration. Under 19 & 20 Vict. c. 47, § 19, every person who had accepted shares in a company formed under it, and whose name was entered in the company's register, and no other person (except a subscriber to the memorandum of association in respect of the shares subscribed for by him) was a shareholder; and § 20 in effect declared that a transferor of a share should be deemed a shareholder until the transferee was registered in his place. These enactments may still be important. Moreover, notwithstanding the repeal of the act of 1856, the regulations contained in table B. in the schedule to that act still apply to those companies which were subject to them when the Companies act, 1862, was passed (see § 206). These regulations, therefore, must be consulted in order to decide who is or is not a member of such companies; and as regards other companies registered under the act of 1856, attention must be paid to their regulations, deeds of settlement, charters, &c. (*a*).

(*x*) *Banwen Iron Co. v. Barnett*, 8 C. B. 406; *Bird's case*, 1 Sim. N. S. 47; *Pilbrow v. Pilbrow's Atmospheric Co.*, 5 C. B. 440.

(*y*) See *ante*, pp. 43 *et seq.*

(*z*) *Dossett v. Harding*, 1 C. B. N. S. 524; *Powis v. Harding*, ib. 551; *Thompson v. Harding*, ib. 555; *Fry v. Russell*, 3 ib. 665; *Powis v.*

Butler, ib. 645, and 4 ib. 469; *Daniell v. Royal Brit. Bank*, 1 H. & N. 681; *Henderson v. Royal Brit. Bank*, 7 E. & B. 356.

(*a*) See *New Brunswick Rail. Co. v. Muggeridge*, 4 H. & N. 160 and 580, and *Boy Lead Mining Co. v. Montague*, 8 Jur. N. S. 310, noticed *ante*, p. 45, note (*e*).

CHAPTER V.

OF ILLEGAL COMPANIES.

SECTION I.—WHAT COMPANIES ARE ILLEGAL.

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Sect. 1.

It has been said that unincorporated joint-stock companies with transferable shares are illegal at common law, first, because the privilege of having transferable shares can only be acquired by charter from the Crown, or by an act of Parliament; and, secondly, because all such companies are dangerous, mischievous, and, in short, public nuisances. But this view cannot, the writer thinks, be supported. The question has now only an historical interest, and the following note on the subject is reprinted for the convenience of those who may desire information on the subject.

Note on the Bubble act.

In order to investigate this subject properly, it is necessary to advert to the celebrated "Bubble act" of 1719, and the decisions upon it, for although that act is repealed, the discussions to which it gave rise are constantly referred to when the illegality at common law of joint-stock companies is alleged or denied. The Bubble act (*a*) was levelled more particularly at—

1. The acting or presuming to act as a corporate body.
2. The raising or pretending to raise transferable stock.

(*a*) 6 Geo. 1, c. 18, § 18. In the first two editions this act was printed at length, but it is omitted now for the sake of gaining space. The act was repealed by 6 Geo. 4, c. 91. The earliest reported decision on the Bubble act is *R. v. Cawood* or *Caywood*, 2 Ld. Raymond, 1361, and 1

Str. 472, but that case throws no light on any question of present importance, as it merely relates to the punishment to be inflicted on a person found guilty of an infringement of the act. See as to the history of this act, Collyer on Partnership, p. 722, ed. 2.

3. The using of charters for purposes not warranted by them.

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4. The formation of dangerous and mischievous companies, tending to the grievance of the subjects of this realm.

1. With respect to acting or presuming to act as a body corporate, it was held in *R. v. Webb* (*b*) that having a committee, general meetings, and power to make bye-laws, was not unequivocally assuming to act as a body corporate; but in the later case of *Josephs v. Pebrer* (*c*) the Court was of a different opinion. To create transferable shares in a common stock has also been said to amount to assuming to act as a body corporate, although only such bodies corporate as are specially empowered so to do can lawfully possess stock, the shares in which are transferable (*d*).

2. With respect to transferable stock it was held that any company not incorporated and specially empowered to possess such stock was illegal, if it professed to have its stock divisible into shares transferable from one person to another without restriction (*e*). But it was held that, if the shares were not thus transferable, their transfer being restricted to such person as should be approved by a committee, and as should enter into some special agreement (*f*), or to persons already members of the company (*g*), the company was not necessarily illegal. A scheme for establishing a tontine the shares in which were to be transferable after a certain time, was held not to be illegal, the scheme having failed before the time arrived (*h*). And where a railway company, the shares in which were to be transferable, was projected, and the projectors issued scrip, but resolved that nothing further should be done without the authority of Parliament, it was held that the project was not illegal (*i*).

3. To use charters for purposes not authorised by them was clearly illegal, not only by the act, but at common law. This ground of illegality does not, however, appear to have been made the subject of any decision on the act now in question.

4. Lastly, with respect to the general ground of illegality, for being mischievous, and tending to the grievance of the subjects of this realm. In *R. v. Dodd* (*k*) it was held that a company with transferable shares based upon a prospectus which declared that no person could be accountable beyond the amount of the shares for which he should subscribe, was illegal,

Using charters improperly.

Tendency to mischief.

Rex v. Dodd.

(*b*) 14 East, 406.

(*c*) 3 B. & C. 639. Adopting a name which necessarily denotes a corporation is assuming to act as a corporation. *R. v. Whitmarsh*, 14 Q. B. 803. So is the assumption and use of a common seal, *Cooch v. Goodman*, 2 Q. B. 580. These cases were not decided on the Bubble act, and do not show that an unincorporated society which assumes to act as a corporation is illegal.

(*d*) See *Duvergier v. Fellowes*, 5

Bing. 248.

(*e*) *Buck v. Buck*, 1 Campb. 547; *R. v. Stratton*, ib. 549, note; *Josephs v. Pebrer*, 3 B. & C. 639.

(*f*) *R. v. Webb*, 14 East, 406; *Pratt v. Hutchinson*, 15 ib. 511.

(*g*) *Per Lord Eldon*, in *Ellison v. Bignold*, 2 J. & W. 510.

(*h*) *Nockells v. Crosby*, 3 B. & C. 814.

(*i*) *Kempson v. Saunders*, 4 Bing 5.

(*k*) 9 East, 516, and see *Blundell v. Winsor*, 8 Sim. 601.

- Bk. I. Chap. 5. on the ground that this was a mischievous delusion, calculated to ensnare
Sect. 1. an unwary public. In *R. v. Webb* (l) it was held that a company, the
Rex v. Webb. shares in which were transferable, but not without restriction, was not
necessarily mischievous; and the jury having found that the company was
in fact rather beneficial than otherwise, the company was held to be legal.
As regards the important question, how far the mere raising transferable
stock was, *per se*, an offence against the act, the Court inclined to think that
it was not, unless the company had in fact a mischievous tendency (m). In
Josephs v. Pebrer (n), a company, with shares transferable without restriction,
Josephs v. Pebrer. was held to be clearly mischievous, particularly because the shares were sold
at a very considerable premium. Abbott, C. J., thought that this tended to
introduce gaming and rash speculation to a ruinous extent, to the grievance
of numbers of his Majesty's subjects.

Such are the leading decisions on this celebrated act. Juster views of
political economy, and of the limits within which legislative enactments
should be confined, have led to the repeal of the statute in question, which,
though deemed highly beneficial half a century ago, probably gave rise to
much more mischief than it prevented. But the repeal of the act still
leaves room for the contention that companies of the nature described in
the act are illegal at common law. This question is one of present
importance, especially in the colonies, and requires therefore careful
consideration.

- Opinion of Lord Eldon. Lord Eldon, who certainly had a great aversion to companies, seems to
have been of opinion, in *Kinder v. Taylor* (o), that companies with large
capitals, arising from numerous small contributions, and with transferable
shares, were injurious to the public, and were illegal, independently of the
Bubble act. The same opinion was expressed by the Court of Common
Pleas, in a case which arose after the repeal of that act (p), and also by the
Vice-Chancellor Shadwell, on a still later occasion (q). In none of these
cases, however, was it necessary to decide this question. In *Duvergier v.*
Duvergier v. Fellowes. *Fellowes* (r), the company was formed for an illegal purpose, *viz.*, the work-
ing of a patent which could not be lawfully transferred to more than five
persons, and this was the ground relied on by the Court of Appeal. In
Blundell v. Winsor (s) the Vice-Chancellor thought that there was held out
Blundell v. Winsor. to the public a false and fraudulent representation calculated to ensnare the
unwary, *viz.*, a representation that any shareholder when he transferred his

(l) 14 East, 406. This is the
leading case on the Bubble act,
and is well worthy of attentive
perusal.

(m) See, too, *Noekells v. Crosby*, 3
B. & C. 814; *Pratt v. Hutchinson*,
15 East, 511; *Brown v. Holt*, 4
Taunt. 587.

(n) 3 B. & C. 639.

(o) Coll. on Part. 917, ed. 2.

(p) *Duvergier v. Fellowes*, 5 Bing.
248; affirmed 10 B. & C. 826, and 1

Cl. & Fin. 39.

(q) *Blundell v. Winsor*, 8 Sim.
601.

(r) 5 Bing. 248, and 10 B. & C.
826, and 1 Cl. & Fin. 39.

(s) 8 Sim. 601. This case can-
not be supported. See *Harrison v.*
Heathorn, 6 Man. & Gr. 81. In
Blundell v. Winsor there was not in
fact any such holding out as sup-
posed by the Vice-Chancellor.

shares ceased to be liable to the debts of the company; and he relied on this as a ground of illegality. Although, therefore, in each of these cases the Court was of opinion that the company was illegal, inasmuch as it trespassed upon the prerogative of the Crown by assuming to do that which cannot be lawfully done without special authority, there were additional circumstances, rendering it unnecessary to decide on this ground alone. In *Walburn v. Ingilby* (t) Lord Brougham declined to declare an unincorporated joint-stock company, with transferable shares, illegal; although the deed of settlement stated that provision was to be made, in all engagements to be entered into by the directors, that no shareholder should be liable beyond the amount of his share, and his lordship thought this clause was nugatory. In *Garrard v. Harley* (u) it was held that an unincorporated joint-stock company, which had assumed the name of "The Limerick Marble and Stone Company," and had a capital of 50,000*l.*, divisible into 500 transferable shares, was not illegal at common law. It was in this case declared that the raising and transferring of stock in a company could not be held to be in itself an offence at common law. In *Harrison v. Heathorn* (x), a similar conclusion was arrived at. In this case the company's deed of settlement provided that a person ceasing to be a shareholder should be entitled to a certificate declaring him discharged from all liabilities on account of the shares formerly held by him. This was, in fact, the same company as was held to be illegal by Vice-Chancellor Shadwell in *Blundell v. Winsor*, which, though not overruled on appeal, can scarcely be supported after the decision in *Harrison v. Heathorn*.

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Walburn v.
Ingilby.

Garrard v.
Harley.

Harrison v.
Heathorn.

Attempts have also been made to induce the Courts to declare scrip companies (*i.e.*, unincorporated companies with shares transferable by delivery) to be illegal at common law (y). But these attempts have been unsuccessful. The case of *Blundell v. Winsor*, always relied upon as an authority by those who contend that such a company is illegal, has never met with approbation from the bench; nor has it ever been followed.

Upon the whole, therefore, it appears that there is no case deciding that a joint-stock company with transferable shares, and not incorporated by charter or act of Parliament, is illegal at common law; that opinions have nevertheless differed upon this question; that the tendency of the Courts was formerly to declare such companies illegal; that this tendency exists no longer; and that an unincorporated company with transferable shares will not be held illegal at common law, unless it can be shown to be of a dangerous and mischievous character, tending to the grievance of her Majesty's subjects. The legality at common law of such companies may therefore be considered as finally established.

Conclusion from
the cases.

(t) 1 M. & K. 61, and Cooper, *temp.* Brougham, 270.

(u) 5 Man. & Gr. 471.

(x) 6 Man. & Gr. 81. See, too, *Sheppard v. Oxenford*, 1 K. & J. 491.

(y) See *Ex parte Barclay*, 26 Beav.

177; *Ex parte Aston*, 27 Beav. 474, and 4 De G. & J. 320; *Ex parte Griscwood*, 4 De G. & J. 544. As to the effect of the act of 1862 on these companies, see *infra*, p. 135.

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Observations on
the illegality of
companies with
transferable
shares.

It is not easy to arrive at any other conclusion if the question is examined without reference to the decisions which have been noticed. For

1. It is not illegal for persons, however numerous, to enter into an ordinary contract of partnership.

2. It is not illegal for all those persons to agree that one of them shall retire, and that a person who is not a member of the firm, but who is willing to become one, shall take his place.

3. It is not illegal for partners, however numerous, to agree once for all that any partner who is willing to retire shall be at liberty so to do, and to introduce in his place any person selected by himself.

4. It is not illegal for an out-going partner of a firm established on this last principle, to retire in favour of an in-coming partner, upon any terms to which they both agree, provided those terms are not themselves illegal.

5. It is not illegal for an out-going and in-coming partner to agree that the latter shall pay the former more or less than he himself paid when he entered the firm.

6. It is not illegal for the members of a partnership to assume a name (*z*), and to agree that the management of its affairs, both external and internal, shall be entrusted to a select few, and that those few shall have the power to make rules which the others will obey.

If these propositions are assented to, it will, it is conceived, be found impossible to establish the illegality at common law of unincorporated joint-stock companies with transferable shares (*a*).

To say that such a partnership is illegal, because it assumes to act as a corporation, is untrue; for none of the above acts are characteristic of corporations. What distinguishes corporations from other bodies is their independent personality; and no society which does not arrogate to itself this character can be fairly said to assume to act as a corporation. Besides this, it is by no means clear that it is illegal at common law to assume to act as a body corporate (*b*).

To assert that unincorporated companies with transferable shares are mischievous and dangerous, and therefore illegal, is to assert a proposition the truth of which has not yet been established, and which therefore cannot be admitted as the basis of a judicial inference. This ground of illegality would probably not have been relied upon so much had it not been for the technical rules of pleading which required all the members of a firm, however numerous, to be made defendants to actions and suits against the firm. This rule undoubtedly created difficulties in dealing with large bodies of persons unless they were incorporated; but if the question is reduced to this, *viz.*, whether the rule, or a company to which it is inapplicable, most deserves to be characterised as mischievous, the question must surely be answered in favour of the company and against the rule. The rule, how-

(*z*) *Ante*, p. 133. See the qualification in p. 131, note (*c*).

(*a*) See *Walburn v. Ingilby*, Cooper, *temp.* Brougham, 270.

(*b*) See 6 Man. & Gr. 107, where Tindal, C. J., says, "I am not aware

that presuming to act as a body corporate was an offence at common law." As to assuming a corporate name and using a corporate seal, see *ante*, p. 131, note (*c*).

ever, being established as law, the judges felt bound to adhere to it, and then finding it difficult to deal with unincorporated companies, declared them mischievous and illegal. The difficulty presented by the rule in question has been to a great extent removed by the Judicature acts and rules made under them.

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Assuming an unincorporated joint-stock company not to be illegal at common law, it remains to be considered whether it is rendered illegal, by statute, if not registered.

Effect of non-
registration.

The Companies act, 1862, is extremely important in this respect, for the 4th section says imperatively that no company, association, or partnership, shall be formed after the 2nd of November, 1862, except as therein mentioned. From this it follows that companies, associations, and partnerships required to register under that section, are illegal if not registered (*c*). In this respect the act of 1862 differs from the Companies acts of 1856 and 1857 (*d*), and resembles the older acts of 7 & 8 Vict. c. 110, and c. 113 (*e*).

Companies act,
1862.

Companies formed before the 2nd of November, 1862, and required by the Companies act, 1862, to register under it, are not illegal, although the consequences of non-registration are severe (see § 210).

The question whether scrip companies formed since the act of 1862 are illegal, has not yet been determined (*f*); but it is of great practical importance, and before deciding it attention must be paid not only to the precise language of the act, but also to the difference between agreements to form companies

Scrip com-
panies.

(*c*) See acc. *Ex parte Day*, 1 Ch. D. 699; *S. Wales Atlantic Steamship Co.*, 2 Ch. D. 763; *Ex parte Hargrove*, 10 Ch. 542; *Harris v. Amery*, L. R. 1 C. P. 148; *Jennings v. Hammond*, 9 Q. B. D. 225; *Shaw v. Benson*, 11 Q. B. D. 563; *Ex parte Poppleton*, 14 Q. B. D. 379; *Smith v. Anderson*, 15 Ch. D. 247; overruling *Sykes v. Beadon*, 11 Ch. D. 170; *Padstow Total Loss Assoc.*, 20 Ch. D. 137; *In re Siddall*, 29 Ch. D. 1, all noticed *ante*, p. 114–115.

(*d*) See 20 & 21 Vict. c. 14, § 3, and c. 49, § 5.

(*e*) As to which see *O'Connor v.*

Bradshaw, 5 Ex. 882, as to banks; and as to other companies, *Butt v. Monteaux*, 1 K. & J. 98; *Sheppard v. Oxenford*, ib. 491. The 7 & 8 Vict. c. 110, did not apply to companies formed before the passing of the act, *Ex parte Aston*, 27 Beav. 474, and 4 De G. & J. 320; and see *Womersley v. Merritt*, 4 Eq. 695.

(*f*) The point was discussed in *The Gen. Co. for the promotion of Land Credit*, 5 Ch. 363, and *Princess of Reuss v. Bos*, L. R. 5 H. L. 176. It is tolerably plain that shares not paid up in full cannot be made transferable to bearer.

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and partnerships and companies and partnerships which are actually formed (*g*). Scrip companies are not, in the writer's opinion, illegal at common law (*h*).

The only other statutes to which it may be useful to allude in the present connection are those relating to bankers (*i*).

Bankers.

By 7 & 8 Vict. c. 32, s. 21 (*k*), all bankers are required on the first day of January, in every year, to make a return to the stamp office of their names, residences, and occupations, or in the case of a company or partnership, of the name, residence, and occupation of every member of the company or partnership, and in default a penalty of 50*l.* is inflicted. Upon this act a question might arise as to the legality of a banking partnership, or company, composed in part of members whose names are not returned.

By two statutes, which have since been considerably modified, it was made unlawful for banking firms of more than six members, to issue in London or within sixty-five miles thereof, notes payable on demand, or within six months after date (*l*).

(*g*) See Partn., p. 23, *et seq.*

(*h*) *Ante*, p. 133.

(*i*) As to marine insurers, see Partn. 97.

(*k*) §§ 8 & 29 of this act, and parts of §§ 9 & 23 are repealed by 37 & 38 Vict. c. 96.

Issue of notes.

(*l*) 39 & 40 Geo. 3, c. 28, § 15; 7 Geo. 4, c. 46. See *Broughton v. Manchester and Salford Waterworks Co.*, 3 B. & A. 1; *Bank of England v. Anderson*, 3 Bing. N. C. 589; *Bank of England v. Booth*, 2 Keen, 466; and on appeal, *Booth v. Bank of England*, 6 Bing. N. C. 415; and 7 Cl. & Fin. 509. By a subsequent act (9 Geo. 4, c. 23) the right to issue bills and notes payable on demand was extended to all bankers (except within London or three miles thereof), provided they obtained a licence and gave a security, as required by the act. By 3 & 4 Will. 4, c. 83, § 2, it was made lawful for banking firms of more

than six persons to issue notes payable in London through an agent, or to draw bills or notes upon any agent in London, payable on demand, or otherwise, in London, and for any less amount than 50*l.* Then the legislature retraced its steps, conferring by the act of 3 & 4 Will. 4, c. 98, certain privileges on the Bank of England, and enacting (§ 2) that during the continuance of those privileges no banking firm of more than six persons should issue in London, or within sixty-five miles thereof, bills or notes payable on demand, with a proviso, as to firms carrying on business beyond that limit, in favour of bills and notes, payable through an agent in London, and for not less than 5*l.* Then by the Bank Charter act of 1844 (7 & 8 Vict. c. 32, §§ 10 & 11), it is enacted that no person, other than a banker, who on the 6th of May, 1844,

Upon these statutes, it was held, that a banking company of more than six persons associated for the purpose of issuing notes payable on demand, or within six months after date, was not illegal unless it was proved that the company issued such notes within sixty-five miles of London (*m*). Upon a similar statute relating to Ireland (*n*), it was held, that in order to establish the illegality of a banking company upon the ground that its houses of business had been, from the time of the formation of the company until the commencement of the suit, and then were, at places in Ireland within fifty miles of Dublin, it was necessary to prove the existence of a place of business within that limit for the whole time alleged (*o*). The statutes in question, moreover, have been held only to affect

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Bankers.

was lawfully issuing his own bank-notes, shall issue any bank-notes in any part of the United Kingdom; and that it shall not be lawful for any banker to issue in England and Wales bills or notes payable to bearer on demand; except that it shall be lawful for any banker who was, on the 6th of May, 1844, carrying on the business of a banker in England or Wales, and was then lawfully issuing in England or Wales his own bank-notes under the authority of a licence, to continue to issue such notes to the extent and under the conditions mentioned in the act; and by § 26, it is made lawful for banking firms, though of more than six members, carrying on business in London, or within sixty-five miles thereof, to draw, accept, or endorse bills not payable to bearer on demand. Such is the state of the law on this subject at the present time. The joint effect of the above enactments seems to be that: (1.) The Bank of England can alone issue, in London, or within three miles of it, notes payable to bearer on demand. (2.) Beyond that limit such notes may be issued by bankers who were

lawfully issuing them before May, 1844, under a licence; but by no other bankers; and not, therefore, by any banking firm of more than six persons carrying on the business of bankers within sixty-five miles of London. In other words there are three limits: (1.) London and three miles round, in which the Bank of England has an exclusive monopoly. (2.) The district more than three, but within sixty-five miles of London, in which the monopoly is divided between the Bank of England and banking firms of less than six members, lawfully issuing notes before May, 1844. (3.) The district more than sixty-five miles from London in which the monopoly is divided between the Bank of England and banking firms of six or more or less members, lawfully issuing notes before May, 1844. See further on this subject the note to the Cos. act, 1862, sched. 3, part 2, in the Appendix; *A.-G. v. Birkbeck*, 12 Q. B. D. 605.

(*m*) *Ransford v. Copeland*, 6 A. & E. 482.

(*n*) 6 Geo. 4, c. 42, § 10.

(*o*) *Hughes v. Thorpe*, 5 M. & W. 656.

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partnerships formed for the purpose of carrying on the business of a banker, and not to interfere with the issue of notes by firms not carrying on such business.

By an act which prior to 1857 regulated joint-stock banks in England (7 & 8 Vict. c. 113, § 1), it was not lawful for any company of more than six persons to carry on the trade or business of bankers in England under any agreement or covenant of co-partnership made or entered into on or after the 6th of May, 1844 (*p*), unless by virtue of letters patent to be granted by her Majesty according to the provisions of that act. Any banking company therefore formed since May, 1844, and not under letters patent, was altogether illegal if its members were more than six in number (*q*). But the law on this head has been altered by 20 & 21 Vict. c. 49, and by the Companies act, 1862. The combined effect of those acts apparently is that banking companies of ten or more members formed between May, 1844, and November, 1862, must be registered unless formed under letters patent, but are not illegal by reason of non-registration (*r*), and banking companies of ten or more members formed since November, 1862, must be registered, and are illegal if not registered (*s*).

Chemists.

An incorporated company may carry on business as chemists and druggists if the persons who actually sell and dispense drugs are duly licensed so to do (*t*). The principle of the decision which settled this is applicable to other licensed trades and businesses.

(*p*) See *Wigan v. Fowler*, 1 Stark. 459; *Perring v. Dunston*, Ry. & M. 426.

(*q*) See *O'Connor v. Bradshaw*, 5 Ex. 882. Compare this case with *R. v. Whitmarsh*, 15 Q. B. 600.

(*r*) See 20 & 21 Vict. c. 49, §§ 4, 5 & 12, and the Companies act, 1862,

§ 205, and sched. 3, and the note thereto in the Appendix.

(*s*) Companies act, 1862, § 4, and *ante*, p. 114.

(*t*) *Pharmaceutical Soc. v. London and Provincial Supply Assoc.*, 5 App. Ca. 857, and 5 Q. B. D. 310; reversing 4 ib. 313.

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Sect. 2.

SECTION II.—CONSEQUENCES OF ILLEGALITY.

If a company, when it is formed, will be illegal, any contract to form it must be illegal also. Upon this ground it was held in *Durergier v. Fellowes* (u), that a bond for the payment of money upon the formation by the obligee of an illegal company was invalid.

Consequences
of illegality.

It does not, however, follow that because an agreement to form a company is illegal, those who subscribe to its formation cannot recover back their subscriptions. If money is paid by A. to B. to be applied by him for some illegal purpose, it is competent for A. to require B. to hand back the money if he B. has not already parted with it (x), and the illegal purpose has not been carried out (y). Although, therefore, the subscribers to an illegal company have not a right to an account of the dealings and transactions of that company and of the profits made thereby (z), they have a right to have their subscriptions returned; and even though the moneys subscribed have been laid out in the purchase of land and other things for the purpose of the company, the subscribers are entitled to have that land and those things reconverted into money, and to have it applied as far as it will go in payment of the debts and liabilities of the concern, and then in repayment of the subscriptions. In such cases, no illegal contract is sought to be enforced; on the contrary, the continuance of what is illegal is sought to be prevented.

Effect of illegality on the right to recover back subscriptions.

In *Sheppard v. Ozenford* (a), a company was started for working mines in Brazil. The members subscribed each a

Actions for account.
Sheppard v. Ozenford.

(u) 5 Bing. 248; 10 B. & C. 826; 7 Q. B. D. 548; and the cases in the last note.
and 1 Cl. & Fin. 39. See, also, *Williams v. Jones*, 5 B. & C. 108.

(z) See *Harvey v. Collett*, 15 Sim. 332. Compare the cases in the next note.

(x) See *Taylor v. Lendy*, 9 East, 49; *Varney v. Hickman*, 5 C. B. 271; *Diggie v. Higgs*, L. R. 2 Ex. D. 422; *Hampden v. Walsh*, 1 Q. B. D. 189; *Taylor v. Bowers*, ib. 291. Compare *Great Berlin Steam-boat Co.*, 26 Ch. D. 616.

(y) Compare *Herman v. Juchner*, 15 Q. B. D. 561; *Wilson v. Strugnell*, really illegal, they must be re-

(a) *Sheppard v. Ozenford*, 1 K. & J. 491. See, too, *Butt v. Montaur*, ib. 98; *Sharp v. Taylor*, 2 Ph. 801; *Symes v. Hughes*, 9 Eq. 475; *Taylor v. Bowers*, 1 Q. B. D. 291. If in these cases the companies were

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certain sum and received a sort of scrip certificate specifying the number of shares to which each was entitled. Mines, buildings, plant, and shares were bought, and at a meeting of the subscribers the defendant and another were appointed sole directors and trustees of the property of the association. Disputes having arisen, a bill was filed against the defendant (his co-trustee being dead) by one of the shareholders on behalf of himself and the others for an account of the monies received and paid by the directors, and of the debts of the association, and for payment of those debts out of the assets, and for a division of the profits among the shareholders, and for an injunction to prevent the defendant from selling the property, and for a receiver. It was contended that the company was illegal, and that no relief could be given; but it was held that the defendant as trustee could not dispute the trust on which he had accepted the property; and a demurrer to the bill was overruled and a receiver and manager was appointed (*b*).

Sales of shares
of an illegal
company.

If a company is illegal, shares in it cannot be recognised, and contracts for the sales of such shares are themselves illegal. Therefore, a broker employed to buy shares in an illegal company cannot recover the price he may have paid for them from the person for whom he bought them (*c*); nor can the buyer, if he has paid the broker, and the shares have been bought, recover back any part of the money so paid, although the broker may have been guilty of a fraudulent overcharge (*d*). But if the purchaser of the shares has paid the broker for them, the broker cannot retain the money against the seller (*e*).

Again, as a contract for the sale of shares in an illegal company is itself illegal, it follows that a purchaser of such shares, who may have paid for them, cannot recover back his

garded as modifying the general proposition, that a court of equity will not assist a person to get back property which he has transferred to another for some illegal purpose. See *Brackenbury v. Brackenbury*, 2 J. & W. 391; *Groves v. Groves*, 3 Y. & J. 163.

(*b*) Compare *Sykes v. Beadon*, 11 Ch. D. 170; and other cases noticed

infra, p. 141, note (*i*).

(*c*) *Joseph v. Pebrer*, 3 B. & C. 639. The illegality in this case was apparently treated as obvious.

(*d*) *Buck v. Buck*, 1 Camp. 548.

(*e*) *Bousfield v. Wilson*, 16 M. & W. 185. See, also, *Nicholson v. Gooch*, 5 E. & B. 999; *Tenant v. Elliott*, 1 Bos. & P. 3, and Partn. 107.

money if it should ultimately turn out that the company is no company at all, but a project which has failed (*f*). Bk. I. Chap. 5.
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Again, if a company is illegal it cannot maintain any action in respect of any transaction tainted with illegality. For example, an illegal company cannot prove in liquidation proceedings for a debt due to it (*g*), nor can the trustee of an illegal loan society recover on promissory notes given by the borrowing members to secure the repayment of the money advanced to them by the society (*h*). Actions, &c.,
by companies.

Again, as no Court will lend its assistance towards carrying out an illegal transaction, a member of an illegal association which is regulated by a trust deed cannot maintain an action to have the trusts administered by the Court nor compel the trustees to pay damages for any breach of trust (*i*).

An illegal company cannot be wound up by the Court (*k*), except perhaps at the instance of a creditor ignorant of its illegality (*l*). But if the company is legal, the mere fact that it may have engaged in some illegal transaction and sustained loss does not exclude contribution amongst the members in respect of such loss (*m*). Winding up.

Before quitting the subject of the consequences of the illegality of a company, the risk of criminal prosecution ought to be mentioned. Persons engaged in an illegal business are liable, whether incorporated or not, to be punished criminally (*n*); and even where the object of a company is not Indictment.

(*f*) *Kempson v. Saunders*, 4 Bing. 5.

(*g*) *Ex parte Day*, 1 Ch. D. 699. Compare *Ex parte Poppleton*, 14 Q. B. D. 379, where a company after registration sued in respect of matters which occurred before.

(*h*) *Shaw v. Benson*, 11 Q. B. D. 563; *Jennings v. Hammond*, 9 Q. B. D. 225.

(*i*) *Ottley v. Browne*, 1 Ball & Bea. 360; *Ex parte Mather*, 3 Ves. 373; *Sykes v. Beadon*, 11 Ch. D. 170. In *Smith v. Anderson*, 15 Ch. D. 247, this last decision so far as it declared

the association in question to be illegal was disapproved. Had it been illegal the decision would have been correct.

(*k*) *Padstow Total Loss Assoc.*, 20 Ch. D. 137.

(*l*) See *infra*, book iv., c. 1, § 2.

(*m*) *Longworth's Ex. case*, 1 De G. F. & J. 17, affirming S. C. Johns. 465. See Partn. 103, *et seq.* and *infra*, book iii., c. 2, § 3, and book iv., c. 1, § 11.

(*n*) See the title Conspiracy in Russell on Crimes, and Archbold's Criminal Law.

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illegal, directors and others will do well to bear in mind, that if they wilfully violate the provisions of an act of Parliament they are in strict law guilty of a misdemeanor and liable to be indicted accordingly (o).

(o) See Lord Campbell's observations in *Longworth's Ex. case*, 1 De G. F. & J. 31. As to issuing fraudulent prospectuses, &c., see *ante*, p. 87.

BOOK II.

OF THE RIGHTS AND OBLIGATIONS OF COMPANIES AS
REGARDS NON-MEMBERS.

CHAPTER I.

GENERAL PRINCIPLES OF AGENCY AS APPLIED TO COMPANIES IN THE
COURSE OF FORMATION.SECTION I.—OF THE LIABILITIES OF PROMOTERS AND SUBSCRIBERS
FOR THE ACTS OF EACH OTHER.

It was formerly held that persons engaged in establishing companies were partners; but this doctrine is clearly not law at the present day (*a*). Associations for forming partnerships, not being partnerships, it follows that persons who hold themselves out as members of such associations do not thereby hold themselves out as partners, either with each other or with their co-members. From this it results further that, in order that a person engaged with others in forming a company may be liable for their acts, he must have authorised them to do those acts as his agent, or have ratified such acts. The authority conferred may be general or special; but unless it is held—which it is not (*b*),—that the pursuit of a common object by persons in concert gives each an authority to act as the agent of the others in whatever he thinks tends to the attainment of that object, it must be held that no one is liable for the acts of

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(*a*) Partn. 23, where *Holmes v. Higgins*, 1 B. & C. 74; *Lucas v.*

Beach, 1 Man. & Gr. 417; and *Burnett v. Lambert*, 15 M. & W. 489, are explained. (*b*) See, in addition to the cases cited below, *Herauld v. Leaf*, 5 C. B. 157.

Bk. II. Chap. 1. the others except so far as he has, in some definite manner,
 Sect. 1. — constituted them his agents or ratified what they have done.

Subscribers not
 liable for acts
 of promoters.

The cases of *Bourne v. Freeth* (c), *Dickinson v. Valpy* (d), and *Fox v. Clifton* (e), are distinct authorities for the proposition that the allottees of shares in an unformed company are not, as such, liable for the acts of its managers. Nor are they liable for the acts of each other unless authority to do the acts can be proved (f).

Promoters of
 companies not
 each other's
 agents.

Reynell v. Lewis,
 Wyld v. Hop-
 kins.

The doctrine that the promoters of companies are not, as such, each other's agents, and liable for each other's acts, appears to have been first distinctly laid down by the Court of Exchequer in *Reynell v. Lewis* and *Wyld v. Hopkins* (g), which were actions brought by advertising agents and map makers against members of the provisional committees of two railway companies. In each of these cases prospectuses and advertisements had been issued by the provisional committee, and the name of the defendant, as a member of the committee, was therein announced to the public. In each case the plaintiff had been directly employed by the solicitor to the committee, and in neither case had the defendant authorised his credit to be pledged to any one, except so far as his being a member of the committee, and knowing what was going on, was to be regarded as conferring an authority to that effect. In both cases the jury found verdicts for the plaintiffs. In both, however, the Court granted new trials, and (in a judgment well worthy of attentive perusal) it was distinctly laid down, that the members of provisional committees are not partners; that they are not even *prima facie* each other's agents; and that, in order to render any member liable for the acts of the others, it is incumbent upon those who assert that such liability exists, to prove, to the satisfaction of a jury, the existence of an authority emanating from the member in question to the others to bind him. At the same time it was as distinctly laid down

(c) 9 B. & C. 632.

(d) 10 B. & C. 128.

(e) 6 Bing. 776; and 9 ib. 115.

(f) *Wood v. Argyll*, 6 Man. & Gr.
 928; *Hamilton v. Smith*, 5 Jur.
 N. S. 32; *Hutton v. Thompson*, 3

H. L. C. 161; *Bright v. Hutton*, ib.
 368.

(g) Both in 15 M. & W. 517.
 Compare *Maddick v. Marshall*, 16
 C. B. N. S. 387, and 17 ib. 829.

that a general authority, conferred by a defendant on his co-committee men or any other person, and sufficient to make their acts his, might be properly inferred from public announcements, and that a special authority for each act was by no means essential to render him liable for it (*h*). But no such general authority is to be assumed from the mere announcement that several persons are acting together, and endeavouring to get up a company.

The principles laid down above have been since constantly recognised and acted upon, as will be seen by reference to the numerous cases cited below, in many of which the defendant was a member, not only of a provisional committee, but of a managing committee also (*i*). The appointment, by a provisional committee, of a managing committee, does not *per se* render the members of the former liable for the acts of the latter (*k*).

It follows from the same principle that the acts, statements, and letters of one member of a committee formed for getting up a company, cannot prejudice any other member, unless the first can be shown to be the agent of the last by some other circumstance than their common object; nor is the receipt of deposits by one member equivalent to a receipt of them by the others (*l*).

(*h*) See, accordingly, *Collingwood v. Berkeley*, 15 C. B. N. S. 145; *Maddick v. Marshall*, 16 ib. 387, and 17 ib. 829; *Barnett v. Lambert*, 15 M. & W. 489; *Higgins v. Hopkins*, 3 Ex. 163; *Lake v. Argyll*, 6 Q. B. 477; *Maitlands' case*, 4 De G. M. & G. 769. See *Newton v. Belcher*, 12 Q. B. 921, and *Newton v. Liddiard*, ib. 925, as to mistaken admissions of liability. See as to contribution amongst promoters, *Lefroy v. Gore*, 1 Jo. & Lat. 571.

(*i*) *Bailey v. Macaulay*, 13 Q. B. 815; *Barker v. Stead*, 3 C. B. 946; *Rennie v. Wynn*, 4 Ex. 691; *Nervins v. Henderson*, 5 Ra. Ca. 684; *Wood v. Argyll*, 6 Man. & Gr. 928; *Patrick v. Reynolds*, 1 C. B. N. S. 727; *McEwan v. Campbell*,

2 McQu. 499; *Rennie v. Clarke*, 5 Ex. 292; *Bell v. Francis*, 9 C. & P. 66; *Kerridge v. Hesse*, 9 C. & P. 200; *Barrett v. Blunt*, 2 C. & K. 271; *Barker v. Lyndon*, ib. 651; *Giles v. Cornfoot*, ib. 653; *Giffin v. Beverley*, ib. 648; *Bremner v. Chamberlayne*, ib. 569.

(*k*) *Cooke v. Tonkin*, 9 Q. B. 936; *Williams v. Pigott*, 2 Ex. 201; *Darvson v. Morrison*, 5 Ra. Ca. 62.

(*l*) See *Burnside v. Dayrell*, 3 Ex. 224; *Rennie v. Wynn*, 4 Ex. 691; *Watson v. Charlemont*, 12 Q. B. 856; *Drouet v. Taylor*, 16 C. B. 671. Compare *Rennie v. Clarke*, 5 Ex. 292; *Wontner v. Shairp*, 4 C. B. 404; *Maddick v. Marshall*, 16 C. B. N. S. 387, and 17 ib. 829.

Members of provisional or managing committees.

Acts of one no evidence against the others.

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SECTION II.—OF THE LIABILITIES OF COMPANIES FOR THE ACTS OF THEIR PROMOTERS.

Liabilities of companies for acts of their promoters.

With respect to companies, the general principle is that no member of an unincorporated company is liable to non-members for acts done before he became a member, unless he has rendered himself liable for them by some contract between him and them (*m*). As regards incorporated companies, it is obvious that they can do no act nor have any agent before they exist themselves: whence it follows that an incorporated company is not liable for the acts and engagements of its promoters, unless it is made so by its charter, act of Parliament, or deed of settlement, or unless it has become so by what it has done since its formation (*n*).

Where liability is imposed by constitution of company.

When a company is formed by act of Parliament, the subscribers are usually bound by the terms of the act obtained by the promoters of the company (*o*); and if that act says that the company is to be liable for debts and liabilities incurred before its formation, of course it will be so liable, and the only question which can arise in such a case is as to the true construction of the act, and the remedy upon it. The Companies Clauses Consolidation act renders companies governed by it liable for the expenses of obtaining their special act (*p*).

Statutory debts.

The statutory obligation thus imposed is a legal obligation enforceable (before the Judicature acts) by an action of debt (*q*); and such action could be sustained, although the plaintiff was a member of the company (*r*).

Person to sue.

The common form of enactment which imposes the obligation usually leaves in doubt the proper person to enforce it. This point, however, was settled by *Wyatt v. Metropolitan Board of Works* (*s*); it was there (in effect) decided that only

(*m*) Partn. 201, *et seq.*

(*n*) See *infra*, c. 2, § 3, as to this. As to the effect of incorporation in discharging sureties, see *Dance v. Girdler*, 1 N. R. 34. As to provisional contracts for the purchase of lands by the promoters of railway companies, see 27 & 28 Vict. c. 121, § 3.

(*o*) See as to this, *ante*, p. 23, 24.

(*p*) 8 & 9 Vict. c. 16, § 65; 27 & 28 Vict. c. 121, § 3, *et seq.*

(*q*) *Tilson v. Warwick Gas Light Co.*, 4 B. & C. 962; *Hitchins v. Kilkeny Rail. Co.*, 9 C. B. 536.

(*r*) *Carden v. General Cemetery Co.*, 5 Bing. N. C. 253.

(*s*) 11 C. B. N. S. 744.

those persons can sue the company upon a clause in the usual form who have incurred expense or bestowed time and trouble in forming the company and in getting its act passed, and who have no other paymasters. For example, solicitors or parliamentary agents who have thus acted, and who have not been employed by other people who are liable to them, can sue the company on such clauses (*t*); but solicitors or parliamentary agents who have been employed by the promoters of the company's act, and who are entitled to be paid by them, cannot sue the company on such clauses (*u*).

It has also been decided that a person who has agreed with the promoters of a company's bill in Parliament to work for nothing and not to charge the company for his services, cannot sue the company for those services, although the company's act contained such a clause as is here referred to (*x*).

Again, notwithstanding such a clause, claims which are illegal on grounds of public policy cannot be enforced, *e.g.*, a claim by a peer for a sum of money agreed to be paid for his vote (or withdrawal of opposition) in Parliament (*y*), or a claim which is inconsistent with representations made to Parliament and inducing it to pass the bill (*z*).

Again, a company's articles of association or deed of settlement only affect the members *inter se* or the parties to the deed, and a clause adopting an agreement made by the promoters does not of itself amount to a contract on which the company can be sued by a person with whom the company has not, in fact, entered into an agreement (*a*); and the fact that

Adoption by the company.

(*t*) *Shaw's claim*, 10 Ch. 177, and see *ante*, note (*q*); *Re Tillard*, 3 De G. J. & Sm. 519.

(*u*) *Kent Tramways Co.*, 12 Ch. D. 312; *Wyatt v. Metrop. Board of Works*, 11 C. B. N. S. 744; *Skegness Tramway Co.*, W. N. 1888, 253. *Kensington Station Act*, 20 Eq. 197, is not consistent with these cases.

(*x*) *Savin v. Hoylake Rail. Co.*, L. R. 1 Ex. 9. Observe that the terms of the agreement were admitted by the demurrer.

(*y*) *Earl of Shrewsbury v. North*

Staff. Rail. Co. 1 Eq. 593, noticed *infra*, p. 153.

(*z*) *Spackman v. Lattimore*, 3 Giff. 16.

(*a*) *Howard v. Patent Ivory Co.*, 38 Ch. D. 156; *Empress Engineering Co.*, 16 Ch. D. 125; *Northumberland Avenue Hotel Co.*, 33 Ch. D. 16; *Rotherham Alum, &c., Co.*, 25 Ch. D. 103; *Melhado v. Porto, Alegre, &c., Rail. Co.*, L. R. 9 C. P. 503, where the directors had an option. And see *Boston Deep Sea Fishing Co. v. Ansell*, 39 Ch. D. 339.

Bk. II. Chap. 1. he is a member of the company makes no difference (*b*). But
 Sect. 2. — such a clause may create a trust for the plaintiff which he can enforce (*c*); and if the clause entitles the promoters with whom the agreement was made to be indemnified against the claim of the plaintiff he can sue them and they can bring in the company as third parties (*d*).

Company taking the benefit of the agreement.

The circumstance that a company has had the benefit of an agreement entered into by its promoters is not of itself sufficient to render the company liable to be sued upon it (*e*). There may, however, be cases in which it may be inequitable to allow a company to hold and enjoy property discharged from those obligations which were contracted by the promoters who enabled the company to acquire it (*f*).

Ordinary rule in other cases.

But in the absence of special circumstances, such as those above alluded to, a company is not liable for what may have been done by its promoters. Thus, it was held that a company formed under the repealed act, 7 & 8 Vict. c. 110, was not liable to pay for the services of agents employed by its promoters (before provisional registration) for purposes connected with the establishment of the company (*g*); and that agreements entered into after provisional but before complete registration, only bound the company when they were expressly made binding by the act itself (*h*).

(*b*) *Broune v. La Trinidad*, 37 Ch. D. 1; *Eley v. Positive Ass. Co.*, L. R. 1 Ex. D. 20 & 88, in which § 16 of the Companies act, 1862, is considered; and see *Wheal Buller Consols*, 38 Ch. D. 42.

(*c*) See *Touche v. Metropolitan Rail. Co.*, 6 Ch. 671; *Terrell v. Hutton*, 4 H. L. C. 1091; *Parsons v. Spooner*, 5 Ha. 102; *Wilkins v. Robuck*, 4 Drew. 281; *Hopkinson's case*, 7 De G. M. & G. 193; *Gandy v. Gandy*, 30 Ch. D. 67, per Cotton, L.J.

(*d*) R. S. C. order 16, r. 48. See the last three notes as to the rights of the plaintiff against the company.

(*e*) See the cases in note (*d*), and *Ennis v. West Clare Rail. Co.*, 15 L.

R., Ir. 180, where promoters sought to make the company pay interest on money borrowed in order to make the usual Parliamentary deposit.

(*f*) See *infra*, p. 149, and c. 5.

(*g*) *Hutchison v. Surrey Gas Co.*, 11 C. B. 689; and 3 Car. & Kir. 45.

(*h*) *Payne v. N. S. Wales Co.*, 10 Ex. 283; *Gunn v. Lond. and Lancashire Fire Insur. Co.*, 12 C. B. N. S. 694. These cases turned on 7 & 8 Vict. c. 110, §§ 23 & 25, as to which, see also, *Taylor v. Crowland Gas Co.*, 10 Ex. 288, note; *Terrell's case*, 2 Sim. N. S. 126; *Lloyd's case*, 1 ib. 248. *Terrell's case* was reversed on appeal, but the principle in which it was decided below is

In cases of this description the promoters themselves are liable on the contracts entered into by themselves (*i*), but not the company. Moreover, as will be seen hereafter, a company cannot ratify a contract made by its promoters before its own existence (*k*). At the same time, an agreement by a company to do what its promoters have undertaken it shall do, may obviously be entered into, and such an agreement, if entered into, and if not *ultra vires*, will be binding on the company. This appears to have been the true *ratio decidendi* in *Browning v. Great Central Mining Company* (*l*), in which a company registered under the Companies act of 1856 was held liable to pay the wages of a person appointed by the promoters of the company to be the manager of the company's works. The company when formed retained the manager in its service, and there were other circumstances warranting the inference that the company had appointed him its manager, although there was no evidence of any formal appointment, as required by the articles of association. The jury having found a verdict for the manager, the Court declined to disturb it. The salary sued for appears to have been calculated from a period anterior to the registration of the company, but upon this point there is some obscurity.

The difficulty of holding companies bound by the acts of their promoters has been felt as much in equity as at law (*m*); but where a company has acquired property or exercised rights under an agreement entered into with its promoters, there is a strong tendency to treat such agreement as binding on the

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Why companies
are not bound
by the acts of
the promoters.

Browning v.
Great Central
Mining Com-
pany.

Liability in
equity.

not impeachable. See *Terrell v. Hutton*, 4 H. L. C. 1091.

(*i*) *Kelner v. Baxter*, L. R. 2 C. P. 174; *Scott v. Lord Ebury*, ib. 255;

Lake v. Argyll, 6 Q. B. 477; *Barton v. Hutchinson*, 2 Car. & K. 712; *Cullen v. O'Meara*, Ir. Rep. 5 Com. L. 640.

(*k*) See the cases in note (*a*), *supra*, and *Wilson v. Tummam*, 6 Man. & Gr. 236; *Gunn v. London and Lancashire Fire Insur. Co.*, 12 C. B. N. S. 694; *Kelner v. Baxter*, L. R. 2 C. P. 174; *Scott v. Lord Ebury*, ib. 255; *Spiller v. Paris Skating Rink Co.*, 7 Ch. D. 368, is overruled by later decisions referred to in note (*a*).

(*l*) 5 H. & N. 856. See, also, *Pilbrow v. Pilbrow's Atmospheric Rail. Co.*, 5 C. B. 440; and *Boston Deep Sea Fishing Co. v. Ansell*, 39 Ch. D. 339, where there was a contract by the company with the plaintiff.

(*m*) See the cases in the next two notes; and as to contracts under seal, *Pickering's claim*, 6 Ch. 525.

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Sect. 2.

Edwards v.
Grand Junction
Railway Com-
pany.

company, provided the agreement is one by which the company would have been bound if the agreement had been entered into on its behalf after its formation (*n*). The leading case on this subject is *Edwards v. The Grand Junction Railway Co. (o)*, in which an agreement between the trustees of a turnpike road and the promoters of a railway company was entered into, to the effect that the trustees should withdraw their opposition to the company's bill, and that the company should, if its bill passed, carry the turnpike road over a bridge of certain dimensions. The trustees withdrew their opposition, the bill passed, and the company refused to perform the agreement. An injunction to restrain the company from violating the agreement was granted both by Vice-Chancellor Shadwell and by Lord Cottenham, on appeal. Lord Cottenham, in the course of his judgment, said :—

Lord Cotten-
ham's reasoning.

" It cannot be denied that the act of Moss (the projector who signed the agreement) was the act of the projectors of the railway ; it is therefore the agreement of the parties who were seeking an act of incorporation, that, when incorporated, certain things should be done by them. But the question is, *not whether there be any binding contract at law, but, whether this Court will permit the company to use their powers under the act, in direct opposition to the arrangement made with the trustees prior to the act upon the faith of which they were permitted to obtain such powers.* If the company and the projectors cannot be identified, still it is clear that the company have succeeded to, and are now in possession of, all that the projectors had before ; they are entitled to all their rights, and subject to all their liabilities. If any one had individually projected such a scheme, and in prosecution of it had entered into arrangements, and then had sold and assigned all his interest in it to another, there would be no legal obligation between those who had dealt with the original projector and such purchaser ; but in this Court it would be otherwise. So here, as the company stand in the place of the projectors they cannot repudiate arrangements into which such projectors had entered ; *they cannot exercise the powers given by Parliament to such projectors in their corporate capacity, and at the same time refuse to comply with those terms upon the faith of which all opposition to their obtaining such powers was withheld.*

(*n*) This condition is essential. See *Shrewsbury v. North Staffordshire Rail. Co.*, 1 Eq. 593, noticed *infra*, p. 153.

(*o*) 1 M. & Cr. 650, affirming S. C. 7 Sim. 337. See, also, *Petre v. The Eastern Counties Rail. Co.*, 1 Ra. Ca. 462, and *Stanley v. The*

Chester and Birkenhead Rail. Co., ib. 58, and 9 Sim. 264, affirmed 3 M. & Cr. 773. Compare *Aldred v. North Midland Rail. Co.*, 1 Ra. Ca. 404, where the terms of the agreement were held insufficient to preclude the company from doing what was complained of.

The case of *The East London Waterworks v. Bailey* was cited to prove that, B. II. Chap. 1
save in certain excepted cases, the agent of a corporation must, in order to Sect. 2.
bind the corporation, be authorised by a power of attorney; but it does not
therefore follow that corporations are not to be affected by equities, whether
created by contract or otherwise, affecting those to whose position they
succeed, and affecting rights and property over which they claim to exercise
control. What right have the company to meddle with the road at all?
The powers under the act give them right; but before that right was so conferred,
it had been agreed that the right should only be used in a particular manner.
Can the company exercise the right without regard to such agreement? I am
clearly of opinion that they cannot."

The passages in italics contain, as Lord Cottenham himself Theory of this
explained in a subsequent case (p), the true principle on which case.
Edwards v. Grand Junction Railway Co. was decided, and
may be supported. In fact, the right of the plaintiff in these
cases is not based upon the notion that there is any contract
between him and the company, but upon the principle that as
the company obtained the power to interfere with him upon
certain terms, it ought not to be allowed to exercise its powers
to his prejudice in violation of those terms.

The propriety of this decision has, however, been questioned Doubts as to
and denied more than once in the House of Lords on the this case.
ground that persons who take shares on the faith of a com-
pany's act of Parliament cannot be justly subjected to any
liabilities not disclosed therein or contracted by the company
after its formation (q). At the same time, the decision itself
has not been overruled; and although Lord Cottenham's
reasoning would apply to all contracts, whether *ultra vires* or
intra vires, and is open to objection on that account, yet as
regards contracts of the latter class, the decision in *Edwards*
v. The Grand Junction Railway Co. may, it is conceived, still
be regarded as unimpeached (r). This view is supported by

(p) *Greenhalgh v. Manchester and* 654; *Shrewsbury v. North Stafford-*
Birmingham Rail. Co., 3 M. & Cr. shire Rail. Co., 1 Eq. 593, *infra*, p.
790, 791. 153.

(q) See *Preston v. Liverpool and* (r) See *Bedford Rail. Co. v. Stanley*,
Manchester Rail. Co., 5 H. L. C. 2 J. & H. 746, where it was con-
605; *Caledonian and Dumbarton-* sidered that the company was bound
shire Rail. Co. v. The Magistrates by the agreement sued upon. See
of Helensburgh, 2 Macqueen, 391; also, *Lindsay v. The Great Northern*
Leominster Canal Co. v. Shrewsbury *Rail. Co.*, 10 Ha. 679.
and Hereford Rail. Co., 3 K. & J.

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Sect. 2.

*Williams v. St.
George's Harbour
Company.*

the judgment of the Lords Justices in *Williams v. The St. George's Harbour Co. (s)*. There the promoters of a railway company had entered into an agreement with an owner of land through which the proposed railway was to pass, for the purchase of his land on certain terms. The landowner, who up to that time had opposed the scheme, agreed to withdraw, and he accordingly did withdraw his opposition. The company obtained its act, took the land in question, but declined to abide by the terms of the contract of sale; it had, however, so far recognised that contract, that it had allowed judgment in an action for its breach to be entered up against itself. This recognition of the contract was held sufficient to render it binding on the company, whatever might have been the case had there been no such recognition.

Cases to which
*Edwards v.
Grand Junction
Railway Com-
pany* does not
apply.

It follows from the principle on which *Edwards v. The Grand Junction Railway Co.* was decided, that if the promoters of a company enter into an agreement with a person, and the company, after its formation, does not exercise its powers to his prejudice, he can no more enforce the agreement against the company on equitable than on legal grounds. This was all that was really decided by the House of Lords in *Preston v. Liverpool, Manchester, &c., Railway Co. (t)*. There the company did not take the plaintiff's land, and was therefore held not bound to pay for it, although the promoters had agreed to pay him a large sum for his land if he withdrew his opposition to their bill, which he did. The plaintiff had nothing but the agreement to rely upon, and even according to *Edwards v. The Grand Junction Railway Co.*, this alone is not sufficient (u).

*Preston v. Liver-
pool, &c., Rail-
way Company.*

Agreements^s
which are
ultra vires.

Again, if the contract of the promoters is one which would be *ultra vires* if entered into by the company after its formation, such contract, even if attempted to be ratified by the company when formed, cannot bind the company. For example, agreements by the promoters of a company that the

(s) 2 De G. & J. 547, varying the S. C. 24 Beav. 339.

(t) 5 H. L. C. 605, affirming 17 Beav. 114. See the same case on demurrer, 1 Sim. N. S. 586.

(u) A similar observation applies to *Caledonian, &c., Rail. Co., v. Magistrates of Helensburgh*, 2 Macquhen, 391.

company, when formed, shall apply its funds to purposes for which they are not subscribed, clearly do not bind the company. -- Nor can the principle of *Edwards v. The Grand Junction Railway Co.* be applied to agreements of this description. In *The Earl of Shrewsbury v. North Staffordshire Railway Co.* (r), an agreement was entered into first by the promoters of a railway company, and afterwards by the company itself, to pay a peer 20,000*l.* for his countenance and support in obtaining the company's act, and also to compensate him for such land as the company should take or injuriously affect. It was held that this agreement was *ultra vires* and could not be enforced against the company, although under its statutory powers it took land belonging to that peer (y).

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Sect. 2.

Shrewsbury v.
North Stafford-
shire Railway
Company.

(x) 1 Eq. 593, where all the cases were most carefully examined.

(y) This is by no means the only authority for saying that agreements by the promoters of a company to the effect that the company shall pay a large sum of money in consideration of the withdrawal of opposition to its bill in Parliament are altogether *ultra vires*. See *Preston v. Liverpool, Manchester, &c., Rail. Co.* 5 H. L. C. 635. The agreements in *Petre v. Eastern Counties Rail. Co.*, 1 R. C. 642, and *Stanley v. Chester and Birkenhead Rail. Co.*, ib. 58, and 9 Sim. 264, and 3 M. & Cr. 773,

were of such an extravagant nature that they might well be held *ultra vires*. In the first of these cases 120,000*l.*, and in the latter 20,000*l.*, were agreed to be paid for the withdrawal of opposition to a bill, and for compensation for the land which might be taken and injuriously affected. It does not, however, follow that such agreements are in any other respects illegal; and it seems that they are not, if the person withdrawing his opposition is personally interested in opposing the bill. See *Simpson v. Lord Howard*, 9 Cl. & Fin. 61; 10 A. & E. 793 & 807; 3 M. & Cr. 97.

Agreements for
withdrawal of
opposition to bill
in Parliament.

CHAPTER II.

GENERAL PRINCIPLES OF AGENCY AS APPLIED TO COMPANIES
AFTER THEIR FORMATION.

Bk. II. Chap. 2.

Agents of com-
panies which
are formed.

THE circumstance that a joint-stock company consists of a large and fluctuating body of members, is itself sufficient to prevent the application to companies of the ordinary partnership rule, that each member of a firm is its agent, for the purpose of carrying on its business. All persons dealing with companies are supposed to know this, and to know that the management of their affairs is entrusted to a few individuals who, and who alone, have power to act for them (*a*).

Company not
bound by the
acts of its
members.
Burnes v.
Pennell.

Burnes v. Pennell (*b*), in the House of Lords, is a good illustration of the doctrine that a company is not, like an ordinary partnership, responsible for the acts of its members. In that case a shareholder in a company, who was also its solicitor and law agent, induced a person, by false representations as to the flourishing state of the company, to buy shares in it. The purchaser being afterwards sued for calls, relied upon the fraud as a defence, and he also sought to have the transfer of the shares to him cancelled. But it was held, that it was no part of the business of the company's solicitor to make any representations on its behalf as to its condition; and that, although he was himself a shareholder, his statements were not the statements of the company, he not being, in his character of shareholder, an agent of the company for any purpose whatever.

(*a*) See *Ridley v. The Plymouth Grinding and Baking Co.*, and *Kingsbridge Flour Mill v. Same*, 2 Ex. 711; *Smith v. Hull Glass Co.*, 11 C. B. 897; *Ernest v. Nicholls*, 6 H. L. C. 418, *per* Lord Wens-

leydale; *Burnes v. Pennell*, 2 H. L. C. 497.

(*b*) 2 H. L. C. 497. See, also, *Barnett, Hoares & Co. v. The South London Tramways Co.*, 18 Q. B. D. 815.

Whether the company is incorporated or not, whether it is a chartered company, a registered company, a company merely empowered to sue and be sued by a public officer, or a company of some other description, is of no consequence whatever as regards the question here alluded to; the same reason applies to them all (c).

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Sect. 1.

SECTION I.—WHO ARE AGENTS.

1. *Directors.*

The directors then of a company, and such other persons, if any, as may be entrusted with the management of its affairs, are its only agents; and by the acts of its directors a company is bound, provided those acts are within the limits of their real or apparent authority; and provided the person dealing with them has had no notice of the irregularity (if any) of their proceedings (d). Moreover the power of directors to bind the company is not affected by any irregularity in their own appointment if the person dealing with them acted *bonâ fide* and without notice of such irregularity (e); although such irregularity may prevent the company from enforcing what they have purported to do as agents of the company (f).

Directors the
agents of the
company.

But it by no means follows that each director is the agent of the company. Speaking generally, it is clear that if a person appoints six others to be his agents jointly, he is not bound by the acts of any five, four, three, two, or one of them. Therefore, if the affairs of a company are entrusted to the management of not less than a fixed number of directors, it is *primâ facie* not bound by the acts of a fewer number. It has been held, for example, that two out of several directors had no

Acts done by
less than the
proper number
of directors.

(c) See Lord Campbell's judgment in *Burnes v. Pennell*, 2 H. L. C. 520, *et seq.*, and *Bramah v. Roberts*, 3 Bing. N. C. 963.

(d) See *infra*, as to this.

(e) *County Life Ass. Co.*, 5 Ch. 288.

(f) *Garden Gully Co. v. McLister*, 1 App. Ca. 39; and cases quoted, notes (y) and (z) below.

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power to waive a forfeiture (*g*), or to allot shares (*h*); that four out of five had no power to compromise a large debt due to the company and to indemnify the debtor against certain bills of exchange (*i*); that six out of eight had no power to bind the company to pay for services rendered pursuant to their order (*k*); that four out of five had no power to bind the company by an agreement for a lease (*l*); that the representations of one director could not be regarded as those of the company (*m*); that notice to one director did not affect the company (*n*); that instructions to sell land given to an auctioneer by one director and by the solicitor of a company, could not, without further evidence, be considered as having been given by the company (*o*); that one liquidator out of four could not bind the company by a bill (*p*).

Majority of
board.

But it must not be supposed that the majority of a duly convened and duly constituted board of directors cannot act for the whole board and bind the company. Business could not be carried on if such a rule were to prevail. The decisions referred to above do not apply to such a case.

Delegation of
authority.

Directors being themselves agents, are *prima facie* unable to delegate their authority to one or more of their own number (*q*); but in many companies, and in all which are governed by Table A. in the schedule to the Companies act, 1862, the directors are authorised to delegate their powers to a few, and even to one only (*r*), of themselves, and such a delegation may be presumed if one or two directors act for the company in a matter incidental to its legitimate business (*s*).

(*g*) *Card v. Carr*, 1 C. B. N. S. D. 593.
197.

(*h*) *Howard's case*, 1 Ch. 561; compare *Ex parte Smith*, 39 Ch. D. 546.

(*i*) *Kirk v. Bell*, 16 Q. B. 290.

(*k*) *Brown v. Andrews*, 13 Jur. 938.

(*l*) *Ridley v. Plymouth Grinding Co.*, 2 Ex. 711.

(*m*) *Holt's case*, 22 Beav. 48; *Nicol's case*, 3 De G. & J. 387. But see as to reports made by the chairman to a meeting of shareholders, *Derby Mining Co.*, 22 Ch.

(*n*) *Ex parte Credit Foncier and Mobilier of England*, 7 Ch. 161.

(*o*) *Moody v. Lond. and Brighton Rail. Co.*, 1 B. & Sm. 290.

(*p*) *Ex parte Birmingham Banking Co.*, 3 Ch. 651.

(*q*) *Cartmell's case*, 9 Ch. 691; *Howard's case*, 1 Ch. 561; *Ex parte Birmingham Banking Co.*, 3 Ch. 651; *Cook v. Ward*, 2 C. P. D. 255.

(*r*) *Taurine Co.*, 25 Ch. D. 118.

(*s*) *Totterdell v. Farcham Brick Co.*, L. R. 1 C. P. 674; *Lyster's*

Where the power to act for a company is vested in a given number of directors, and that number does not exist, and there is no provision in the company's regulations enabling the directors to act, notwithstanding a vacancy in their board (*t*), the directors who do exist cannot act for the company (*u*). At the same time, if a company does in fact carry on business by certain persons who are allowed by the shareholders to act as if they were the duly constituted directors of the company, the company will be bound by the acts of such persons in all ordinary matters of business, in favour of all persons *bonâ fide* dealing with them, without notice of their insufficiency in number or defective appointment (*x*). But as to matters out of the ordinary course of business the company will not be bound. In *Kirk v. Bell* (*y*), where a company's deed of settlement contained a clause to the effect that there should not be less than five directors, and that three should be a quorum for the transaction of ordinary business, and where there were in fact only four directors, it was held that a deed executed by these four on behalf of the company did not bind it, the deed being of an unusual description, and not a matter of ordinary business. In like manner, in *In re Alma Spinning Company, Bottomley's case* (*z*), where the articles of association provided that the business of the company should be conducted by not less than five nor more than seven directors, it was held that these words were imperative, and not merely directory, and consequently a call made by the directors, when their number had been reduced to four, and a resolution passed by them forfeiting a member's shares for non-compliance with the call were invalid.

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Where the proper number of directors does not exist.

Kirk v. Bell.

Bottomley's case.

Closely connected with the present subject is the question

case, 4 Eq. 233; *Ex parte The Contract Corporation*, 3 Ch. 105 & 116.

(*t*) *Scottish Petroleum Co.*, 23 Ch. D. 413; and see *York Tramways Co. v. Willows*, 8 Q. B. D. 685.

(*u*) As to giving notices to hold meetings of shareholders, *Harben v. Phillips*, 23 Ch. D. 14; of directors, *Ex parte Smith*, 39 Ch. D. 546. Compare *Browne v. La Trinidad*, 37 Ch. D. 1.

(*x*) See *Mahony v. East Holyford Mining Co.*, L. R. 7 H. L. 869; *Thames Haven Dock Co. v. Rose*, 4 Man. & Gr. 552, a case relating to calls where the court was asked to set aside a judgment.

(*y*) 16 Q. B. 290.

(*z*) 16 Ch. D. 681; see, also, *Howbeach Coal Co. v. Teague*, 5 H. & N. 151; *London and Southern Counties, &c., Land Co.*, 31 Ch. D. 223.

Bk. II. Chap. 2. whether an act which ought to be done by a *Board* of directors
Sect. 1. --- is valid when done by the requisite number but not at a board

Acts done by
directors but
not by a Board.

meeting. There certainly is authority for answering this question in the negative (*a*); and as between the company and any person having notice of the irregularity, that answer is probably correct. But as between the company and persons having no notice of the irregularity, the preponderance of authority is in favour of holding the company bound (*b*).

Quorum must
be present.

Moreover, in order that a majority of persons present at a meeting may exercise the powers of a meeting, the meeting itself must not be too small (*c*), nor summoned at too short notice (*cc*).

Commencement
and termination
of directors'
power to bind
the company.

Primâ facie, the power of the directors of a company to bind it commences at the date of its formation or of their appointment; but the commencement of that power may be postponed to a later period; and if it is, their previous acts will not bind the company to a person dealing with them with notice express or implied of their want of authority (*d*). Again in conformity with the general principles of agency, the directors of a joint-stock company continue to have power to bind it, not only as long as their appointment lasts, but also as long as its termination is unknown to those with whom they have been accustomed to deal. But this proposition must be taken in connection with the rule that persons dealing with companies are deemed to have notice of the contents of companies' acts of Parliament, charters, and registered deeds of settlement; and consequently, if it is sought to make a company liable for the acts done by its directors after their retirement from

(*a*) *Bosanquet v. Shortridge*, 4 Ex. 699; *D'Arcy v. Tamar, &c., Rail. Co.*, L. R. 2 Ex. 158, and *Ex parte Smith*, 39 Ch. D. 546.

(*b*) See *Mahony v. East Holyford Mining Co.*, L. R. 7 H. L. 869; *Collie's claim*, 12 Eq. 246; *County Life Ass. Co.*, 5 Ch. 288. In *Collie's claim* it was said, but surely not correctly, that *D'Arcy v. Tamar, &c., Rail. Co.*, turned on a technical rule of pleading. See, further, the cases as to irreg-

cited *infra*.

(*c*) *London and Southern Counties Land Co.*, 31 Ch. D. 223; *Howbeach Coal Co. v. Teague*, 5 H. & N. 151; *Ex parte Morrison*, De Gex, 539; and compare *York Tramways Co. v. Willows*, 8 Q. B. D. 685.

(*cc*) *Ex pte Smith*, 39 Ch. D. 546; *Browne v. La Trinidad*, 37 Ch. D. 1.

(*d*) See *Peirce v. Jersey Waterworks Co.*, L. R. 5 Ex. 209. Compare *Touche v. Metropolitan Rail., &c., Co.*, 6 Ch. 671.

office, it must be ascertained whether, upon the principle Bk. II. Chap. 2. Sect. 1. — alluded to, there was or was not notice of the cessation of — their authority to act for the company (*e*).

The extent to which directors are agents of each other and liable for each others acts will be noticed hereafter (*f*).

2. Agents who are not directors.

The directors of a company are not necessarily its only Agents who are not directors. agents. It may, and indeed generally must, be competent for them to employ other persons to act for the company; and where this is the case, those persons will also have power to bind the company within the limits of their agency but not further (*g*). In dealing with the agents of companies there is great danger of finding their authority altogether repudiated, on the ground that they have not been duly appointed. Now, although directors have no implied power to delegate the authority conferred upon themselves, yet they must necessarily employ persons not only to do the every-day work of the company, but also to transact special branches of business requiring peculiar knowledge. Upon principle, therefore, where persons are in fact employed by directors to transact business for a company the authority of those persons to bind a company within the scope of their employment cannot be denied by the company, unless—1, their employment was altogether beyond the power of the directors; or unless, 2, the persons employed have been appointed irregularly, and those who dealt with them had notice of the irregularity (*h*). Where the power to appoint an agent for a given purpose exists, irregularity in its exercise is immaterial to a person dealing with the agent *bonâ fide* and without notice of the irregularity in his appointment. The following cases are important on this point.

In *Smith v. The Hull Glass Company* (*i*), it was held that a Smith v. Hull Glass Company. company registered under 7 & 8 Vict. c. 110, was liable to pay

(*e*) See as to notice, *infra*, § 2.

(*f*) Book ii., c. 6, § 1.

(*g*) See *infra*, p. 161, note (*r*).

(*h*) See *Hawken v. Bourne*, 8 M.

& W. 703, and the cases cited in the next few notes.

(*i*) 8 C. B. 668, and 11 ib. 897.

Pl. II. Chap. 2. for goods ordered by persons in its employ, and that it was not
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— necessary for the plaintiff to prove that those persons were authorised by the directors to order the goods in question. Maule, J., went further than this, and his judgment is an authority for the broad proposition that a company is bound by the acts of persons who take upon themselves, with the knowledge of the directors, to act for the company, provided such persons act within the limits of their apparent authority; and that strangers dealing *bonâ fide* with such persons, have a right to assume that they have been duly appointed (*k*).

Authority
inferred.

This view is in accordance with later authorities. Thus, a company has been held bound by a verbal contract with the chairman of directors, although a sealed contract countersigned by three directors was required by the company's deed of settlement (*l*); so by orders for repairs given by a secretary instead of by the directors (*m*); so by an agreement for the sale of land made by a company's manager who was allowed by the directors to make such contracts (*n*); so by cheques drawn by *de facto* but improperly appointed directors (*o*). Again, in *Giles v. The Taff Railway Company* (*p*), it was held that a railway company was liable for a tort committed by one of its servants in the course of his employment, although there was no proof, except that afforded by the fact of employment, that he was the servant of the company.

*Giles v. Taff
Railway Com-
pany.*

*Browning v.
Great Central
Mining Com-
pany.*

Even as between the agent himself and the company, if the directors appoint him and allow him to act as agent of the company, and he does so act *bonâ fide* and without notice of any irregularity in his appointment, the company will be liable to him for his salary although he may not have been appointed

(*k*) See 11 C. B. 927. The other judges relied more on the fact that the directors had sanctioned and adopted the contracts. But as the knowledge on the part of the directors of what was done was assumed rather than proved, there was little if any difference in the views of the different members of the Court.

(*l*) *Reuter v. Electric Telegraph Co.*, 6 E. & B. 341.

(*m*) *Allard v. Bourne*, 15 C. B. N. S. 468.

(*n*) *Wilson v. West Hartlepool Rail. Co.*, 34 Beav. 187, affd. 2 De G. J. & Sm. 475. Compare *Moody v. London and Brighton Rail. Co.*, 1 Best & Sm. 290.

(*o*) *Mahony v. East Holyford Mining Co.*, L. R. 7 H. L. 869.

(*p*) 2 E. & B. 822; *Goff v. G. N. Rail. Co.*, 3 E. & B. 672. See, further, *infra*, c. 3, § 2.

precisely in the manner prescribed by the regulations of the Bk. H. Chap. 2.
company (q). Sect. 2.

These cases must not be confounded with others in which Limits to author-
companies have been held not bound by acts done by their rity of agent.
agents when acting beyond the limits set by the nature of their
employment (r).

SECTION II.—AUTHORITY OF AGENTS OF COMPANIES.

Having seen who are to be considered agents of a company, Limits of the
it is necessary to examine the limits within which a company directors' authority.
is answerable for their acts. Agents cannot have a more
extensive authority than their principals can legally confer
upon them; and this principle at once limits the authority of
all agents of incorporated companies. The capacity of such
companies is itself limited, and they cannot be legally bound
by any acts of their directors or officers in which the companies
themselves are legally incompetent to engage. But as regards
other matters, business cannot be carried on unless the directors
of companies may be dealt with, on the assumption that they
have power to bind their companies by all such acts as can
fairly be said to be necessary for the purpose of carrying on
their legitimate businesses in the way in which such businesses
are usually carried on by other people. Such power is con-
sequently implied (s) in favour of all persons dealing *bonâ fide*,

(q) *Browning v. Great Central Mining Co.*, 5 H. & N. 856. In this case an appointment under the seal of the company was not necessary. See, also, *Totterdell v. Fareham Brick Co.*, L. R. 1 C. P. 674.

(r) See as to Promissory notes, *Simpson's claim*, 36 Ch. D. 532; as to buying shares, *Cartmell's case*, 9 Ch. 691; as to policies of insurance issued by local agents, *Linford v. Provincial Horse and Cattle Insurance Co.*, 34 Beav. 291; as to orders by station masters for surgical attendance, *Coe v. Midland Counties*

Rail. Co., 3 Ex. 268; *Walker v. Great Western Rail. Co.*, L. R. 2 Ex. 228; statements made by secretary, *Barnett, Hoares & Co. v. South Lond. Tramways Co.*, 18 Q. B. D. 815; statements by solicitors as to the flourishing condition of the company, *Burnes v. Pennell*, 2 H. L. C. 497; sales by a solicitor not instructed to sell by the directors, *Moody v. Lond. and Brighton Rail. Co.*, 1 B. & Sm. 290.

(s) See *Smith v. Hull Glass Co.*, 8 C. B. 668; *Taunton v. Royal Insur. Co.*, 2 Hem. & M. 135; *A. & G. v.*

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Distinction between acts *ultra vires* and acts *intra vires*, but irregular.

and without notice of its non-existence. Further it is established that what the directors of a company have power to do, and do in the name of the company and on its behalf (*t*), binds the company, although they may not have acted in the manner prescribed by the regulations of the company. A distinction is thus taken between what directors have no power to do at all, and what they have power to do, provided certain conditions are complied with; in other words, between acts which, as regards the company, are altogether *ultra vires* and those which are *intra vires* but irregular; and whilst it is held that companies are not bound by acts of the former class, it is held that they may be bound by acts of the latter class in favour of all persons dealing with their directors *boni fide* and without notice of the irregularities of which they may be guilty (*u*).

1. *Of acts which are ultra vires.*

Acts altogether *ultra vires*.

With respect to those acts which directors have no power to do at all, it must be borne in mind that trading and similar corporations which are created for certain definite purposes have no greater capacity than is conferred upon them by their constitution (*x*). They exist for certain purposes, more or less well defined in the instrument incorporating them, but they exist for no other purposes; and a corporation created for one purpose cannot lawfully do anything which is foreign to the purpose for which alone it was created. If, therefore, it can be predicated of any contract entered into by or on behalf of a body corporate, that such contract is one into which the corporation, even with the assent of all its members, cannot legally enter, such contract must necessarily be invalid. This is not the consequence of any doctrine of the law of agency, but of the nature of corporations, and of the difference between

Great Eastern Rail. Co., 5 App. Ca. 473.

(*t*) See *Hambro' v. Hull, & Co.*, *Insurance Co.*, 3 H. & N. 789.

(*u*) See generally on the subject of the ensuing pages a treatise on the doctrine of *ultra vires* by Seward Brice.

(*x*) See the judgment of Bowen, L. J., in *Baroness Widdlock v. River Dee Co.*, 36 Ch. D. 684 n., where the difference between trading and other corporations of that kind, and municipal corporations is pointed out.

them and ordinary individuals (*y*). This principle applies to joint stock companies. But there is an important difference between incorporated and unincorporated companies, for whilst it is competent for *all* the shareholders of an unincorporated company to depart from the agreement entered into by each with the others (*z*), it is not competent for all the shareholders of a company incorporated by charter or statute to do anything contrary thereto (*a*). Nor can a corporate body be estopped by deed or otherwise from showing that it had no power to do that which it purports to have done (*b*).

The constitution of a company as settled by its charter, act of Parliament, memorandum of association, or deed of settlement, limits, to a certain extent, the powers of its directors; for whatever it may or may not be competent for all the shareholders to do, it certainly is not competent for the directors of a company to bind it by entering on its behalf into transactions not warranted by its constitution as settled for the time being (*c*). The directors of a company have authority to do whatever is necessary for the transaction of the company's legitimate business in the way in which such business is usually carried on by other people (*d*), but they have no power

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Powers of directors limited by the constitution of the company.

(*y*) See upon this subject, *Pollock on Contracts*, 110, *et seq.*; *Att.-Gen. v. Great Eastern Rail. Co.*, 5 App. Ca. 473, and 11 Ch. D. 449; *L. and N. W. Rail. Co. v. Price*, 11 Q. B. D. 485; *London Financial Assoc. v. Kelk*, 26 Ch. D. 107; *Baroness Wenlock v. River Dee Co.*, 10 App. Ca. 354, 36 Ch. D. 675 n., *ib.* 674, and 38 Ch. D. 534; and the cases referred to *infra*, notes (*f*) and (*g*). See, as to dealings with land, *Grand Junction Canal Co. v. Petty*, 21 Q. B. D. 273, and cases there cited. As to the consequences of a corporation taking securities which it ought not to take, see *Ayers v. S. Australian Banking Co.*, L. R. 3 P. C. 548.

(*z*) Partn. 408; *Blackburn Benefit Soc. v. Cunliffe, Brookes & Co.*, 29 Ch. D. 902.

(*a*) See *Ashbury Railway Carriage Co. v. Riche*, L. R. 7 H. L. 653; *Society of Practical Knowledge v. Abbott*, 2 Beav. 559; *Jayshaw v. Eastern Union Rail. Co.*, 7 Ha. 114, and 2 M. & G. 389; and *Baroness Wenlock v. River Dee Co.*, *ubi supra*.

(*b*) See *Baroness Wenlock v. River Dee Co.*, *ubi supra*; *Ex parte Watson*, 21 Q. B. D. 301; *Fairtitle v. Gilbert*, 2 T. R. 169. Compare *Webb v. Commissioners of Herne Bay*, L. R. 5 Q. B. 642, where the company had power to issue debentures, although they did not properly exercise the power.

(*c*) *Ashbury Railway Carriage Co. v. Riche*, L. R. 7 H. L. 653.

(*d*) *Smith v. Hull Glass Co.*, 8 C. B. 668; *Taunton v. Royal Ins. Co.*, 2 Hem. & M. 135.

Bk. II. Chap. 2. to engage in a class of business for the transaction of which
Sect. 2. the company was not formed (e).

Capacity of
corporations.

With respect to the capacities of trading and similar corporate bodies to bind themselves by contracts, there is an apparent difference of opinion upon the question whether the burden of proof is upon those who assert that the power to enter into any particular contract exists or upon those who assert the contrary.

It is agreed on all hands that a corporation cannot lawfully do that which its constitution does not expressly or impliedly warrant. The difference of opinion, if there really be any, is not as to that, but simply as to whether the act of incorporation is to be regarded as conferring unlimited powers except where the contrary can be shown; or whether alleged corporate powers are not rather to be denied unless they can be shown to have been conferred either expressly or by necessary implication.

The former is apparently the correct view so far as municipal and other corporations not created for any clearly limited purpose are concerned (f); but the latter is submitted to be the correct view with respect to trading and similar corporations which are created for certain definite purposes only (g). That such corporations cannot do that which their constitution does not warrant admits of no doubt, and is conclusively established by the decision of the House of Lords in *Ashbury Railway Carriage Co. v. Riche* (h). In that case it was held that a company formed and registered under the Companies act, 1862, for contracting to supply materials for making railways and to carry on the business of general contractors, was not bound by a contract to make a railway, although such

Ashbury, &c.,
Co. v. Riche.

(e) The cases on this head are excessively numerous, and will be noticed hereafter.

(f) See the authorities cited, L. R. 9 Ex. 262, *et seq.*

(g) The leading cases on this subject are *Baroness Wenlock v. River Dee Co.*, 10 App. Ca. 354, and 36 Ch. D. 674, and *Ashbury Railway Carriage Co. v. Riche*, L. R. 7 H. L. 653, and

9 Ex. 224. See Lord Justice Bowen's judgment, 36 Ch. D. 684 n.; and Lord Selborne's judgment, L. R. 7 H. L. 693, both of which are in favour of the view in the text; but the judgment of Lord Blackburn, 9 Ex. 262, *et seq.*, is opposed to it.

(h) L. R. 7 H. L. 653, S. C. L. R. 9 Ex. 224, 249.

contract had been entered into by directors of the company, and had been afterwards approved by the shareholders (i). Such a contract was not authorised by the company's memorandum of association and could not bind the company in its corporate character, even though every shareholder in it might have assented to it. The rule laid down in this case applies to all companies created by statute for a particular purpose, and is not confined to companies created by the Companies act, 1862 (k). At the same time, whatever may fairly be regarded as incidental to or consequential upon those things, which the legislature has authorised, ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires* (l).

Companies' articles of association and deeds of settlement usually prescribe certain limits to the powers of their directors, rendering them much less extensive than they would be if limited merely by the purpose for which the companies are formed; and opinions have differed upon the question whether the public can safely deal with the directors of companies without ascertaining the real limits set to their authority (m). But it is now settled that persons who deal with a company whose regulations are registered, and are therefore accessible to the public, cannot hold the company liable if the directors exceed their authority as disclosed by those regulations. Accordingly in *Balfour v. Ernest* (n), it was held, that an insurance company

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Public bound
to notice the
regulations of
the company.

Balfour v.
Ernest.

(i) Compare *Sheffield Nickel Co. v. Unwin*, 2 Q. B. D. 214, where what was done was within the scope of the memorandum of association.

(k) *Att.-Gen. v. Great Eastern Rail. Co.*, 5 App. Ca. 473, and 11 Ch. D. 449; *Baroness Wenlock v. River Dee Co.*, 10 App. Ca. 354, and 36 Ch. D. 675 n.

(l) *Att.-Gen. v. Great Eastern Rail. Co.*, *ubi supra*; *L. and N.-W. Rail. Co. v. Price*, 11 Q. B. D. 485.

(m) The difference of opinion on this subject will be seen at once by comparing the judgments in *Greenwood's case*, 2 Sm. & G. 95 (reversed on appeal, 3 De G. M. & G. 459);

Ernest v. Nicholls, 6 H. L. C. 401; *Royal British Bank v. Turquand*, 6 E. & B. 327; *Athenæum Life Ass. Society v. Pooley*, 1 Giff. 102, and 3 De G. & J. 294. See as to Lord Wensleydale's observations in 6 H. L. C. 419; *Agar v. Athenæum Life Ins. Soc.*, 3 C. B. N. S. 725; *London Dock Co. v. Sinnott*, 8 E. & B. 347.

(n) 5 C. B. N. S. 601. See, too, *Irvine v. Union Bank of Australia*, 2 App. Ca. 366, as to resolutions which ought to be registered; *Peirce v. Jersey Waterworks Co.*, L. R. 5 Ex. 209; *Ex parte Overend, Gurney & Co.*, 4 Ch. 460; *Ex parte*

Bk. II. Chap. 2. was not bound by a bill of exchange accepted by its directors
 — Sect. 2. — on its behalf for a debt incurred by another insurance company, which had been amalgamated with the first; for the amalgamation was not authorised by the deed of settlement of the company on whose behalf the bill had been accepted, and the holder of the bill was aware of the nature of the debt for which the bill had been given.

Chapleo v.
 Brunswick
 Building
 Society.

Again in *Chapleo v. Brunswick Building Society (o)*, it was held that persons who have dealings with a building society must be taken to know that such a society has no power of borrowing except such as is conferred upon it by its rules; and if the directors exceed their authority in this respect, those who trust them and lend them money for the society, cannot compel the society to repay it.

Limits of this
 doctrine.

This doctrine is based upon the necessity of protecting shareholders against the unauthorised acts of their directors, and ought not to be extended to cases in which persons who are really ignorant of the powers of directors, seek to make them personally responsible for the assumption of powers they did not really possess. The liability of directors in respect of contracts entered into by them beyond their powers will be alluded to hereafter (*p*); and it will then be seen that although such contracts do not bind the company for which the directors may have acted, it by no means follows that they are not personally liable in respect of them.

2. Of acts which are *intra vires*, but irregular.

Acts *intra vires*,
 but irregular.

Notwithstanding, however, that a company is not bound by those acts of its directors, which as regards the company are *ultra vires*, and notwithstanding the doctrine that persons dealing with companies are affected with notice of their registered regulations, yet, as already stated, there is no necessity on the part of such persons to see that *de facto* directors are

Eagle Ins. Co., 4 K. & J. 549; (o) 6 Q. B. D. 696, at pp. 712 &
Athenæum Life Ass. Soc. v. Pooley, 1 713. See, further, as to borrowing
 Giff. 102, and 3 De G. & J. 294; powers, *infra*, pp. 187, *et seq.*
Sheffield's case, Johns. 451, and (p) Book ii., c. 6, § 1.
Kearys v. Leaf, 1 Hem. & M. 681.

properly appointed (*q*), nor to see that directors exercise the powers they possess in the precise manner prescribed by the regulations of the company; and it may be taken as now settled that persons dealing with directors *bonâ fide*, and without notice of an irregular or improper exercise of their powers, are not affected by such irregularity or impropriety.

The leading authority on this head is *The Royal British Bank v. Turquand* (*r*). In that case, a company's deed, registered under 7 & 8 Vict. c. 110, empowered the directors to borrow on the bonds of the company such sums, as by a general resolution of the company might be authorised to be borrowed. The directors gave the bankers of the company a bond for 1000*l.*, sealed with the seal of the company, and signed by two directors, as a security for what might be due from the company to its bankers on its current account. This was not authorised by any resolution of the company, and it was therefore contended that the bond was invalid. There was no question here as to the form of the bond, or as to the authority of those who issued it to act for the company. The company was *primâ facie* bound by the bond, and no one looking only at the deed of settlement and the bond, could come to a different conclusion. The only question was, whether the bankers were bound to look further and to ascertain whether the issuing of the bond had been authorised by the resolution of a general meeting. It was held both by the Court of Queen's Bench and by the Court of Appeal, that they were not, and that the excess of authority was a matter which concerned only the shareholders and the directors. C. J. Jervis, in affirming the decision of the Court below, said,

"We may now take for granted, that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement; but they are not bound to do more (*s*). And the party here on reading the deed of settlement, would find not a prohibition from borrowing, but a per-

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Royal British
Bank v. Tur-
quand.

(*q*) *County Life Ass. Co.*, 5 Ch. 288, where there were some duly appointed directors; *Mahony v. East Holyford Mining Co.*, 11 R. 7 H. L. 869, where there were none.
(*r*) 5 E. & B. 248, and 6 ib. 327.
(*s*) See acc. as to bye-laws, *Royal Bank of India's case*, 4 Ch. 252.

Bk. II, Chap. 2. Sect. 2. mission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorising that which on the face of the document appeared to be legitimately done" (t).

Omnia præsumuntur rite esse acta.

Clarke v. Imperial Gas Company.

Hill v. Manchester Waterworks Company.

Smith v. Hull Glass Company.

Agar v. Athenæum Assurance Society.

This was not the first occasion on which the maxim *omnia præsumuntur rite esse acta* had been applied to such cases. In *Clarke v. The Imperial Gas Light and Coke Company* (u), a bond given by the directors of a company under the seal of the company for the payment of an annuity to a retired servant, was presumed to have been executed after due compliance with all conditions; and in *Hill v. The Manchester and Salford Waterworks Company* (x), the same principle was acted upon; although that case rather turned on the inadmissibility of the evidence by which it was sought to show that the requisite formalities had not been complied with. In *Smith v. The Hull Glass Company* (y), Maule, J., whilst recognising the doctrine that all persons who contract with the directors of a registered company must be taken to be cognisant of the extent of the authority conferred upon them, added, "But it by no means follows that they are to be taken to be cognisant of all the proceedings of the board of directors;" and that learned judge held, that the public were entitled to assume that a person acting as the agent of a company had been duly appointed by the directors; for by the company's deed of settlement, they had power to appoint persons to carry on its business. Again in *Agar v. The Athenæum Life Assurance Society* (z), the directors had power to borrow, but only with the consent of an extraordinary general meeting of shareholders. They did borrow by issuing debentures sealed with the seal of the company, and signed by two of themselves; and it was held, that these debentures were binding on the company, although no such authority to borrow had been conferred by a general meeting as was con-

(t) See as to this *Irvine v. Union Bank of Australia*, 2 App. Ca. 366, where the resolution, if any, would have been registered. See, also, *Landowners' Inclosure Co. v. Ashford*, 16 Ch. D. 411; *Romford Canal Co.*, 24 Ch. D. 85.

(u) 4 B. & Ad. 315.

(x) 5 B. & Ad. 866.

(y) 11 C. B. 897.

(z) 3 C. B. N. S. 725. Compare this with *Athenæum Life Ass. Soc. v. Pooley*, 3 De G. & J. 294, and 1 Giff. 102.

templated by the company's deed of settlement. In *The Prince of Wales Assurance Society v. The Athenæum Insurance Society* (a), the Court of Queen's Bench held, that a policy of insurance issued under the seal of an insurance society and signed by three of its directors, was binding upon the society, although the issue of the policy had not been authorised by a previous resolution of directors as required by the company's deed.

The same principles have frequently been approved and acted upon in chancery. In *Ex parte The Eagle Company* (b) a claim was made against the Athenæum Assurance Society in respect, not of a policy under its seal, but of an agreement to grant such a policy entered into on behalf of the society by its directors. The Court allowed the claim. The Vice-Chancellor Wood, in delivering judgment, approved of the observations made in *The Royal British Bank v. Turquand* and of the distinction there drawn, between that which upon the face of it is manifestly imperfect when tested by the requirements of the deed of settlement of the company, and that which contains nothing to indicate that those requirements have not been complied with.

"Thus, where the deed requires certain instruments to be made under the common seal of the company, every person contracting with the company can see at once whether that requisition is complied with, and he is bound to do so; but where, as in the case I have last referred to, the conditions required by the deed consist of certain internal arrangements of the company, for instance, resolutions at meetings and the like, if the party contracting with the directors finds the acts which they undertake to do, to be within the scope of their power under the deed, he has a right to assume that all such conditions have been complied with. In the case last supposed, he is not bound to inquire whether the resolutions have been duly passed or the like, otherwise he would be bound to go further back and to inquire whether the meetings have been duly summoned and so ascertain a variety of other matters into which, if it were necessary to make such inquiry, it would be impossible for the company to carry on the business for which it is formed."

(a) 3 C. B. N. S. 756, note. See, too, *Prince of Wales Assurance Soc. v. Harding*, E. B. & E. 183.

(b) 4 K. & J. 549. See, too, *Anglo-Australian, &c., Ass. Co. v. British Provident, &c., Society*, 3 Giff. 521, varied on appeal, 4 De G. F. & J. 341.

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Sect. 2.

Ex parte Over-
end, Gurney &
Co.

Again in *Ex parte Overend, Gurney & Co.* (c), a company was held bound by bills accepted by its chairman, although he had only been authorised to accept them on certain conditions which had not been complied with. The bill holder in this case had no notice of the conditions, but even if he had had such notice it would have been no part of his business to see that they had been complied with; he would have been entitled to assume that they had (d).

Further illustrations of the same principle are afforded by the cases already noticed in which companies have been held bound by the acts of agents irregularly appointed (e).

Peirce v. Jersey
Waterworks
Company.

In connection with these cases it is necessary to allude to a decision apparently in direct conflict with them, viz., *Peirce v. Jersey Waterworks Company* (f). In this case a company was formed and registered under the Companies' act, 1862, with articles which provided in substance that when 3,000 shares had been allotted the members should be associated for the objects of the company and be all bound by its regulations, as if all the shares had been allotted. Before 3,000 shares were allotted the directors appointed the plaintiff to be the engineer of the company; and he sued the company for his salary, and although he had no notice that the 3,000 shares had not been allotted, he was held not entitled to recover. The Court considered that until 3,000 shares had been allotted no such company existed as the plaintiff could contract with. But the company unquestionably did exist as a corporate body (g); and although the allotment of 3,000 shares may have been a condition precedent to the commencement of the directors' power to bind the company, the cases already alluded to go far to show that the plaintiff was entitled to assume that the condition had been performed. There is, however, a difference between assuming that an agency has commenced and assuming that persons whose agency has commenced are pursuing their authority, and this difference is perhaps sufficient to render the decision in question consistent with those alluded to above (h).

(c) 4 Ch. 460.

(d) See *per* L. J. Giffard, *ib.* 474.

(e) *Ante*, pp. 158, 160.

(f) L. R. 5 Ex. 209.

(g) *Ante*, p. 111.

(h) See the end of Mr. Baron Bramwell's judgment.

The principles established by the foregoing cases apply, not only as between companies on the one hand and strangers on the other, but also between companies and their members; and it has been held over and over again, as will be seen hereafter, that as between one shareholder and the others the validity of the acts of their directors depends in any particular case much more on the power of the directors to do the acts in question, than on the regularity or irregularity of the manner in which those acts may have been done (*i*).

A person who knows or is to be treated as knowing that directors or agents are acting irregularly and improperly cannot hold the company bound by their acts (*k*); and instruments signed by directors on behalf of a company, in a name which is not that of the company, are improper on the face of them, and do not bind the company (*l*).

In connection with the subject of notice, it must not be forgotten that transferees of bonds and other ordinary choses in action of that kind, not being negotiable instruments, are *primæ facie* in no better position than their transferors (*m*). But a company may be estopped from denying as against a transferee of a security what it might have denied as against the transferor. For example, in *Webb v. Commissioners of Herne Bay* (*n*), a corporation was empowered by statute to issue debentures but not to members of its governing body. Debentures however were issued to one of such members, and were assigned to a *bonâ fide* holder for value without notice of the impropriety in the issue, and it was held that the corporate body was bound by the debentures, and was estopped from denying their validity as against the plaintiff.

Again in the case of the *Romford Canal Co.* (*o*), some debentures were issued to a contractor without the sanction of a meet-

(*i*) See in book iv. under the head Contributors.

(*k*) See *Chapleo v. Brunswick Building Society*, 6 Q. B. D. 696; *Balfour v. Ernest*, 5 C. B. N. S. 601; *Zulueta's claim*, 5 Ch. 444; *Irvine v. Union Bank of Australia*, 2 App. Ca. 366.

(*l*) *Hambro' v. Hull, &c., Ins. Co.*, 3 H. & N. 789.

(*m*) *Athenæum Life Ass. Soc. v. Pooley*, 1 Giff. 102, and 3 De G. & J. 294; and other cases noticed *infra*, p. 180.

(*n*) L. R. 5 Q. B. 642.

(*o*) *Carew's claim*, 24 Ch. D. 85. See, also, *Ex parte The City Bank*, 3 Ch. 758; *Ex parte Colborne and Strawbridge*, 11 Eq. 478.

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Sect. 2.

Irregularities
as affecting
members of
the company.

Effect of notice
of impropriety.

Transferees of
securities impro-
perly issued.

*Webb v. Com-
missioners of
Herne Bay.*

*Romford Canal
Company.*

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ing at which an insufficient number of shareholders was present and he knew this. A *bonâ fide* transferee for value without notice of the irregularity was nevertheless held entitled to payment by the company.

Formalities
required by
law.

The observations made above respecting the validity of contracts, &c., entered into by directors in contravention of a company's regulations, have no application to cases in which contracts are required by law to be in a particular form, and that form is not observed. The formalities which must be complied with in order to render contracts binding upon companies will be noticed hereafter (*p*), and it will then be seen that whether these formalities are required by statute or by the common law, contracts not in the form prescribed are altogether invalid, unless they can be upheld on the equitable principles relating to part performance.

SECTION III.—IMPERATIVE AND DIRECTORY CLAUSES IN COMPANIES' STATUTES AND REGULATIONS.

A statute may require an act to be done in a particular way and yet not render the act null and void if not done in the way prescribed. Whether invalidity of what is done is a consequence of a departure from the terms of the act or not depends on its true interpretation, and this again depends on the wording of the statute and on the object sought to be attained by it. Statutes are said to be *imperative* when they render null and void what is done contrary to their provisions; and to be *directory* when the consequence of disregarding them is not the nullity of what is done but something different. The following cases illustrate the distinction in question:—

Examples of directory statutes,
R. v. Birmingham.

By the 4 Geo. 4, c. 76, § 16, it was enacted that the father, if living, of any party under twenty-one years of age, should have authority to give consent to the marriage of such party, and if the father was dead, then that other persons mentioned in the act should have such authority; and the act then went on thus: "And such consent is hereby required for the marriage

of such party so under age, unless there shall be no person authorised to Bk. II. Chap. 2.
 give such consent." A person who was under twenty-one, and whose father Sect. 3.
 was living, married without his consent. It was held that the marriage was
 nevertheless valid; for the legislature evidently did not intend to bastardise
 the issue of marriage solemnised without the consent required (*q*). *Aguin, Payne v.*
 it has been held that a covenant by a municipal corporation to repay money *Prison.*
 borrowed, is valid, although the money is not borrowed for any purpose to
 which the borough fund is made applicable by the Municipal corporation
 act, and although the deed containing the covenant has not been approved
 by the Lords of the Treasury as required by the same act (*r*). So it was *Le Feuvre v.*
 held, that a rate made under the Public health act of 1848 was valid, *Miller.*
 although that statute requires all rates made or collected under it, to be
 published in the same manner as poor-rates, and the rate in question had
 not been published in the manner required (*s*).

In each of these cases, the statute in question was said to be
 directory only; and to each of them the maxim *Fieri non*
debit sed factum valet, was held applicable. In each case
 something was to be done in a particular manner; but what-
 ever may have been the consequences of doing it in some
 other manner, the invalidity of what was done was not one of
 those consequences; and this appears to be the test whereby
 to decide whether a law is directory or imperative as those
 terms are customarily employed (*t*).

Statutes which are directory only are common enough, but
 it is not easy to recognise them with certainty before they have
 been judicially interpreted. There is, however, a natural ten-
 dency on the part of Courts of justice to uphold an honest
 transaction although somewhat irregular, if to do so is con-
 sistent with the true interpretation of the statute which has to
 be construed. The following illustrations of clauses held to
 be directory will serve as guides in other cases.

In *Foss v. Harbottle* (*u*), an act of Parliament incorporating *Examples of so-*
 the Victoria Park Company, declared that it should be in the *called directory*
 power of a certain number of shareholders, acting in a certain *clauses.*
Foss v.
Harbottle.

(*q*) *R. v. Birmingham*, 8 B. & C. 29. *Ingall*, 2 Q. B. D. 199; *Hunt v.*
Hibbs, 5 H. & N. 123; *Brumfitt v.*

(*r*) *Payne v. Brecon*, 3 H. & N. 572. *Bremner*, 9 C. B. N. S. 1; *R. v.*
Rochester, 7 E. & B. 910; *Lancaster,*

(*s*) *Le Feuvre v. Miller*, 8 E. & B. 321. *&c., Rail. Co. v. Heaton*, 8 E. & B.
 952; *Caldow v. Pieell*, 2 C. P. D.

(*t*) For other instances of direc- 562.
 tory statutory enactments, see *R. v.* (*u*) 2 Ha. 461.

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Sect. 3.

Holding of
meetings.

Quorum of
directors.

Cases where a
document has
been informally
sealed.

Signatures of
cheques.

manner, and observing certain forms, to require the directors to convene extraordinary meetings, and in case of their default, to convene such meetings themselves. A question having arisen how far it was necessary to adhere strictly to the letter of the enactment, in order to give validity to the acts of a meeting convened under it, the Vice-Chancellor, Sir James Wigram, expressed a strong opinion that the acts of a meeting convened in substantial compliance with the statute would be valid, although all the prescribed forms had not been observed. He considered the statute to be in this respect directory only.

In *The Thames Haven and Dock Railway Company v. Rose (x)*, a private act of Parliament directed that the business of a company should be carried on by twelve directors, of whom five should be a quorum; and the Court of Common Pleas was of opinion that the act was in this respect directory only, and that calls made by five out of seven directors, there being no more, were valid (*y*).

Again, it has more than once been held, that when a company is incorporated by charter, or act of Parliament, which directs the observance of certain forms before the corporate seal is annexed to contracts purporting to bind the body corporate, a contract under the corporate seal, and of a kind authorised by the charter or statute, is binding on the corporation, although the seal may have been annexed without the observance of the prescribed formalities (*z*).

So, in the case of any ordinary joint-stock company, the deed of settlement of which declared that all cheques on its bankers were to be signed by three directors, and the directors drew cheques signed by less than three of them, it was held that this irregularity did not affect the right of the directors to be allowed as between themselves and the shareholders the sums drawn out, such sums having been *bonâ fide* applied for the purposes of the company (*a*).

(*x*) 4 Man. & Gr. 552.

(*y*) Compare *Kirk v. Bell*, 16 Q. B. 290, and other cases cited *ante*, pp. 155, 156.

(*z*) See *Fountaine v. Carmarthen Rail. Co.* 5 Eq. 316; *The Royal British Bank v. Turquand*, 6 E. &

B. 327, and 5 E. & B. 248; *Agar v. The Athenæum Life Assurance Society* 3 C. B. N. S. 725. Compare *D'Arcy v. Tamar, &c., Rail. Co.*, L. R. 2 Ex. 158.

(*a*) *Ex parte Bignold*, 22 Beav. 143. Compare *Ex parte Agra and Master-*

So, clauses relating to the mode of signing minutes of meetings, keeping registers, and making returns, so as to render them admissible in evidence without preliminary proof, are considered as directory only (*b*). Bk. II. Chap. 2.
Sect. 4.
Signature of minutes.

As regards borrowing money, statutes limiting the amount which may be borrowed are always regarded as imperative, as will be seen hereafter (*c*) ; but a statute authorising money to be borrowed with the consent of a general meeting was, as to this, held directory only (*d*). Borrowing money.

Sect. 43 of the Companies act, 1862, which directs limited companies to keep registers of all mortgages and charges has been held to be directory only ; and an unregistered mortgage, even to a director of the company, is not invalid (*e*). Non-regis-try of securities.

On the other hand, a clause in a company's regulations requiring proxy papers to be attested has been held to be imperative, and proxy papers not so attested were rejected (*f*). Proxy papers.

These cases are not to be confounded with those in which shareholders and companies have been held estopped from taking advantage of the non-observance of formalities. Such cases do not turn upon whether the clauses prescribing the formalities are directory or imperative ; but upon the very different question, whether, supposing them to be imperative, the invalidity of what has been done informally can be insisted on by those who have always treated it as valid, and induced others to do the same. Cases of estoppel to be distinguished.

SECTION IV. — OF RATIFICATION BY COMPANIES.

When a contract has been entered into on behalf of a company informally, but has been acted upon and is then disputed by the company, the question naturally arises whether it has Ratification by companies.

man's Bank, 6 Ch. 206 ; *Ex parte Birmingham Bank Co.*, 3 Ch. 651.

(*b*) See *ante*, p. 57, 102, 110, as to registers and returns, and *infra*, book iii., c. 1, as to minutes of meetings.

(*c*) *Infra*, c. 3.

(*d*) *Landowners, &c., Inclosure Co. v. Ashford*, 16 Ch. D. 411.

(*e*) *Wright v. Horton*, 12 App. Ca. 371.

(*f*) *Harben v. Phillips*, 23 Ch. D. 14, a dispute between shareholders.

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Sect. 4.

not been ratified or otherwise adopted by the company and so become binding on it. In order to answer this question, regard must be had first of all to the nature of the contract. If it is one by which the company would not have been bound, even if all proper formalities had been observed, ratification by the directors can be of no avail as against the company; nor will ratification or adoption by the shareholders be of any avail against the company, if the contract in question is one into which the company has no power to enter (*g*). But if the contract would have been binding on the company, if all proper formalities had been observed, or if all the shareholders had concurred in it, ratification or adoption by or on behalf of the company is perfectly possible; and the only question for determination then is, whether the contract has been effectually ratified or adopted or not (*h*).

Acts done before
the formation of
the company.

A contract entered into or an act done before a company is formed cannot be ratified by it in the proper sense of that expression. Ratification is a technical word and presupposes the existence—1, of a principal; 2, of an agent; and 3, of some act done by the agent for and on behalf of the principal but without his authority (*i*). Where there is no principal there can be no agent and no act done by him for his principal, and consequently there can be no ratification—*i.e.*, approval by him of something previously done for him. A company therefore cannot, properly speaking, ratify what its promoters have done before its formation (*k*). But a company may after its formation become bound to do what others have undertaken it shall do when formed. It may

(*g*) *Ashbury Railway Carriage Co. v. Riche*, L. R. 7 H. L. 653, noticed *ante*, p. 164. See, also, *Chapleo v. Brunswick Building Society*, 6 Q. B. D. 696, at p. 711; *Blackburn Benefit Society v. Cunliffe, Brooks & Co.*, 29 Ch. D. 992; *Baroness Wullock v. River Dee Co.*, 36 Ch. D. 675 n.; *Imp. Bank of China, &c. v. Bank of Hindustan*, 6 Eq. 91; *Phoenix Life Ass. Co.*, 2 J. & H. 441; *The Era Co.'s case*, 2 J. & H. 408; 1 De G. J.

& S. 29, and 1 Hem. & M. 672.

(*h*) *Irvine v. Union Bank of Australia*, 2 App. Ca. at p. 374, noticed *infra*.

(*i*) *Wilson v. Tummam*, 6 Man. & Gr. 236.

(*k*) See acc. *Browne v. La Trinidad*, 37 Ch. D. 1; *Northumberland Avenue Hotel Co.*, 33 Ch. D. 16. Compare *Howard v. Patent Ivory Manufacturing Co.*, noticed *infra*.

become so bound by its charter or act of incorporation, or by a valid contract entered into by itself after its formation. Bk. II. Chap. 2. Sect. 4. This subject, so far as regards charters and acts of incorporation, has been already examined (*l*), and as regards contracts made by the company after its formation, the reader is referred to § 2 of the present chapter, and to *Howard v. Patent Ivory Manufacturing Co. (m)*, where a company was held bound by debentures issued by it pursuant to arrangements made before it was formed. But the new contract must, of course, be itself *intra vires*, or it will be worthless.

Acts done by the agents of a company since its formation can be ratified by it, provided they are not *ultra vires* the company (*n*). Acts done since the formation of the company.

Moreover, although a company's articles cannot be altered for the future without a special resolution duly passed and confirmed, an act done by the directors contrary to the articles as they stand may be ratified by the shareholders without altering the articles, and without any such special resolution as their alteration requires (*o*).

A ratification, to be imputable to a company, must be made directly by its shareholders or indirectly through their agents acting within the limits of their real or apparent authority; and in order that ratification by the shareholders or their agents may be proved, it must be shown—

1. That the parties alleged to have ratified the contract knew what it was; or, having their attention drawn to it, did not choose to inquire into it (*p*).

2. That they have in some way recognised and adopted it.

If these two essential points are established, there will still remain for consideration the question whether the recognition

(*l*) *Ante*, p. 146.

(*m*) 38 Ch. D. 156. See *Ex parte Watson*, 21 Q. B. D. 301, where the deposit note was given in discharge of a debt not due from the society.

(*n*) *Ante*, p. 166, *et seq.*; V.-C. Bacon in *London Financial Ass. v. Kell*, 26 Ch. D. 146 & 151, seems to go even further if the question of *ultra vires* is doubtful.

(*o*) *Grant v. United Kingdom Switchback Rail. Co.*, 40 Ch. D. 135. See, also, *Irvine v. Union Bank of Australia*, 2 App. Ca. 366. Compare *Clay v. Rufford*, 5 De G. & S. 760.

(*p*) See *La Banque Jacques Cartier v. La Banque, &c., de Montreal*, 13 App. Ca. 111.

Bk. II. Chap. 2. and adoption have been in proper form. Each of these matters
Sect. 4. requires a few observations.

1. As to know-
ledge.

First, as to knowledge. Where the contract is one which it is competent for the directors to make, it is also one which it is competent for them to ratify; and in such a case knowledge by them is for the purpose in question equivalent to knowledge by the company (*q*). The case of *Smith v. Hull Glass Co.* (*r*) is a leading authority on this head, and has been followed by others which have been already referred to (*s*). Where, however, the contract is one which it is not competent for the directors to make, ratification by them is of no avail; and knowledge on their part of what is being done under the contract is not equivalent to knowledge on the part of the company. In such a case as this, ratification on the part of the shareholders must be proved, in order to establish ratification by the company (*t*). But even in this case, it will be inferred as against the shareholders, from comparatively slight circumstances, that they were cognisant of what it was the duty of the directors to bring before them (*u*).

Knowledge by
shareholders
not always
essential.

As in ordinary cases of agency a principal may ratify his agents' acts without inquiring into them, so shareholders who have their attention fairly drawn to what the directors have done may ratify their acts without knowing all the circumstances attending them. Ratification on the part of all the shareholders will be inferred if the acts are such as all can ratify; if the attention of them all, or of such of them as choose to attend, has been fairly called to the acts in question (*x*), and if those acts have been permitted to be done or acted upon for any length of time without being called in question. Although cases exist which are extremely difficult

(*q*) Implied knowledge from the books of the company, but which they never saw, is not enough. See *Curtmell's case*, 9 Ch. 691.

(*r*) 8 C. B. 668, 11 ib. 897.

(*s*) See *ante*, p. 160. and *Grady's case*, 1 De G. J. & Sm. 488.

(*t*) *Athenicum Life Assur. Soc. v. Pooler*, 1 Giff. 102, and 3 De G. & J. 294. See, also, *Erans v. Smallcombe*, L. R. 3 H. L. 249; *Burges and Stock's*

case, 2 J. & H. 441.

(*u*) See *Lane's case*, 1 De G. J. & S. 504.

(*x*) Of course this is essential. See *Irvine v. Union Bank of Australia*, 2 App. Ca. 366; *Blackburn, &c., Building Society v. Cunliffe, Brooks & Co.*, 29 Ch. D. 902, at p. 910; *Grant v. United Kingdom Switchback Rail. Co.*, 40 Ch. D. 135.

to reconcile with this principle (*y*), the principle itself will be found recognised even in those cases which have been decided not to fall within it (*y*). Others have been decided in accordance with it (*z*). A leading case on this subject is *The Phosphate of Lime Co. v. Green* (*a*), in which it was held in effect:

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Phosphate of
Lime Company
v. Green.

1. That a purchase of shares by the directors of a company out of its funds was beyond the powers of the directors.
2. That the money paid for them might have been recovered by the company but for the subsequent ratification of the transaction.
3. That the company ought to be treated as having ratified the transaction, as it was fairly brought to the attention of the shareholders (*b*), and had been allowed to pass unquestioned for five years, and had been treated as valid in other arrangements since made by the company.

A ratification of a past irregular act does not of itself authorise a repetition of a similar act; and it may happen that whilst an ordinary meeting of shareholders may suffice to ratify what has been done, a different kind of meeting is required to confer an authority to do the like in future. This is well illustrated by *Irvine v. Union Bank of Australia* (*c*), in which the directors of a Rice Company were empowered by its articles of association to borrow money to an extent not exceeding one half of its paid-up capital. The directors borrowed more than this from a bank which had notice of the restriction, and that the articles had not been altered by proper authority (*d*). The company was held not liable for the sum thus borrowed in excess of the directors' powers, although the shareholders had ratified a similar transaction two years before.

Ratification for
past not equivalent
to authority
for the future.

Irvine v. Union
Bank of Australia.

(*y*) *Spackman v. Evans*, L. R. 3 H. L. 171; *Houldsworth v. Evans*, ib. 263.

(*z*) *Evans v. Smallcombe*, L. R. 3 H. L. 249; *Brotherhood's case*, 31 Beav. 365, and 8 Jur. N. S. 926, on appeal; and the case next cited.

(*a*) L. R. 7 C. P. 43. See, also, *London Financial Ass. v. Kell*, 26 Ch. D. 107, and the next case.

(*b*) Opinions might reasonably have differed upon this point, as the allusion to the transaction in question was somewhat misleading.

(*c*) 2 App. Ca. 366. *Grant v. United Kingdom Switchback Rail. Co.*, 40 Ch. D. 135.

(*d*) The notice of the restriction was given by the articles of association; an alteration of them could only be made by a registered special resolution. The bank was therefore treated as having had notice as stated in the text. The report does not state that the bank had notice that the limit was in fact exceeded, but the writer assumes that it had.

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Ratification of
directors in case
of fraud on the
shareholders.

A ratification by the directors is not a ratification by the company where the ratification relates to an act done by the directors in fraud of the shareholders, and the person relying on such ratification was party to the fraud (*e*). Therefore, if directors of a company fraudulently issue debentures under the seal of the company to a person privy to the fraud, and the issue of such debentures is entered in the company's books, and interest upon the debentures is regularly paid, but the shareholders are kept in ignorance of the entry and payments, the company is no more bound by ratification than by the original issue of the debentures. And inasmuch as a debenture is a chose in action, and only confers upon its assignee the title of its assignor, even a *bonâ fide* purchaser for value, without notice of any fraud, is in no better position against the company than the original payee; and the purchaser's position against the company is not improved by the recognition of his title by its directors (*f*). But, as before observed, a company may be estopped from denying as against a transferee the validity of an instrument it might impeach if in the hands of his transferor (*g*).

2. Mode of
recognition.

Secondly, with respect to the mode of recognition and adoption. Assuming a contract to be one which the directors of a company have power to enter into, and that it has been entered

(*e*) So an entry in the books of a bank, by its manager, making it appear that a debt due from him is due from the bank, does not bind the bank, *La Banque Jacques Cartier v. La Banque, &c., de Montreal*, 13 App. Ca. 111.

(*f*) *Athenæum Life Ass. Soc. v. Pooley*, 1 Giff. 102, and 3 De G. & J. 294. This case was followed in *Wood's claim* and *Brown's claim*, 9 W. R. 366, and 10 ib. 662. See, too, *Burges and Stock's case*, 2 J. & H. 441. Compare *Woodhams v. Anglo-Australian Co.*, 3 Giff. 238; *The Magdalena Steam Nav. Co.*, Johns. 690; *Hulitt's case*, 2 J. & H. 306, where the shareholders were not kept in ignorance of what had been

done. *The Athenæum Life Ass. Society v. Pooley* appears at first sight to be opposed to *Agar v. Athenæum Life Ass. Society*, 3 C. B. N. S. 725; for in the latter case judgment was recovered in an action at law upon one of a set of debentures, whilst in the former case others of the same set were held invalid. In the action at law, however, the only plea was *non est factum*, and no question of fraud, even if there was any in that case, was raised. But in the suit in equity the debenture was impeached for fraud, and was set aside on that ground.

(*g*) *Ante*, p. 171.

into irregularly, and has been acted upon with their knowledge, Bk. II. Chap. 2.
Sect. 4. then, upon the principles already explained, the company ought to be deemed to have ratified the contract in question, and to be bound by it, unless some particular form of ratification is required by law, and that form has not been observed. It has been already seen that the non-observance of particular formalities prescribed by companies' deeds of settlement and regulations is immaterial as regards persons dealing *bonâ fide* with the directors without notice of the non-observance of the forms; and several instances have been already referred to in which informal contracts have been held binding on companies on the ground that they have been acted on with the knowledge of the directors (*h*). A greater difficulty, however, arises where the formalities in question are required to be observed by law as distinguished from agreement between the parties. If informal ratifications of contracts informally entered into were in such cases held valid, the law requiring the observance of the formalities would be practically repealed. Upon this ground it is that the old rule of the common law that a body corporate can only be bound by instruments under its common seal has been so rigidly adhered to, even where the corporation has had the benefit of the contract (*i*). But even here, as will be seen hereafter, the equitable doctrines of part performance may come into operation and render the contract binding.

(*h*) *Ante*, pp. 166-172.

(*i*) *Infra*, c. 4.

CHAPTER III.

OF THE LIABILITIES OF COMPANIES FOR THE ACTS OF THEIR AGENTS IN PARTICULAR CASES.

Bk. II. Chap. 3. RECAPITULATING the results arrived at in the foregoing
Recapitulation. pages, it may be taken as settled that,—

1. Companies can only be bound by the acts of their real or ostensible agents.

2. The agents of a company cannot bind it by any act which the company as a body has no power to do.

3. The agents of a company can bind it by all acts which can be shown to be within the limits of the authority really conferred upon them :

4. And also by acts, which, although not themselves authorised, belong to a class which is ; and which acts, therefore, may be authorised for anything that can be learned to the contrary by an examination of the authority conferred.

5. As regards acts of this last description, the neglect of directors to observe the provisions of their company's deed of settlement or regulations is a matter which does not concern a person dealing with them *bonâ fide* without notice of the non-observance of those provisions.

6. The above rules apply as well to ratifications of contracts previously entered into as to other matters.

7. But a company cannot ratify acts done before it came into existence ; although it may bind itself by a new contract, or be bound by its act of incorporation, to perform them.

8. Where particular formalities are required to be observed by law in order that a contract may be binding, an informal ratification of an informal contract is of no avail, except in the limited class of cases to which the equitable doctrines of part performance are applicable.

9. But as regards matters which are not beyond the powers of all the shareholders, they or the company will be held to have ratified what they might have disputed, provided their attention has been fairly called to it, and they have not chosen to question it. H. Corp. Sect. 1.

It is necessary next to illustrate the application of these general principles to particular cases.

SECTION I.—CASES NOT INVOLVING ANY TORT OR FRAUD.

Admissions.—Admissions made by the servants and officers of a company in the course of their business and relating to matters which it is their duty to transact are admissible in evidence against the company (a). But not other admissions. In *The Devala Provident Gold Mining Company's case* (b), a speech by the chairman of a meeting to the shareholders of a company admitting that the prospectus was false, was held inadmissible against the company in a proceeding to set aside an allotment of shares applied for on the faith of the prospectus. So an admission by a liquidator was held insufficient proof of facts relied on for the purpose of setting aside an amalgamation (c).

See further, *infra*, *Representations*.

Amalgamation.—Directors of companies have no power to amalgamate their respective companies unless such power is expressly or impliedly conferred upon them. Amalgamation of companies.

General powers of management do not include a power to purchase the business of another company (d), or to sell the business of one's own company (e). Whether such a power

(a) See *Bell v. L. & N. W. Rail. Co.*, 15 Beav. 448; *Mear's Exors. case*, 2 De G. M. & G. 522; and *Barnett, Hoares & Co. v. South London Tramways Co.*, 18 Q. B. D. 815.

(b) 22 Ch. D. 593.

(c) *Empire Corporation*, 17 W. R. 431.

(d) *Ernest v. Nicholls*, 6 H. L. C.

401. See, too, *Gilbert v. Cooper*, 10 Jur. 580; *Beman v. Rufford*, 1 Sim. N. S. 550; *Clay v. Rufford*, 5 De G. & Sm. 768; and see the next two notes.

(e) See *Ex parte The Liquidators of the British Nation, &c., Association*, 8 Ch. D. 679.

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can be conferred on directors by a meeting of shareholders has been much discussed, and is scarcely yet settled. Such a purchase generally involves the assumption by the purchasing company of the debts and liabilities of the selling company, and it is difficult to hold that a transaction of this kind is one as to which a majority ought to be able to bind a minority (*f*).

The amalgamation of ^{the} insurance companies is now governed by 33 & 34 Vict. c. 61, and 34 & 35 Vict. c. 58, as amended by 35 & 36 Vict. c. 41.

See further *infra* *Sales*, and Book IV. c. 2, § 4.

Arbitration by
companies.

Arbitration.—The question whether the directors of a company can bind it by agreeing to refer a dispute to arbitration has not been decided. But the power to bring and defend actions involves a power to compromise them.

See *infra*, *Compromise*.

By the Railway companies arbitration act, 1859 (*g*), railway companies are empowered to refer to arbitration any matters in which they are mutually interested, and which they might lawfully settle by agreement amongst themselves; and by the Companies act, 1862 (*h*), companies governed by that act are also empowered to refer disputes with other companies or persons to arbitration, in accordance with the Railway companies arbitration act, 1859.

Where a company has entered into an agreement which is *ultra vires*, any agreement to refer disputes arising out of it to arbitration is equally *ultra vires* (*i*).

(*f*) Compare upon this subject the judgments in the cases of the *Era Assurance Soc.*, 2 J. & H. 400; and of the *Saxon Life Assurance Soc.*, *ib.* 408, and 1 De G. J. & Sm. 29, and 1 Hem. & M. 672. See, also, *Kearns v. Leaf*, and *Aldebert v. Kearns*, 1 Hem. & M. 681. In *Ex parte Bagshaw*, 4 Eq. 341; *Anglo-Australian Assurance Co. v. British Prov. Life, &c., Soc.*, 3 Giff. 521, and 4 De G. F. & J. 341, the power to purchase was conferred by the deed of settlement, and see *Argus Life Ass. Co.*, 39 Ch. D. 571. But even an express power to amalgamate does

not enable directors to force their own shareholders to take shares in another company. *Higg's case*, 2 Hem. & M. 657; *Ex parte Bagshaw*, 4 Eq. 341, and see, as to the construction of such powers, *Stace and Worth's case*, 4 Ch. 682; *Bank of Hindustan v. Alison*, L. R. 6 C. P. 54, and 222.

(*g*) 22 & 23 Vict. c. 59. See *L. C. & D. Rail. Co. v. S. E. Rail. Co.*, 40 Ch. D. 100, as to jurisdiction of the Court.

(*h*) §§ 72 and 73.

(*i*) *Maunsell v. Midland Great Western Rail. Co.*, 1 Hem. & M. 130.

Bills of exchange and promissory notes.—Whether directors, secretaries, or managers of companies have implied power to bind the companies to which they belong by bills of exchange and promissory notes, depends partly on the statutes relating to the privileges of the Bank of England *(k)*. But where these statutes do not apply the power depends on the nature of the company. If its business is such that it cannot be carried on in the ordinary way without the use of bills, &c., its directors have power to draw, accept, and indorse them in the name and on behalf of the company *(l)*, in the ordinary course of the company's business *(m)*. But if its business is not of this description, there is *prima facie* no such power *(n)*. This has been decided in the cases of a salvage company *(o)*, a mining company *(p)*, a gas company *(q)*, a washing company *(r)*, a salt and alkali company *(s)*, a waterworks company *(t)*, a cemetery company *(u)*, a railway company *(x)*.

Where the directors of a company have power to bind it by bills and notes, a bill or note issued by them improperly but in the name of the company, is binding on it in favour of any *bonâ fide* holder for value without notice of the impropriety *(y)*.

(*k*) As to which see *ante*, p. 136, note (*l*).

(*l*) See *per* Parke, B., and Rolfe, B., in *Mayor of Ludlow v. Claverton*, 6 M. & W. 821, and *per* Best, J., in *Broughton v. Manchester and Salford Waterworks Co.*, 3 B. & A. 1. See, also, *Murray v. East India Co.*, 5 *ib.* 204; *Peruvian Rail. Co. v. Thames, &c., Ins. Co.*, 2 Ch. 617; *Ex parte City Bank*, 3 Ch. 758.

(*m*) *Simpson's Claim*, 36 Ch. D. 532.

(*n*) The Bills of Exchange act, 1882, does not extend the power. See § 22 (1).

(*o*) *Thompson v. Universal Salvage Co.*, 1 Ex. 694.

(*p*) *Dickinson v. Valpy*, 10 B. & C. 128; *Brown v. Byers*, 16 M. & W. 252.

(*q*) *Bramah v. Roberts*, 3 Bing. N. C. 963.

(*r*) *Neal v. Tutton*, 4 Bing. 149.

(*s*) *Bull v. Mould*, 12 A. & E. 745; see the judgment of Coleridge, J.

(*t*) *Broughton v. Manchester, &c., Waterworks Co.*, 3 B. & A. 1.

(*u*) *St. John v. Harmer*, 14 M. & W. 831, reversed, but not on this point, 4 Ex. 1.

(*x*) *Bateman v. Mid-Wales Rail. Co.*, L. R. 1 C. P. 499. Compare *Peruvian Rail. Co. v. Thames, &c., Ins. Co.*, 2 Ch. 617, where the power was held to be conferred by the general words of the articles of association.

(*y*) *Ex parte Orrend, Gurney, & Co.*, 4 Ch. 460; *Gordon v. Sea Fire and Life Assurance Co.*, 1 H. & N. 599; *Thompson v. The Wesleyan Newspaper Association*, 8 C. B. 849; *Allen v. Sea Fire and Life Assurance Co.*, 9 C. B. 574; *Forbes v. Marshall*, 11 Ex. 166; *MacLae v. Sutherland*, 3

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Bills of ex-
changes.

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Before leaving the subject of negotiable instruments it may be observed that it is often difficult to say whether they purport to be the paper of a company or only that of some one or more of the directors. Unless the paper purports to be the paper of a company no one whose name is not on the paper is liable to be sued on it (c). This subject will be adverted to hereafter (a).

Bill in Parlia-
ment.

Bill in Parliament.—It will be seen hereafter that it is not competent for the directors of a company to employ its funds in endeavouring to obtain an act of Parliament authorising it to engage in businesses for which it was not formed (b). And a contract by one railway company with another, to the effect that the first shall take a lease of the line of the second and pay the expenses of an application to Parliament for an act extending and improving such line has been held illegal and void (c). But in a more recent case, it has been held that a railway company is liable to pay for surveys, plans, &c., made by order of its directors for the purpose of an application to Parliament for an extension of powers (d).

Bonds.

Bonds, see infra, Borrowing money, Debentures, Mortgages.

Borrowing
money.

Borrowing money.—One of the most important questions respecting the powers of directors, and one which is constantly

E. & B. 1. See, also, the judgment of Holroyd, J., in 3 B. & A. 10, and compare *Stark v. Highgate Archway Co.*, 5 Taunt. 792. In *Aggs v. Nicholson*, 1 H. & N. 165; and *Lindus v. Melrose*, 2 *ib.* 293, and 3 *ib.* 177, the point decided was, that the defendants were not personally liable on the notes there in question. These cases by no means decided that the companies would have been liable without proof of authority in their directors to issue notes on their behalf. The marginal notes of the reporters go too far, and are apt to mislead. In *Halford v. Cameron's Coalbrook, &c.*, Co., 16 Q. B. 442, and *Edwards v. Cameron's Coalbrook, &c.*, Co., 6 Ex.

269, the action was against the company, but the authority of the directors to bind it by bills was not in issue.

(c) Bills of Exchange act, 1882, § 23.

(a) *Infra*, c. 4, § 3.

(b) *Infra*, Bk. III., c. 2, § 2, c. 1 § 3, b.

(c) *Eastern Anglian Rail. Co. v. Eastern Counties Rail. Co.*, 11 C. B. 775. See, also, *McGregor v. Dover and Deal Rail. Co.*, 18 Q. B. 618; *Mainwell v. Midland Great Western Rail. Co.*, 1 Hem. & M. 130; *Taylor v. Chichester and Midhurst Rail. Co.*, L. R. 2 Ex. 356, and 4 H. L. 628.

(d) *Bateman v. Mayor of Ashton-under-Lyne*, 3 H. & N. 323; Bramwell, B., dissented.

arising in practice, is whether they can borrow money for their company and render their company liable to repay it. Bk. II. Chap. 3.
Sect. 1.

Whenever this question arises, the first point to determine is whether the company is one which cannot lawfully borrow money at all, for if all borrowing is *ultra vires*, it follows that it cannot be liable as debtor (*e*) to repay what its directors may have assumed to borrow for it (*f*).

Supposing that all borrowing is not *ultra vires*, the next point to determine is whether there is any statutory or other limit to the amount which may be borrowed; and whether this amount has been already raised so as to render any further exercise of the power to borrow, not only irregular and improper as an excess of authority, but wholly *ultra vires*. If this be the case, it will again follow that, to the extent to which the borrowing powers have been exceeded, the company will not be liable to repay what may in fact have been borrowed in its name and on its credit (*g*).

Supposing, thirdly, that borrowing is not *ultra vires* as regards the company, its liability for money borrowed in its name will depend upon whether the directors had authority, express or implied, to borrow money for the company; for if not, the company will not be liable to repay what its directors may in fact have borrowed for it, unless the company has ratified the borrowing (*h*).

Supposing, lastly, that borrowing is *intra vires* so far as the company is concerned, and that the directors have implied though no express authority to borrow, and they do borrow money for and on behalf of the company, then the company will be liable to repay it, unless there has been some excess of real authority known to the lender (*i*).

Cases in which the directors of a company have power to borrow, and do borrow for and in the name of the

(*e*) As to liability arising from the application of the money, see *infra*, c. 5.

(*f*) *Montreal Assurance Co. v. McGillivray*, 13 Moo. P. C. 87, and the cases in the next note.

(*g*) *Blackburn Building Soc. v. Cunliffe, Brooks & Co.*, 22 Ch. D. 61,

and 9 App. Ca. 857; *Baroness Wenlock v. River Dee Co.*, 36 Ch. D. 675, note, and 10 App. Ca. 354; and see further on other points, 38 Ch. D. 534, aff. 36 *ib.* 674, and 19 Q. B. D. 155.

(*h*) See *ante*, 166, &c., 175, &c.

(*i*) See *ibid.*

Bk. II. Chap. 3. company, give rise to no difficulty, and need not be further
Sect. 1. alluded to.

Again cases in which the directors of a company borrow as principals, and not for or in the name of the company, give rise to no difficulty, for *ex hypothesi* the money borrowed has not been lent to or borrowed by the company.

Application of
the money.

When money is so borrowed for a company as to render the company liable to repay it as a debt of its own, it is quite immaterial to the lender what has been done with the money; the application of the money in the case supposed is no concern of his, and in no way affects his rights. But if money is so borrowed for a company as not to render the company liable to repay it as a debt of its own, still the lender may not be wholly without remedy against the company. The application of the money then becomes important, and may render the company liable to repay him in whole or in part, as will be more fully explained hereafter (*infra*, Book II. c. 5).

Having made these general observations, it is proposed to notice the leading decisions on the subject.

Whether all borrowing is *ultra vires*, whether only borrowing beyond a certain amount is *ultra vires*, whether there is any and what authority on the part of directors or others to borrow (assuming no question of *ultra vires* to arise), are all questions which depend on the nature of a company's business, and upon the terms of its charter, act of Parliament, deed of settlement, or regulations.

It is very seldom that the nature of a company is such as to render all borrowing under all circumstances *ultra vires*, so that even all its members cannot sanction a loan to it for any purpose.

Limited
power to
borrow.

But there are numberless companies which have by statute or charter power to borrow to a limited extent (*k*), and there are numerous cases establishing that loans to such companies beyond the authorised amount are invalid. The two most

(*k*) *E.g.*, railway, canal, and other companies which obtain special acts and limited borrowing powers. See, as to them, 8 & 9 Vict. c. 16, §§ 38, *et seq.*; 16 & 27 Vict. c. 118, §§ 22-35; 29 & 30 Vict. c. 108; 32 & 33 Vict. c. 48, § 1; and 38 & 39 Vict. c. 66. As to loan notes, &c., im- properly issued, see 7 & 8 Vict. c. 85, § 19.

recent and instructive decisions on this point are *Baroness Wenlock v. River Dee Co.*, and *The Blackburn Building Society v. Cunliffe, Brooks & Co.* Bk. II. Chap. 3.
Sect. 1.

In the *Baroness Wenlock v. The River Dee Co. (l)*, a company was formed to improve the river Dee and lands adjoining, and was empowered to borrow 25,000*l.* on mortgage. The directors borrowed 85,000*l.*, which was applied in paying off a previous mortgage of 60,000*l.* In an action to recover the 85,000*l.* and interest, it was held that the plaintiff was only entitled to recover 25,000*l.*, and so much more as had been applied in payment of debts and liabilities of the company properly incurred (*m*). Baroness Wenlock v. River Dee Company.

The borrowing powers of benefit building societies are strictly defined by statute (*n*). Such societies are empowered to borrow money up to a certain limit if their certified rules enable them so to do (*o*). But apart from the acts and the rules there is no power to borrow (*p*). Consequently if money is borrowed by the managers of the society for it, the society itself is not liable to repay the amount (*q*), although the managers are personally liable to repay it by virtue of an express enactment to that effect (*r*). So stringent is the law limiting the borrowing powers of these societies, that if money is borrowed beyond the authorised amount, and the amount so

(*l*) 10 App. Ca. 354, and 36 Ch. D. 675, note, and 19 Q. B. D. 155. See also, *Landowners, &c., Inclosure Co. v. Ashford*, 16 Ch. D. 411.

(*m*) See as to this, *infra*, c. 5.

(*n*) 37 & 38 Vict. c. 42, §§ 15, 16; 38 Vict. c. 39.

(*o*) The rules need not themselves limit the amount: *Murray v. Scott*, 9 App. Ca. 519, and 23 Ch. D. 440, *sub nom.*, *Guardian Permanent Build. Soc.*; *Mutual Aid Build. Soc.*, 29 Ch. D. 182, and 30 *ib.* 434; *Laing v. Reed*, 5 Ch. 4. These authorities overrule *Hill's case*, 9 Eq. 605, and *Davis' case*, 12 Eq. 516. See as to the difference between borrowing money and receiving

money for shares in advance, *Guardian, &c., Building Soc.*, 23 Ch. D. p. 453.

(*p*) See, in addition to the cases cited below, *Kent Benefit Build. Soc.*, 1 Dr. & Sm. 417; *Ex parte Williamson*, 5 Ch. 399.

(*q*) *Chapleo v. Brunswick Build. Soc.*, 6 Q. B. D. 696; *Blackburn Build. Soc. v. Cunliffe, Brooks & Co.*, cited below. See also, *Ex parte Watson*, 21 Q. B. D. 301, where the society acquired borrowing powers and then gave a note for money previously borrowed.

(*r*) 37 & 38 Vict. c. 42, § 43; *Chapleo v. Brunswick Build. Soc.*, *ubi supra*; *Looker v. Wrigley*, 9 Q. B. D. 397.

Bk. II. Chap. 3. Sect. 1. borrowed is actually repaid out of the funds of the society, such an application of the funds is *ultra vires*, and the amount so repaid can be recovered back by the society from the lender of the money.

Blackburn
Building Society
v. Cunliffe,
Brooks & Co.

This was decided in *The Blackburn, &c., Building Society v. Cunliffe, Brooks & Co. (s)*. It had been previously decided that the bankers could not recover the amount of the society's overdraft nor hold securities given for it except to the extent to which the moneys advanced had been properly applied in discharging liabilities of the company (*ss*).

Ex parte
Watson.

It has also been decided that where money was borrowed for a building society which had no power to borrow, a note given by it for repayment of the money was invalid, although the society had acquired power to borrow before it gave the note (*t*). There was in this case no compromise and no consideration for the note to render it *intra vires*. The note was clearly not given for money borrowed when there was power to borrow; there was no fresh borrowing.

Implied
power to
borrow.

Passing now to cases unaffected by the doctrines of *ultra vires*, the directors of ordinary trading companies, whose regulations are silent on the subject of borrowing, have an implied power to borrow for the purposes of the business of the company (*u*), but the directors of other companies have, it is conceived, no such implied power (*x*).

A power to borrow is so necessary to a banking company that its directors can scarcely be deprived of it; and there are several cases in the books in which their power was held to have been exercised so as to bind the company (*y*). Moreover, although the directors of a company may have no power to borrow, power so to do may be conferred upon them by the shareholders; for this is a matter as to which a majority can bind a minority (*z*),

(s) 29 Ch. D. 902.

(ss) *Cunliffe, Brooks & Co. v. Blackburn Buil. Soc.*, 9 App. Ca. 857, and 22 Ch. D. 61.

(t) *Ex parte Watson*, 21 Q. B. D. 301.

(u) *Ex parte Pitman & Edwards*, 12 Ch. D. 707, and the next four notes.

(x) See the judgment of L. J. Bowen in 36 Ch. D. 685, note.

(y) *Bank of Australasia v. Breil-lat*, 6 Moore, P. C. 152, and 12 Jur. 189; *Mac-lue v. Sutherland*, 3 E. & B. 1; *Royal Brit. Bank v. Turquand*, 5 ib. 248, and 6 ib. 327; *Galloway's case*, 18 Jur. 885.

(z) *Bryon v. Metropolitan Saloon Omnibus Co.*, 3 De G. & J. 123. As to unincorporated building societies, see 29 Ch. D. 902.

unless borrowing is *ultra vires* as regards the company itself. Further, if the directors have already power to do whatever the company itself can do, this includes a power to borrow (*a*), if to borrow is *intra vires*. Moreover, a special power given to the directors to borrow to a certain extent does not preclude the company from borrowing to a greater extent with the sanction of the shareholders (*b*).

Borrowing imports the creation of the relation of debtor and creditor, and whenever money is obtained upon terms which produce this relation, there is in substance a borrowing; *e.g.*, overdrawing a banking account is borrowing (*c*). But mortgages and charges may be created on property, and the remedy of the lender may be confined to realising his security; whether such securities are valid as against any particular company, must be decided upon the principles already explained. But where directors have no power to borrow, they have no power to raise money on such securities, unless such power can be shown to exist (*d*). It is not, however, every transaction by which money is obtained that can be considered borrowing, even although the transaction involves the payment of money by the person who obtains the money, to the person from whom it is procured; the transaction may be a sale and rehiring, and such a transaction, if *bonâ fide* and not a borrowing in disguise, will be valid, although there may be no power to borrow (*dd*). Further, giving a note for an existing debt not due from the company, is not a borrowing by the company (*e*).

What is borrowing.

Connected with the subject of borrowing money, is increasing capital. The difference between them is illustrated by *Bryon v. Metropolitan Saloon Omnibus Company* (*f*). In that case the capital of a limited joint-stock company had been expended,

Increasing capital.

Bryon v. Metropolitan Saloon Omnibus Company.

(*a*) *Australian Steam Clipper Co. v. Mounsey*, 4 K. & J. 733; *Gibbs and West's case*, 10 Eq. 312.

(*b*) *Irvine v. Union Bank of Australia*, 2 App. Ca. at p. 374.

(*c*) *Blackburn Building Soc. v. Cunliffe, Brooks & Co.*, 9 App. Ca. 837, and 22 Ch. D. 61; *Landowners' &c., Inclosure Co. v. Ashford*, 16 Ch. D. 437; *Looker v. Wrigley*, 9 Q. B. D. 397. *Waterlow v. Sharp*, 8 Eq. 501,

and *Cefn Cilcen Mining Co.*, 7 Eq. 88, *contra*, are overruled by the above.

(*d*) See *Baroness Wenlock v. River Dee Co.*, *ubi supra*.

(*dd*) *Yorkshire Rail. Waggon Co. v. Maclure*, 19 Ch. D. 478, and 21 *ib.*, 309.

(*e*) *Ex parte Watson*, 21 Q. B. D. 301.

(*f*) 3 De G. & J. 123.

Bk. II. Chap. 3. and a majority of shareholders proposed to borrow money on
 Sect. 1. the credit of the company. A dissentient minority sought to restrain the majority from so doing, and reliance was placed on the doctrine that the capital of the company could not be increased by borrowing money without the consent of all the shareholders. But it was held competent for the majority to borrow money on the credit of the company, and that the doctrine relied on had no application to the case; the capital of the company being one thing, and that which was sought to be increased by borrowing (viz., the cash in hand) being a different thing.

Obtaining goods] The difference between borrowing money and procuring
 on credit. goods or services on credit is not only obvious (*g*), but is practically important, as is shown by the cases in which members of cost-book mining companies have been held liable for goods supplied to the mine (*h*), but not for money borrowed (*i*).

Exercise of power to borrow. An authority to borrow does not warrant the issue of debentures except to secure money lent or to discharge a liability (*k*); nor does an authority to borrow on the security of the funds and property of a company justify a mortgage of its uncalled-up capital (*l*); but future debts may be charged by way of security (*m*). Where directors have power to borrow on mortgage but not on bills of exchange, a mortgage to secure money borrowed and for which bills have been given, is not invalid (*n*).

(*g*) Partn. 133.

(*h*) *Tredwen v. Bourne*, 6 M. & W. 461; *Hawken v. Bourne*, 8 *ib.* 703.

(*i*) *Hartogne v. Bourne*, 7 M. & W. 595; *Burmester v. Norris*, 6 Ex. 796; *Ricketts v. Bennett*, 4 C. B. 686; *Brown v. Byers*, 16 M. & W. 252; *Beldon v. Campbell*, 6 Ex. 886.

(*k*) *Inns of Court Hotel Co.*, 6 Eq. 82; *West Cornwall Rail. Co. v. Mowatt*, 12 Jur. 407.

(*l*) *English Channel Steam Co. v. Rolt*, 17 Ch. D. 715; *Ex parte Bradshaw*, 15 Ch. D. 467; *Stanley's case*, 4 De G. J. & Sm. 407; *Bank of S. Australia v. Abrahams*, L. R. 6 P. C.

265; and see *King v. Marshall*, 33 Beav. 565. Calls actually made, *Gibbs and West's case*, 10 Eq. 312; *Saukey Brook Coal Co.*, No. 2, *ib.* 381, and calls actually determined to be made, although not actually made, *Saukey Brook Coal Co.*, No. 1, 9 Eq. 721, may be mortgaged. So may uncalled-up capital if the power extends to the properties and rights of the company, *Howard v. Patent Ivory, &c., Co.*, 38 Ch. D. 156.

(*m*) *Bloomer v. Union, &c., Coal Co.*, 16 Eq. 383.

(*n*) *Scott v. Colburn*, 26 Beav. 276.

Indeed, where the power to borrow exists and money is borrowed, a debt is contracted, although the security given for it may be informal (*o*). Bk. II. Chap. 3.
Sect. 1.

Where the directors of a company have power to borrow, there is nothing now to prevent a loan to the company by one of themselves (*p*). Loans by
directors.

The validity of securities improperly issued depends on the principles above explained. If they are *ultra vires* they are invalid and worthless even in the hands of *bonâ fide* holders for value, except so far as the money they represent can be recovered by reason of its having been applied for the benefit of the company (*q*). But where the doctrines of *ultra vires* do not apply, securities which are improperly issued are invalid in the hands of persons having notice of the impropriety (*r*), and also in the hands of their transferees if the securities are mere choses in action and are not negotiable, and if the company is not estopped as against such holders from denying the validity of the securities (*s*). But if the securities are negotiable (*t*), or if they create a legal charge (*u*), or if, although they are not negotiable and are mere choses in action, the company is estopped, as against a *bonâ fide* transferee for value without notice of any impropriety, from disputing their validity (*x*) such a transferee can enforce them against the company. Validity of
securities im-
properly issued.

Borrowed or loan capital (*y*) may be properly referred to in connection with this subject. The right to raise it depends on the principles already alluded to. There are, however, several very important statutory enactments relating to the Borrowed
capital.

(*o*) See *Strand Music Hall Co.*, 3 De G. J. & Sm. 147; *Ross v. Army and Navy Hotel Co.*, 34 Ch. D. 43.

(*p*) *Campbell's case*, 4 Ch. D. 470. It was otherwise under 7 & 8 Vict. c. 110, as to which see *Teversham v. Cameron's Coalbrook Co.*, 3 De G. & S. 296; *Baker's case*, 1 Dr. & Sm. 55; *Murray's Ex. case*, 5 De G. M. & G. 746.

(*q*) See *ante*, p. 162, *et seq.* and *infra*, p. 237, *Landowners, &c., Inclosure Co. v. Ashford*, 16 Ch. D. 434.

(*r*) *Howard v. Patent Ivory, &c.*, L.C.

Co., 38 Ch. D. 156.

(*s*) *Athenæum Life Ass. Co. v. Pooley*, 1 Giff. 102, and 3 De G. & J. 294, *ante*, p. 180.

(*t*) *Ante*, p. 171.

(*u*) This is inserted on general principles; no case actually deciding the point has been found.

(*x*) As in *Romford Canal Co., Carew's claim*, 24 Ch. D. 85; *Webb v. Commissioners of Herne Bay*, L. R. 5 Q. B. 642.

(*y*) As to this use of the word "capital" see bk. iii., c. 3, § 1.

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Sect. 1.

borrowed or loan capitals of companies incorporated by special acts of Parliament and governed by the Companies' clauses consolidation act, 1845, and these enactments require attention.

8 & 9 Vict. c. 16.

By the act in question, railway and other companies governed by it are empowered to raise money by mortgage or bond by the order of a general meeting (z). But this order is not essential to the validity of the securities issued (a). The bonds or mortgages rank *pari passu* as between their respective holders *inter se*, without reference to their respective dates (b). A register of the bonds and mortgages is required to be kept, and the holders of them are entitled to inspect the register (c). The bonds or mortgages are transferable by deed (d), and the transfer must be registered in order to complete the title of the transferee as between himself and the company (e). The interest on the bonds and mortgages is payable in priority to dividends to shareholders (f). As regards repayment of the principal sum, a day for repayment may be fixed in the bond or mortgage, or no time for repayment may be fixed. If a day for repayment is fixed the principal sum then becomes a debt for which an action may be brought (g). If no time be fixed the creditor may call in the money twelve months after the date of the bond or mortgage on giving the company six months' notice (h). The company may pay it off on giving a like notice (i). The most effectual remedy for enforcing payment is to obtain a receiver (j); and if the special act authorises the mortgagees to apply for a receiver, they can obtain one from two justices of the peace (k).

(z) 8 & 9 Vict. c. 16, §§ 38, 39, 40.

(a) *Fountaine v. Carmarthen, &c., Rail. Co.*, 5 Eq. 316; *Romford Canal Co.*, 24 Ch. D. 85.

(b) §§ 42, 44. See *Bowen v. Brecon, &c., Rail. Co.*, 3 Eq. 541.

(c) § 45.

(d) § 46.

(e) § 47. See *Doe v. Jones*, 5 Ex. 16; *Lane v. Smith*, 14 Beav. 49.

(f) § 48.

(g) § 50. *Price v. Great Western Rail. Co.*, 16 M. & W. 244; *Vertue v. East Anglian Rail. Co.*, 5 Ex. 280, shows that a transferee can sue in his own name. See *infra*, c. 7.

(h) § 51.

(i) § 51.

(j) *Infra*, c. 7. A bond creditor must first recover judgment.

(k) §§ 53 & 54.

The Railway companies securities act, 1866 (*l*), also contains important provisions relating to the registration of persons authorised to issue securities, to rendering accounts of loan capital, and to the endorsement on bonds and mortgages of certain particulars in order to prevent over-issues.

The Railway companies act, 1867 (*m*), protects the rolling stock of railway companies from seizure (*n*), and declares that money borrowed on mortgage bond or debenture stock under any special act shall have priority over other claims arising after August, 1867, with some few exceptions (*o*).

This act was passed after the decision of *Gardner v. London, Chatham & Dover Railway Co.* (*p*), which settled that mortgagees of a railway company's "undertaking" are not entitled to any specific charge upon the company's stock or surplus lands, but are only entitled, so long as the company is a going concern, to a receiver of its earnings. The effect of the priority clause just alluded to does not affect this decision; and notwithstanding that clause, a judgment creditor can obtain a sale of the surplus lands and payment out of their proceeds in priority to mortgagees of the company's undertaking (*q*). The clause in fact only comes into operation when there is a receiver of the earnings, when there is a scheme of arrangement, and when the company is being wound up under the Railway abandonment act (*r*).

Debenture stock is merely borrowed capital consolidated into one mass for the sake of convenience. Instead of each lender having a separate bond or mortgage, he has a certificate entitling him to a certain sum, being a portion of one large loan. The debenture stock of railway companies and of other companies created by special act of Parliament and governed by the Companies' clauses consolidation act, 1845, is regulated

(*l*) 29 & 30 Vict. c. 108.

(*m*) 30 & 31 Vict. c. 127.

(*n*) § 4, and see *infra*, c. 7.

(*o*) *Ib.* The exceptions are rents granted under the Lands clauses acts, rents payable under leases, claims for lands taken or

injuriously affected.

(*p*) 2 Ch. 201. This is the leading case on these securities.

(*q*) *Hull, Barnsley, &c., Rail. Co.*, 40 Ch. D. 119.

(*r*) *Ib.*, and see *infra*, bk. iv., c. 3.

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Gardner v. London, Chatham, and Dover Railway Company.

Debenture
stock.

Bk. II. Chap. 3. by a variety of statutes of which the principal are the Companies' clauses act, 1863 (26 & 27 Vict. c. 118), the Railway companies' securities act, 1866 (29 & 30 Vict. c. 108), and the Railway companies act, 1867 (30 & 31 Vict. c. 127), to which the reader is referred for further details.

See further, *Debentures*; *Mortgages*.

Cheques. *Cheques*.—The bankers of a company which has no proper directors may, nevertheless, safely pay cheques drawn in its name by those persons who in fact carry on its business, unless the bankers are aware of their want of authority (s).

Overdrawing is borrowing; and bankers who allow companies which have no power to borrow to overdraw their accounts cannot recover the amount overdrawn from the company (t).

Bankers who allow a company to overdraw its account have no remedy against the directors personally; although they may have signed the cheques or authorised others to sign them (u). But as regards building societies, the law is otherwise by virtue of 37 & 38 Vict. c. 42, § 43 (x).

Compromises. *Compromises*.—A company has, as incident to its existence, the same power as an individual to compromise claims brought against it (y).

Debentures. *Debentures*.—The word debenture, though of frequent occurrence in connection with companies, has no definite legal meaning (z). What is called a debenture may be a mere promise to pay, a covenant to pay under seal, or a mortgage or charge under the seal of the company (a). If, as is usually the case, it purports to give the holder a charge on the under-

(s) *Mahony v. East Holyford Mining Co.*, L. R. 7 H. L. 869.

(t) *Ante*, p. 191; see *Cunliffe Brooks & Co. v. Blackburn Building Soc.*, 22 Ch. D. 61, and 9 App. Ca. 857.

(u) *Beattie v. Lord Ebury*, L. R. 7 H. L. 102.

(x) See *Looker v. Wrigley*, 9 Q. B. D. 397; *Chapleo v. Brunswick Build. Soc.*, 6 Q. B. D. 696.

(y) *Bath's case*, 8 Ch. D. 334;

Dixon's case, L. R. 5 H. L. 618, per Lord Westbury.

(z) *British India Steam Nav. Co. v. Commissioners of Inland Revenue*, 7 Q. B. D. 165; *Edmonds v. Blaina Furnaces Co.*, 36 Ch. D. 215; *Levy v. Abercorris Slate Co.*, 37 Ch. D. 260; *Topham v. Greenside Fire Brick Co.*, 37 Ch. D. 281.

(a) See cases in last and succeeding notes.

taking or the general property of the company, the charge given is what has been called "a floating security," that is, it charges the property of the company for the time being, but does not prevent the company from dealing with its property in the ordinary course of its business (*b*). Consequently, if the company, after having issued debentures of this nature, mortgages a specific part of its property in the ordinary course of its business, or to obtain an advance of money necessary to carry on that business, the specific mortgagee, whether he had notice of the previous issue of debentures or not, has priority over the debenture-holders (*c*). On the appointment of a receiver by a debenture-holder, or on the commencement of a winding-up, the floating nature of the security is at an end, and the charge then becomes effective on the property of the company existing at that time, but not as a rule on capital which has not been called up (*d*).

The validity of debentures given by way of renewal of former debentures or in lieu of bills or bonds of the company previously issued, depends on the validity of such former instruments (*e*). Where power exists to issue debentures they may be issued at a discount (*f*).

What are called *Lloyd's Bonds* are instruments under the seal of a company, containing an admission by the company of its indebtedness to a specified amount to the obligee, and a covenant to pay him such amount, with interest, on a future

(*b*) See *Panama, &c., Mail Co.*, 5 Ch. 318; *Marine Mansions Co.*, 4 Eq. 601; *New Clyde Co.*, 6 Eq. 514; *Gardner v. Lond. Chatham and Dover Rail.*, 2 Ch. 201; *Ex parte Moor*, 10 Ch. D. 530; *Moor v. Anglo-Italian Bank*, 10 Ch. D. 681; *Hodson v. Tea Company*, 14 Ch. D. 859; *Ex parte Bradshaw*, 15 Ch. D. 465; *Willmott v. London Celluloid Co.*, 34 Ch. D. 147.

(*c*) *Moor v. Anglo-Italian Bank*, 10 Ch. D. 681; *Ex parte Pitman and Edwards*, 12 Ch. D. 707; *Wheatley v. Silkstone Coal Co.*, 29 Ch. D. 715, and compare *In re Horne and Helbard*, 29 Ch. D. 736. As to the

priority of debenture-holders *inter se*, see *Gartside v. Silkstone, &c., Iron Co.*, 21 Ch. D. 762; *Mowatt v. Castle Steel Co.*, 34 Ch. D. 58.

(*d*) *Ex parte Bradshaw*, 15 Ch. D. 465; *English Channel Steam Co. v. Rolt*, 17 Ch. D. 715. Compare *Howard v. Patent Ivory Co.*, 38 Ch. D. 188.

(*e*) See *Fountaine v. Carmarthen Rail. Co.*, 5 Eq. 316. Compare *Irvine v. Union Bank of Australia*, 2 App. Ca. 366.

(*f*) *Anglo-Danubian, &c., Colliery Co.*, 20 Eq. 339; *Campbell's case*, 4 Ch. D. 470. See, also, *Regent's Canal Ironworks Co.*, 3 Ch. D. 43.

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Lloyd's bonds.

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day. The validity of these instruments depends on the considerations for which they are given; they are *primâ facie* binding on the company as admissions of indebtedness; but when issued by railway companies for money borrowed after their statutory powers of borrowing have been exhausted, they are altogether illegal and void (*g*).

Issue of debentures.

Debentures are issued when they are delivered (*h*).

Registration of debentures under Bills of sale act.

Section 17 of the Bills of sale act, 1882, excepts from the operation of that act any debentures issued by any mortgage loan or other incorporated company and secured upon the capital, stock, or goods, chattels, and effects of such company (*i*).

And as to debenture stock of companies governed by special acts of Parliament, see 26 & 27 Vict. c. 118, Part 3; and 32 & 33 Vict. c. 48.

See further *Borrowing Money* and *Mortgages*.

Deeds of companies.

Deeds.—The deeds of unincorporated companies are governed by the principles applicable to ordinary partnerships (*k*).

The question, whether an instrument sealed with the seal of an incorporated company is binding on the company, depends (1) on the authority by which the seal was affixed to the instrument, and (2) on the nature of the instrument. An instrument to which the seal has been affixed by a person who has no authority to affix it, is invalid, and if there is any intent to defraud, is a forged instrument (*l*). On the other

(*g*) *Chambers v. Manchester, &c., Rail. Co.*, 5 B. & Sm. 588; *White v. Carmarthen Rail. Co.*, 1 Hem. & M. 786; *Cork and Youghal Rail. Co.*, 4 Ch. 748; *Fontaine v. Carmarthen Rail. Co.*, 5 Eq. 316-325. As to debentures issued for debts contracted before the power to borrow commenced, see *Re Baginbaldtown and Wexford Rail. Co.*, Ir. R. 4 Eq. 505, where the previous authorities are reviewed.

(*h*) *Mowatt v. Castle Steel Co.*, 34 Ch. D. 78.

(*i*) See on this section, *Ross v. Army and Navy Hotel Co.*, 34 Ch. D. 43; *Edmonds v. Blairst Furnaces*

Co., 36 Ch. D. 215; *Levy v. Abercorris Slate Co.*, 37 Ch. D. 260; *Topham v. Greenside Fire Brick Co.*, ib. p. 281; *Jenkinson v. Brandley Mining Co.*, 19 Q. B. D. 568, and as to the Bills of Sale Act, 1878, see *Swift v. Punnell*, 24 Ch. D. 210, and *Palmer's Comp. Prec.* 4th ed. pp. 386-388.

(*k*) As to the inability of one partner to bind his firm by a deed, see Partn. 136.

(*l*) See *Bank of Ireland v. Evans' Charities*, 5 H. L. C. 389, and *per Lord Eldon in Mayor of Colchester v. Lowten*, 1 V. & B. 244; *Mayor of the Staple of England v. Bank of England*, 21 Q. B. D. 160.

hand, an instrument sealed by the proper officers is, *prima facie*, binding on the body corporate; and although the presence of the seal does not have the effect of binding the corporation with respect to matters which are *ultra vires*, it does throw upon the corporation the onus of proving the invalidity of the instrument, and precludes the corporation from taking advantage of the non-observance of preliminary formalities, if the person dealing with its managers had not notice of such non-observance (*m*).

By § 55 of the Companies act, 1862, any company under the act may empower any person to execute deeds on its behalf in any place not situate in the United Kingdom (*n*).

Extension of business.—It follows from the principles investigated in the last chapter that although the directors of a company may develop the business which it was formed to transact, they have no power to change the character of such business, nor to enlarge it by embarking in any business not necessary to carry on the first in the usual way. This subject has been already alluded to (*o*), and will be more fully examined hereafter when considering the powers of majorities to bind minorities, and the cases in which injunctions have been granted against directors (*p*). It is sufficient here to state that in conformity with the principles above alluded to, a company formed for the purposes of life insurance has been held not bound by policies against maritime risks, though issued with the sanction of two general meetings (*q*); that it has been doubted whether a copper mining company could sue on a contract for the supply of iron by itself (*r*); that a canal company has been held unable to obtain by prescription any right to water except for the purposes of its canal (*s*).

(*m*) *Bateman v. The Mayor of Ashton*, 3 H. & N. 323; *The Australian, &c., Co. v. Mounsey*, 4 K. & J. 733; *The Royal British Bank v. Turquand*, 5 E. & B. 248, and 6 ib. 327; *Agar v. The Athenæum Life Assurance Co.*, 3 C. B. N. S. 725; *Scott v. Colburn*, 26 Beav. 276, and see *ante*, p. 166 *et seq.*

(*n*) See also the Companies' Seals

act, 1864, 27 & 28 Vict. c. 19.

(*o*) See *ante*, p. 162 *et seq.*

(*p*) See book iii. chap. 1, § 3, and chap. 9, § 4.

(*q*) *Burges and Stock's case*, 2 J. & H. 441.

(*r*) *Copper Miners' Co. v. Fox*, 16 Q. B. 229.

(*s*) *National Guaranteed Manure Co. v. Donald*, 4 H. & N. 8.

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Extension of
Business.

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On the other hand, it is now settled that railway companies are bound by contracts to carry or send goods beyond the limits of their own lines (*t*); and a railway company can sue upon a contract between itself and others who undertake to carry passengers and goods from its terminus across the sea in steam vessels (*u*).

See further in connection with this subject *ante*, *Bill in Parliament*, and *infra*, under the heads *Leases* and *Transfer of business*.

Buying share
in another
business.

The power of a company formed for lending money, acquiring property and carrying on any monetary operations, to join other persons in buying an estate and building upon it and to form another company in order to carry out the speculation

London Financial
Association v.
Kelk.

was much discussed in *London Financial Assurance v. Kelk* (*x*); and it was held that such operations were within the power of the company; that any irregularities in the way in which the directors had acted had arisen from mere errors of judgment; and that what they had done had been approved and sanctioned by the bulk of the shareholders. In this case, however, the company's memorandum of association was so wide in its terms as to warrant almost any kind of business which the directors might choose to engage in.

Indemnities by
directors.

Indemnity.—A company is not bound by an indemnity given by its directors, unless their power to give it can be shown (*y*); but a general power of management is a sufficient authority, if giving an indemnity is fairly within the scope of the company's business (*z*). Nor is a company bound by a guarantee given for a fraudulent purpose, and which purpose is known to the person to whom the guarantee is given (*a*).

(*t*) *Wilby v. West Cornwall Rail. Co.*, 2 H. & N. 703, and the cases there cited; *Great Western Rail. Co. v. Blake*, 7 H. & N. 987.

(*u*) *South Wales Rail. Co. v. Redmond*, 10 C. B. N. S. 675. Compare *Colman v. Eastern Counties Rail. Co.*, 10 Beav. 1.

(*x*) 26 Ch. D. 107. Referred to *infra*, book iii., c. 2.

(*y*) *Era Assurance Co., W. N.*, 1866, 309; *Ridley v. Plymouth Grinding*

Co., 2 Ex. 711; *Kirk v. Bell*, 16 Q. B. 290; and see, as to guaranteeing profits to other companies, *Colman v. Eastern Counties Rail. Co.*, 10 Beav. 1.

(*z*) *Ex parte Booker*, 14 Ch. D. 317; *Small v. Smith*, 10 App. Ca. 119.

(*a*) *British and American Tel. Co. v. Albion Bank*, L. R. 7 Ex. 119; *Gray v. Lewis*, 8 Eq. 526; reversed but not on this point, 8 Ch. 1049.

An agreement by directors, that persons taking shares in a company shall be indemnified by the company against loss, does not bind the company (*b*); nor does an agreement that the company will indemnify outgoing shareholders against their liabilities (*c*). But directors who personally give such indemnities, are bound by them (*d*).

Where two companies have power to amalgamate, an agreement by one of them to indemnify the other against its liabilities is valid, and capable of being enforced (*e*). See further as to this subject *infra*, under the head *Purchases*.

Insurances.—A life insurance company is not bound by marine policies issued by its directors with the sanction of a general meeting of shareholders (*f*). Nor is a fire insurance company, which has power to issue marine policies limiting the liability of the company to its funds, bound by marine policies issued in a name which is not the name of the company, and containing no stipulation as to the limit of liability (*g*).

Investments and loans.—Notwithstanding 38 & 39 Vic. c. 60, a loan by a friendly society to a person who is not a member of the society on the security of his promissory note is not illegal but merely unauthorized and the money lent can therefore be recovered (*h*).

Judicial Proceedings.—The powers of directors and others to act for the company in legal proceedings will be noticed hereafter when treating of actions (Bk. II., c. 7, and Bk. III., c. 9), and winding up (Bk. IV. c. 1).

Leases.—With respect to leases to and by companies, a company may take on lease a larger house and more land than it wants at the time, and may sublet what it does not actually

(*b*) See *Bunn's case*, 2 De G. F. & J. 275.

(*c*) See *Munt's case*, 22 Beav. 55, and others of that class, which will be noticed hereafter in book iii., ch. 5, § 6.

(*d*) See *Barker v. Allan*, 5 H. & N. 61; *Haddon v. Ayres*, 1 E. & E. 118. Compare *Ellis v. Colman*, 25 Beav. 662.

(*e*) *Anglo-Australian Ass. Co. v. British Prov. Society*, 3 Giff. 521; and on app. 4 De G. F. & J. 341.

(*f*) *Phoenix Life Assurance Co.*, 2 J. & H. 441.

(*g*) *Hambro' v. Hull and London Fire Ins. Co.*, 3 H. & N. 789.

(*h*) *In re Coltman*, 19 Ch. D. 64.

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require at the time (i). It has also been held that the directors of an hotel company might lease part of the hotel for the purposes of a government office (k); but in this case the circumstances were peculiar; the hotel was of an immense size and just finished; the letting was to be temporary; and the whole building could not have been advantageously opened as an hotel at once. It is settled that in the absence of express power so to do, one railway company cannot lease its line to another and exclude itself from using it (l). Where, however, the articles of association of a company authorised two-thirds of the shareholders to require the directors to do any act which the company itself could do, and two-thirds of the shareholders authorised and required the directors to lease the company's works for twenty-one years, and such lease was made accordingly, it was held to be valid and binding on the company and on dissentient members (m).

It has been decided that a railway company cannot make a valid lease of any part of its land, so as to prevent the company from retaking the land if and when possession of the land becomes necessary for the purposes of the company (n). But this doctrine is not to be extended to cases in which it is not clearly proved that the lease is inconsistent with the attainment by the company of the purposes for which it was created (o).

Mortgages and
pledges.

Mortgages and Pledges.—With respect to mortgages and pledges by companies little remains to be added to what has been said above under the head *Borrowing money*. It has been held that a trading company can give a valid bill of sale

(i) See *Horsey's claim*, 5 Eq. 562.

(k) *Simpson v. Westminster Palace Hotel Co.*, 2 De G. F. & J. 141, and 8 H. L. C. 712. See, also, *Forrest v. Manchester and Sheffield Rail. Co.*, 30 Beav. 40, and 7 Jur. N. S. 887, as to temporary use of property.

(l) See *Winch v. Birkenhead Rail. Co.*, 5 De G. & Sm. 562; *London and Brighton Rail. Co. v. London and S.-W. Rail. Co.*, 4 De G. & J. 362; *Shrewsbury and Birmingham Rail. Co. v. North-Western Rail. Co.*,

6 H. L. C. 113. See further, as to this much litigated case, 2 Mac. & G. 324; 3 ib. 70; 16 Beav. 441; 4 De G. M. & G. 115; 17 Q. B. 652.

(m) *Featherstonhaugh v. Lee Moor Porcelain Clay Co.*, 1 Eq. 318.

(n) *Mulliner v. Midland Rail. Co.*, 11 Ch. D. 611. Qu., if this case did not go too far.

(o) See *Grand Junction Canal Co. v. Petty*, 21 Q. B. D. 273, where part of a towing path was dedicated to the public as a highway.

to secure a debt of the company (*p*); that the directors of a steam ship company having general powers of management can mortgage its ships for money borrowed (*q*), and that the directors of a manufacturing company with similar powers can equitably mortgage its property by depositing its deeds (*r*); but that a mortgage of the uncalled-up capital of a company is invalid unless under special circumstances (*s*).

As to mortgages by companies governed by the Companies' clauses consolidation act, see *ante*, under the head *Borrowing money*, and also 8 & 9 Vict. c. 16, § 38 *et seq.*, and as to debenture stock, 26 & 27 Vict. c. 118, § 22 *et seq.*, 32 & 33 Vict. c. 48, § 1.

All limited registered companies are required by the Companies act, 1862, to keep a register of all mortgages and charges specifically affecting their property and to allow the register to be inspected (*t*); but unregistered mortgages are not invalid, even although held by a director whose duty it is to see that the statute is complied with (*u*).

By section 19 of the Stannaries act, 1887 (50 & 51 Vict. c. 43), all companies to which that act applies are required (in addition to any other registration required by law) to register at the office of the registrar of the vice-warden's court within twenty-eight days of their date, all documents whereby power is given to any person to take possession of any mining effects of or in their mine. Unless registered the documents shall confer no priority over, or title as against, the claims of any

(*p*) *Shears v. Jacob*, L. R. 1 C. P. 513; *Deffell v. White*, L. R. 2 C. P. 144. A bill of sale given by a company is within the Bills of Sale act, 1882 (45 & 46 Vict. c. 42), unless it is a debenture within the meaning of section 17 of that act. See *Attenborough's case*, 28 Ch. D. 682, and *ante*, p. 196.

(*q*) *Australian Steam Clipper Co. v. Mounsey*, 4 K. & J. 733.

(*r*) *Ex parte National Bank*, 14 Eq. 507; *Patent File Co.*, 6 Ch. 83.

(*s*) See *ante*, p. 192, (*l*) and p. 197 (*d*).

(*t*) 25 & 26 Vict. c. 89, § 43.

(*u*) *Wright v. Horton*, 12 App. Ca. 371, which finally settles this much-contested question. The earlier authorities are, *General South American Co.*, 2 Ch. D. 337; *Borough of Hackney Newspaper Co.*, 3 Ch. D. 669; *North and South Wales Bank*, 10 Eq. 515; *Dublin Drapery Co.*, 13 L. R. Ir. 174. Compare *Native Iron Ore Co.*, 2 Ch. D. 345; *Ex parte Valpy and Chaplin*, 7 Ch. 289, where the mortgages were held invalid.

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Sec. 1.

Registers of
mortgages.

Bk. II. Chap. 3. persons for work done in the mine or for goods supplied to the
Sect. 1. company by which the mine is carried on.

Mortgage De-
benture Act.

By the Mortgage debenture act, 1865 (28 & 29 Vict. c. 78, amended by 33 & 34 Vict. c. 20) (*x*), facilities are given for the issue, by certain classes of companies, of transferable mortgage debentures, upon certain terms and conditions. But the act only applies to, 1, companies governed by the Companies act, 1862, and restricted by the memoranda of association to the objects of advancing money on real securities, and of borrowing money on transferable mortgage debentures, or on real securities (*y*); 2, to companies incorporated by act of Parliament for similarly restricted purposes. Moreover the paid-up capitals of these companies must not be less than 100,000*l.*, and each share must be of the nominal value of not less than 50*l.*, of which not less than one-tenth nor more than one-half must have been paid up.

Notice to com-
panies, &c.

Notice.—From the principle that the individual shareholders, and even the individual directors of a company are not its agents (*z*), it follows that notice to one of them is not notice to the company (*a*); and a company is not deemed to have notice through a director of a fraud on the company committed by that director (*b*); nor are two companies having some directors in common necessarily affected through them with notice of each other's affairs (*c*). Thus where two companies, A. and B., had in common two directors and a solicitor, and company A., in order to buy up its own shares, borrowed money of company B., and this circumstance was known to one of the two directors and to the solicitor, it was nevertheless held that company B. had no notice of the impropriety of

(*x*) The act contains a great variety of important provisions, to which it is unnecessary to allude in the present place.

(*y*) There is power to alter the memorandum so as to restrict it to these objects where the memorandum as originally framed includes them, but extends to others as well. See § 3.

(*z*) *Ante*, p. 155 *et seq.*

(*a*) See *Powles v. Page*, 3 C. B.

16; *Re Carew's Estate Act* (No. 2), 31 Beav. 39; *Peruvian Rail. Co. v. Thames, &c., Insurance Co.*, 2 Ch. 617.

(*b*) *Oriental Commercial Bank*, 5 Ch. 358; *Re Carew's Estate Act*, (No. 2), 31 Beav. 39.

(*c*) *Crédit Foncier, &c., Co.*, 7 Ch. 161; *Ebbw Vale Co.'s claim*, 8 Eq. 14.

the transaction (*d*). At the same time if, as sometimes happens, one director has authority to act for a company, his knowledge of matters within the scope of his authority affects the company; and it may be said generally that a company is affected by the knowledge acquired by its agents in the course of their duty (*e*), and as to matters to which it is their duty to attend, but not to other matters (*f*).

Although every person has notice of what he himself does, a company is not affected with notice of what is done by its officers when acting for themselves and not for the company (*g*), nor when acting in fraud of the company or beyond their powers (*h*).

Purchases.—Companies are clearly liable for goods supplied to them for the purpose of carrying on their business, if ordered by their agents. It has been held that the members of a cost-book mining company are liable for goods supplied to the mine by the order of its directors or resident manager (*i*); and that an ordinary joint-stock company cannot escape liability for goods *bond fide* supplied to it for the purposes of its business, and by the order of the superintendent of its works, simply because he may not have been appointed in strict conformity with the company's deed of settlement (*k*).

(*d*) *Crédit Foncier, &c., Co.*, 7 Ch. 161. See, also, *Gray v. Lewis*, 8 Ch. 1035, reversing S. C. 8 Eq. 526.

(*e*) *Société Générale de Paris v. Tramways Union Co.*, 14 Q. B. D. 424, and 11 App. Ca. 20, *sub nom. Société Gén., &c. v. Walker*, where the knowledge was acquired from casual talk at a funeral. As to notice through clerks, see the cases in note (*h*).

(*f*) *British and American Tel. Co. v. Albion Bank*, L. R. 7 Ex. 119. See, also, *Styles v. Cardiff Steamboat Co.*, 4 N. R. 483, Q. B.; a case as to notice of ferocity of a dog.

(*g*) See the cases on reputed ownership, *Ex parte Boulton*, 1 De G. & J. 163; *Browne v. Savage*, 4

Drew. 635; *Willes v. Greenhill*, 29 Beav. 376 and 387.

(*h*) See in addition to the cases in note (*b*), *Partn.* 142, and *Banque Jacques Cartier v. La Banque, &c., de Montreal*, 13 App. Ca. 111; *Williamson v. Barbour*, 9 Ch. D. 535; *Lacey v. Hill*, 4 Ch. D. 537, and *ante*, p. 178 *et seq.*

(*i*) *Newton v. Daly*, 1 Fos. & Fin. 26; *Tredwen v. Bourne*, 6 M. & W. 461; *Hawken v. Bourne*, 8 ib. 703. As to *Vice v. Anson*, 7 B. & C. 409, see the above cases, and *Owen v. Van Uster*, 10 C. B. 318.

(*k*) *Smith v. Hull Glass Co.*, 11 C. B. 897; *Allard v. Bourne*, 15 C. B. N. S. 468.

Plk. II. Chap. 3. So a company is liable to pay for goods which it has power to Sect. 1. buy, and which have been ordered in its name by its agents, although not for its use (*l*). But the mere circumstance that goods have been supplied to a company in the course of its trade and have been used by it, is not sufficient to render the company liable for them if they were supplied by the order of persons not authorised to obtain them for the company (*m*). In such a case ratification by the company must be proved (*n*). A company has implied power to purchase a patent which is useful to it for the purpose of carrying on its business (*o*).

Whether a company can buy shares in another company depends on the objects with which it is formed (*p*). But a company has no implied power to buy its own shares, nor is such a power included in a general power to deal in shares (*q*). In fact, such a power is inconsistent with the whole principle of limited companies, and cannot be conferred on such a company even by its articles of association, nor is it conceived even by its memorandum of association (*r*).

Representations. *Representations*.—A joint stock company is not bound by the statements of one of its members, unless he is also the agent of the company, and his statements relate to matters within the scope of his agency (*s*), and are made by him when acting for the company in some business with a third party (*t*). Nor is a company bound by statements made by one of its directors, if he is not singly an agent of the company (*u*). But a company is bound by the statements of its directors, if

(*l*) *Ebbw Vale Co.'s claim*, 8 Eq. 14.

(*m*) *Kingsbridge Flour Mill Co. v. Plymouth Grinding Co.*, 2 Ex. 718.

(*n*) As to which, see *ante*, p. 178 *et seq.*

(*o*) *Leifchild's case*, 1 Eq. 231.

(*p*) *Ante*, pp. 43, 200.

(*q*) *Zulueta's claim*, 5 Ch. 444.

(*r*) See *Trevor v. Whitworth*, 12 App. Ca. 409, where the earlier cases are collected and discussed. Lord Macnaghten (p. 436) was of opinion that the power even if contained in the memorandum of

association would be void—and the writer is of the same opinion. This point, however, did not actually arise, and has not been directly decided.

(*s*) *Burnes v. Pennell*, 2 H. L. C. 497, *ante*, p. 154; *Barnett Hoares & Co. v. South London Tramways Co.*, 18 Q. B. D. 815.

(*t*) *Devala Provident Gold Mining Co.*, 22 Ch. D. 593.

(*u*) *Holt's case*, 22 Beav. 48; *Gibson's case*, 2 De G. & J. 275; *Nicol's case*, 3 De G. & J. 387.

made by them honestly for the company and in the course of the business which it is their duty to transact (*c*).

As regards representations respecting the credit of persons, these to be actionable must be in writing signed by the persons, making them (9 Geo. 4, c. 14, § 6). Signature by an agent is not enough, and it has been held that a banking company governed by 7 Geo. 4, c. 46, is not liable to be sued for a misrepresentation of the kind in question made by its manager although signed by him (*g*).

How far companies are liable for the false and fraudulent statements of their directors and other officers will be examined in a subsequent section of the present chapter.

See further on this subject *ante*, under the head *Admissions*.

Sales.—With respect to sales by companies, the main points to be borne in mind are:—

1. Corporate bodies have by common law full power to sell their own corporate property (*z*).

2. Railway and other companies governed by special acts of Parliament conferring upon them rights and privileges which they would not otherwise enjoy, cannot delegate or transfer those rights and privileges to other persons (*a*).

3. Although general powers of management necessarily include power to sell in the ordinary course of business, such powers do not authorise sales of an unusual description, *e.g.*, a sale of the business of the company (*b*).

But there is a distinction between selling the business of a company as a whole and selling the specific goods and chattels of the company. This is well illustrated by the case of *Wilson v. Miers* (*c*). There a steamship company, being the

(*c*) See the cases cited in § 3. *Mour's Ex. case*, 2 De G. M. & G. 522.

(*y*) *Swift v. Jewsbury*, L. R. 9 Q. B. 301, overruling 8 Q. B. 244. Compare *Barwick v. English Joint Stock Bank*, 2 Ex. 259.

(*z*) *Mayor, &c., of Colchester v. Lowten*, 1 V. & B. 226; *Erin v. Corporation of Aron*, 29 Beav. 144. See, also, *Patent File Co.*, 6 Ch. 83.

(*a*) See *Winch v. Birkenhead Rail. Co.*, 5 De G. & Sm. 562, and other cases of that class, *ante*, p. 202, note (*l*).

(*b*) See *Ernest v. Nicholls*, 6 H. L. C. 401; *Ex parte Liquidators of the British Nation, &c., Ass.*, 8 Ch. D. 679, and the cases cited *ante*, p. 184 note (*f*). See, also, *Chapple v. Cudell*, Jac. 537, *infra*, note (*e*).

(*c*) 10 C. B. N. S. 348.

Pl. II. Chap. 3. reverse of prosperous, its directors entered into a contract for
Sect. 2. — the sale of its whole fleet. The purchaser declined to complete the contract, on the ground that, although the directors had general powers of management, including power to buy and sell ships, they could not, in the absence of a resolution to dissolve the company, sell off all its ships at once. The Court of Common Pleas, however, held that the contract was one which the directors could lawfully enter into and carry out without any special authority from the shareholders.

4. A power to sell the assets of a company as a whole when it is being wound up is conferred by the Companies act, 1862 (*d*); and independently of that act, where there is power to wind up, there must necessarily be a power to sell and convert into money (*e*).

See further *ante*, *Amalgamation*.

Transfer of
business.

Transfer of business, see *ante*, *Amalgamation*, and *Sales*.

SECTION 2.—TORTS.

Although companies are never created to do what is wrong, and can seldom be said to have in fact authorised the wrongful acts of their directors or servants, it is plain that the ordinary principles of agency apply to such cases; and on these principles, companies are liable for the negligence of their servants, and for torts committed by them in the course of their employment; and it never has been admitted, as a sufficient reason for non-liability on the part of the company, that it did not in fact authorise the very act complained of. All that is necessary to charge the company is that the act complained of

Negligence of
servants.

(*d*) See § 161, and *Higg's case*, 2 Hem. & M. 657; *Clinch v. Financial Corp.*, 5 Eq. 450, and 4 Ch. 117; *Imperial Bank of China, &c. v. Bank of Hindustan*, 6 Eq. 91; *City and County Investment Co.*, 13 Ch. D. 475; and *Union Bank of Kings-*

ton-upon-Hull, *ib.* p. 808.

(*e*) See *Lord v. Copper Miners' Co.*, 2 Ph. 740. Compare *Chapple v. Cadell*, Jac. 537, where it was held that the majority of the proprietors of a newspaper could only sell their own shares.

should be *intra vires*, and not *ultra vires* (*f*), and should be committed by the agent or servant of the company in the course — of the business to which it is his duty to attend, or as it is sometimes expressed, in the course and as part of his employment (*g*). Upon this principle it has been held that the Bank of England is liable for a wrongful detention of bank notes by its servants (*h*); that a banking company is liable for the loss of securities entrusted to it and carelessly kept (*i*); that a company is liable for a wrongful seizure of goods made by its servants for non-payment of tolls (*k*); for wrongful assaults (*l*), and arrests if made by persons authorised to act for the company in removing persons or giving them into custody (*m*); for negligence in laying down gas-pipes (*n*); for reckless driving (*o*); for the infringement of a patent by its servants contrary to the orders of its directors (*p*); and for the publication of a libel by transmitting it by telegraph (*q*). Moreover, in such cases as

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(*f*) See *ante*, p. 161, *et seq.* and *Poulton v. L. & S.-W. Rail. Co.*, L. R. 2 Q. B. 534.

(*g*) See, on this subject generally, *Burns v. Poulson*, L. R. 8 C. P. 563, and the cases cited *infra*; with reference to arrests, *Lord Bolingbroke v. Local Board of Swindon*, L. R. 9 C. P. 575; *Mersey Docks Co. v. Gibbs*, L. R. 1 H. L. 93; *Coe v. Wise*, *ib.* 1 Q. B. 711; and as to the non-liability of companies for the acts of directors and agents when not acting as their agents, *British Mutual Banking Co. v. Charnwood Forest Rail. Co.*, 18 Q. B. D. 714; *McGowan & Co. v. Dyer*, L. R. 8 Q. B. 141.

(*h*) *Yarborough v. Bank of England*, 16 East, 6. See, too, *Giles v. Taff Vale Rail. Co.*, 2 E. & B. 822.

(*i*) *Johnston's claim*, 6 Ch. 212. Compare *Giblin v. McMullen*, L. R. 2 P. C. 317.

(*k*) *Maund v. Monmouthshire Canal Co.*, 4 Man. & Gr. 452; *Smith v. Birmingham Gas Co.*, 1 A. & E. 526.

(*l*) *Butler v. Manchester and Sheffield Rail. Co.*, 21 Q. B. D. 207.

(*m*) *Moore v. Metropolitan Rail. Co.*, L. R. 8 Q. B. 36; *Bayley v. Manchester and Sheffield Rail. Co.*, L. R. 8 C. P. 148; *Goff v. G. Northern Rail. Co.*, 3 E. & E. 672. Compare *Edwards v. London and N.-W. Rail. Co.*, L. R. 5 C. P. 445; *Allen v. London and S.-W. Rail. Co.*, L. R. 6 Q. B. 65; *Poulton v. London and S.-W. Rail. Co.*, L. R. 2 Q. B. 534, and *Eastern Counties Rail. Co. v. Broom*, 6 Ex. 314, in all of which the company was held not liable.

(*n*) *Scott v. Mayor of Manchester*, 1 H. & N. 59, and 2 *ib.* 204.

(*o*) *Green v. London General Omnibus Co.*, 7 C. B. N. S. 290; *Limpus v. Same*, 1 Hurlst. & C. 526.

(*p*) See *Betts v. De Vitre*, 3 Ch. 441.

(*q*) *Whitfield v. South-Eastern Rail. Co.*, E. B. & E. 115. See, further, as to libels by companies, *Lawless v. Anglo-Egyptian, &c., Co.*, L. R. 4 Q. B. 262, where the libel complained of was contained in a report made by the directors to the shareholders

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Sect. 2.

Malicious
injuries.

those now in question, it is not necessary, in order to fasten liability on the company to prove any formal appointment of the agent by the company (*r*).

Whether an action will lie against a corporate body for a malicious injury has been much discussed and doubted, and can scarcely be said to be yet settled (*s*). The weight of authority is however in favour of such an action being maintainable, and in the author's opinion this is most in accordance with principle (*t*).

It is, however, essential in order that a company may be liable for the wrongful acts of its servants that those acts should be such as the company could have authorised, and that they should have been authorised or ratified by the company, or have been done by the servants in the course of their employment, and not when acting in matters to which it is not their duty to attend (*u*). Accordingly it was held that a company was not liable for injuries committed by a dog kept in a yard, there being no evidence to show that the savage nature of the dog was known to any one who had charge of it, nor to the company's manager, nor, in fact, to any one whose knowledge could be considered as the knowledge of the company, although it was proved to be known to one or two of its servants (*x*).

and which was held to be a privileged communication.

(*r*) See *Giles v. Taff Vale Rail. Co.*, 2 E. & B. 822.

(*s*) An action for malicious prosecution was held to lie in *Edwards v. Midland Rail. Co.*, 6 Q. B. D. 287; and the possibility of its being sustainable was recognised by the Privy Council in *Bank of New South Wales v. Owston*, 4 App. Ca. 270. See, however, *contra*, *Stevens v. Midland Counties Rail. Co.*, 10 Ex. 352, and *Abrath v. N.-E. Rail. Co.*, 11 App. Ca. 247, where Lord Bramwell

expressed a decided opinion against such an action. As to maintenance and champerty, see *Metropolitan Bank v. Pooley*, 10 App. Ca. 210.

(*t*) Pollock on Torts, 51 & 81.

(*u*) See the cases in the last ten notes, and the judgment in *Bank of New South Wales v. Owston*, 4 App. Ca. 270. The cases cited in note (*m*) show that a company can ratify and adopt the torts of its agents, if those torts are such as can theoretically be imputed to the company.

(*x*) *Styles v. Cardiff Steam Boat Co.*, 4 N. R. 483, Q. B.

Bk. II. Chap. 7.
Sect. 5.

SECTION III. FRAUDS.

It is now proposed to examine the general question—Under what circumstances is a fraud perpetrated by the directors of a company imputable to the company?

Directors of a company have no implied authority from the company to make false representations on its behalf; and, generally speaking, frauds committed by directors are quite as much frauds on the companies they represent as on other persons. But consistently with the established principles of agency, it does not follow that, as between an innocent company on the one hand, and an innocent individual defrauded by its directors on the other, the company is not responsible for the fraud committed by the directors. It has been held that the general interests of society demand that the representations by the directors of a company shall bind the company, although the shareholders may be ignorant of the representations and of their falsehood (*y*). In practice this question never arises in an abstract form, but always with reference to some remedy sought either by the company or against it; and if against it, then with reference to the rescission of some contract or with reference to an action for damages. This must always be borne in mind in reading the reported cases on the subject; for observations true with reference to one class of remedies may be inapplicable to another class (*z*).

First it will be convenient to refer to cases in which companies have sought redress, and to cases in which relief by way of rescission of contract has been sought against them.

In *The National Exchange Company of Glasgow v. Drew* (*a*), the defendants had been induced, by the false statements contained in the reports of the directors to the shareholders of a company, and by the false representations of its manager, to borrow money of the company, and to buy shares in it with

1. Rescission
of contract.National Ex-
change Company
of Glasgow v.
Drew.

(*y*) See the cases cited below.

(*z*) See in addition to the cases in the text, *Western Bank of Scotland v. Addie*, L. R. 1 H. L. Sc. App. 145; *Ranger v. The Great Western Rail. Co.*, 5 H. L. C. 72.

(*a*) 2 McQueen, 103. The judg-

ments in this case were reviewed by Lord Chelmsford in *Nicol's case*, 3 De G. & J. 387, and were not altogether approved by him. See, however, the judgment of Lord Justice Turner in the same case.

Bk. II. Chap. 3.
Sect. 3.

the money so borrowed, in order to keep the price of shares up in the market. The company sued for a return of the money lent, and the defendants relied upon fraud as an answer to the suit. The fraud was clearly proved, and it was held imputable to the company, and a sufficient ground of defence. The following passage from the judgment of the Lord Chancellor shows how the argument, that the fraud committed was not the fraud of the company, was met.

Judgment of
Lord Cranworth.

"The company, as an abstract thing, can represent or do nothing. It can only act by its managers. When, therefore, the directors, in the discharge of their duty, fraudulently (for I assume this to be so), for the purpose of misleading others as to the state of the concerns of the company, represent the company to be in a different state from that which they know it to be, and the persons to whom the representation is addressed act upon it in the belief that it is true, I cannot think that society can go on without treating that as a misrepresentation by the company. Otherwise companies of this sort would be in this extraordinary predicament—that they might employ, nay, must employ, agents to carry on their concerns, and that those agents might make representations, be they ever so false and ever so fraudulent, and yet that the company might and must benefit by those misrepresentations, without being at all liable to be told, that is your fraud. It was plausibly argued that these reports were not made *by* the company but *to* the company. In form that is so. No doubt they are reports made to the company. But I assume, for the present, that they were made to the company under such circumstances that what they so report is known and intended to be known, not only to the shareholders, but to all persons who may be minded to become shareholders, just the same as if they were published to the world. I repeat that I think the exigencies of society demand that the reports so made and so circulated should be deemed to be the reports of the company." Lord St. Leonards expressed a similar view upon this question. He said, "If representations are made by a company fraudulently, for the purpose of enhancing the value of their stock, and they induce a third person to purchase stock, those representations so made by them for that purpose do bind the company. I consider representations by the directors of a company as representations by the company, although they may be representations made to the company; it is their own representation. What is the first act which takes place at any such meeting as that at which the report was read? The first act which takes place at every such meeting in Scotland and England is, that if there is not a rejection, there is an adoption of the report; then I say the report is the act of the company, and not simply of the directors. It does not stand as the simple statement of the directors. It becomes the act of the company by the adoption of the report, and sending it forth to the world as a true representation of their affairs, and if that representation is made use of in dealing with third persons for the benefit of the company, it subjects them to the loss which may accrue to the party who deals, trusting to those misrepresentations."

Judgment of
Lord St. Leonards.

Again in *New Brunswick Co. v. Conybeare* (b), the facts of which will be referred to hereafter in considering the subject of the rescission of contracts for fraud, Lord Westbury, said :—

11. Chap. 3.
Sect. 3.

New Brunswick
Company v.
Conybeare.

“ I certainly am not at all disposed to advise your lordships to throw any doubt upon this doctrine, that if reports are made to the shareholders of a company by the directors, and the reports are adopted by the shareholders at one of the appointed meetings of the company, and those reports are afterwards industriously circulated &c., undoubtedly representations contained in those reports must be taken, after their adoption, to be representations and statements made with the authority of the company, and therefore binding the company. Neither do I think it would be at all expedient to question this conclusion—that if those reports, having been industriously circulated, shall be clearly shown to have been the proximate and immediate cause of shares having been bought from the company by any individuals, or subscribed for by any individuals, undoubtedly it will be impossible, consistently with the principles of equity, to permit the company to retain the benefit of that contract, and to keep the purchase money that has been so paid. There may be a very different consideration applied to the same transaction in a court of law and in a court of equity; because when an attempt is made in a court of law to render a party liable in damages for certain consequences of a misrepresentation, it is necessary to prove that the individual was aware, at the time, of the falsehood of the representation, or ought to have been so aware; but with regard to a claim for the restitution of property acquired through false representations made by an individual acting in the capacity of agent, although the company were no parties to those representations, and did not distinctly authorise them, it would still appear to be inconsistent with natural justice to permit property acquired by the company through the medium of those representations to be retained by them. So far, therefore, as these reports are concerned, they must be taken, I think, to be representations made by the company” (d).

Judgment of
Lord Westbury.

Difference
between law
and equity.

Lord Cranworth expressed it as his opinion “ That if an incorporated company, acting by an agent, induces a person to enter into a contract for the benefit of the company, that company can no more repudiate the fraudulent agent than an individual could repudiate him, and that consequently the company are bound by the misrepresentations of their agent:” and after alluding to the opinion he had expressed in the *National Exchange Company v. Drew*, and which is given above, his lordship added—

Judgment of
Lord Cranworth.

“ To that opinion I entirely adhere, and I think it would have been

(b) 9 H. L. C. 711.

(c) A report by the directors to the shareholders is not industriously circulated by being sent to absent shareholders, *Ex parte Barrett*, 2 Dr. & Sm. 415.

(d) See, in illustration of this doctrine, *Lovell v. Hicks*, 2 Y. & C. Ex. 46 and 481; *Slim v. Croucher*, 1 De G. F. & J. 518; *Smith v. Reese River Co.*, 2 Eq. 264; 2 Ch. 604, and L. R. 4 H. L. 64.

Bk. II. Chap. 3. applicable in this case if it had been proved that there had been a fraudulent representation or concealment by the directors, in order to induce Mr. Conybeare to purchase, not shares in the market (that is a very different thing), but shares belonging to the company; namely, forfeited shares. If the directors, or the secretary acting for them, had fraudulently represented something to him which was untrue, I then adhere to the opinion which I expressed in the former cases, that the company would have been bound by that fraud. But the principle cannot be carried to the wild length that I have heard suggested, namely, that you can bring an action against the company upon the ground of deceit, because the directors have done an act which might render them liable to such an action. That I take not to be the law of the land, nor do I believe that it would be the law of the land if the directors were the agents of some person, not a company. The fraud must be a fraud that is either personal on the part of the individual making it, or some fraud which another person has impliedly authorised him to be guilty of."

Principles applicable to these cases.

The principles above laid down have indeed been questioned (*e*); but so long as it is law that a principal *may* be bound by the unauthorised act of his agent, so long it will be impossible to deny that companies *may* be affected by the false and fraudulent representations of their directors, although they have no authority to promulgate falsehoods. The falsehood may be an excess of authority, but it does not therefore follow that it is imputable only to those who utter it: and it is now settled that for all purposes of rescission of contract induced by a false and fraudulent statement made by an agent of a company, such statement is, in point of law, the statement of the company, if the statement relates to a matter as to which he is its agent (*f*), and if it is made in the course, and as part of the business which he is appointed to transact for the company (*g*). Moreover in such cases there is no difference in principle between a fraudulent misstatement and a fraudulent concealment of a material fact (*h*).

Distinction between reports of directors and reports of shareholders.

A distinction is sometimes drawn between false reports made by directors to the shareholders, and adopted by them and

(*e*) See *Nicol's case*, 3 De G. & J. 387; *Mixer's case*, 4 ib. 575; *Ex parte Barrett*, 2 Dr. & Sm. 415.

(*f*) See the cases of rescission of contracts to take shares, *ante*, book i., c. 3, as well as the authorities referred to in the present section.

(*g*) As to this qualification, see the cases *infra*, p. 216.

(*h*) See *Peck v. Gurney*, 13 Eq. 79, and L. R. 6 H. L. 377; *Barwick v. English Jt. Stock Bank*, L. R. 2 Ex. 259; and *Oakes v. Turquand*, L. R. 2 H. L. 325.

then laid before the public, and false statements made by the directors alone to persons making enquiries of them with reference to the affairs of the company. But if such statements as the last cannot bind the company, it is difficult to see on what principle untrue reports adopted by shareholders can be regarded as emanating from those shareholders who do not expressly adopt them. If the directors are not the agents of the body of shareholders, for the purpose of stating what is false, surely some of the shareholders are not the agents of the rest for the same purpose. To say that a falsehood emanating from the directors is not imputable to the company, but that a falsehood emanating from a meeting of the shareholders is imputable to the company, cannot be right. The same principles ought to be applied to both cases; and the distinction between representations made by shareholders and similar representations made by directors is only sound when the representations relate to matters which the shareholders are competent to deal with, but the directors are not.

It must not be concluded from the foregoing observations that circulars and reports issued by a company are to be regarded as representations by the company to any one who sees them and is induced, even by an officer of the company, to act upon them. They will not amount to representations by the company unless they were issued for the purpose for which they are afterwards used; nor unless used by some person whose business it is to carry out that purpose; nor unless used by him when acting on behalf of the company. This is well illustrated by *Burnes v. Pennell* (i), which is sometimes, but erroneously, supposed to have decided that false reports made by the directors to their shareholders, and afterwards laid before the public, are not to be regarded as representations by the company. In this case a company was paying dividends when it was not warranted in doing so; its directors had issued and published false reports as to the flourishing state of its affairs; some time after these reports had been

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Reports and circulars when not imputable to company.

Burnes v. Pennell.

(i) 2 H. L. C. 497. See, too, *case*, 4 Drew. 529; and see *Peck v. Nicol's case*, 3 De G. & J. 387; *Gurney*, L. R. 6 H. L. 377, which, *Bigge's case*, 5 Jur. N. S. 7; *Worth's* however, was an action for damages.

Bk. II. Chap. 3. published, and when in fact they were old, they were shown by
 Sect. 3. — the law agent of the company to a person who was desirous of taking shares in it, and who ultimately did take shares in it on the faith of the representations made to him by the law agent, backed by the reports in question. It was held that these circumstances afforded no answer to an action for calls. It was no part of the business of the law agent to induce people to take shares in the company; no part of his business to make any representations as to the affairs of the company. The case is an authority for the proposition that representations made by an unauthorised person, although an officer of the company, do not bind the company, and that reports of the company used by him to substantiate his statements are not to be regarded as representations made by the company to the person to whom he shows them. But the case is no authority for the proposition that reports of directors are not reports of the company upon whose affairs it is part of their business to report. Whether any person who sees them is entitled to make use of them against the company is quite a different matter. He is only entitled to do so in one of two cases, viz., 1, if the reports are published for the purpose of being acted upon by the public, and he as one of the public deals with the company upon the faith of them; or, 2, if, being used for the purposes for which they were published, they are so used by the agents of the company when acting within the limits of their real or apparent authority and on behalf of the company.

Numerous other cases illustrating these principles will be found in the chapter relating to membership induced by false statements (Bk. I. c. 3, *ante*, p. 68, *et seq.*).

2. Actions for damages.

Passing now to actions for damages, the question whether a corporate body can commit a fraud and be liable in damages for it, at once presents itself for consideration. Some eminent judges are of opinion that an action of deceit will not lie against a corporation (*k*); but the contrary has been decided more than

(*k*) See Lord Bramwell's judgment in *Abrath v. N.-E. Rail. Co.*, 11 App. Ca. 352; and *per* Lords Chelmsford and Cranworth in *Addie v. Western Bank of Scotland*, L. R. 1 Sc. & Div. App., pp. 158,

166. See the comments on the dicta in this case in *Mackay v. Commercial Bank*, L. R. 5 P. C. 413; and *Houldsworth v. City of Glasgow Bank*, L. R. 5 App. Ca. 317.

once, both by the Privy Council and by the Exchequer Chamber. 13k. II. Chap. 3.
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In *Barwick v. English Joint Stock Bank* (b), an incorporated banking company was held liable in damages for a false and fraudulent statement of its manager relating to the state of a customer's account with the bank. Barwick v.
English Joint
Stock Bank.

In *Mackay v. Commercial Bank of New Brunswick* (m) the above case was followed, and a banking corporation was again held liable in damages for a false and fraudulent statement of its manager, by which the plaintiff had been induced to accept a bill in which the bank was interested. Mackay v.
Commercial
Bank of New
Brunswick.

In *Swire v. Francis* (n) these cases were again approved, but this was not an action against a company. *Swire v. Francis* is, however, another clear authority to the effect that principals are liable for the frauds of their agents on precisely the same grounds on which they are liable for other acts which are not in fact authorised: and this the writer conceives to be the true doctrine (o).

But assuming this to be the law it will be still true that a company (like any other principal) is not liable in damages for a false and fraudulent representation of its agent unless such representation has been made for and on behalf of the company and in the course of the business which it is his duty to transact. *Burnes v. Pennell* (p), which has been already noticed, is an illustration of the application of this principle to reports made by directors to shareholders and shown to other persons by agents of the company, but by agents whose employment did not extend to circulating the reports.

So in *British Mutual Bank Co. v. Charnwood Forest Railway Co.* (q), a company was held not liable for a false and fraudulent statement. British Mutual
Bank Co. v.
Charnwood
Forest Rail. Co.

(l) L. R. 2 Ex. 259, a case of fraudulent concealment. Compare *Swift v. Jewsbury*, L. R. 9 Q. B. 301, which turned on the signature of the manager not being the signature of the bank, within 9 Geo. 4, c. 14, § 6.

(m) L. R. 5 P. C. 394.

(n) 3 App. Ca. 106.

(o) See Bigelow's Lead. Ca. on

the Law of Torts, p. 25, *et seq.*; Pollock on Torts, 236, *et seq.* In *Houldsworth v. City of Glasgow Bank*, 5 App. Ca. 317, *ante*, p. 74, the liability of the company, but for the winding up, was not denied by the House of Lords.

(p) *Ante*, p. 215. See, also, *Peek v. Gurney*, L. R. 6 H. L. 377.

(q) 18 Q. B. D. 714. Observe

Observe that their stock certificates were for stock which the company had no power to issue - being for stock in excess of the amount which the company had power to borrow.

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lent representation made by an agent for his own purposes and not in fact for or on behalf of the company; although the representation related to matters as to which it was his business to answer inquiries.

Barnett, Hoares
& Co. v. South
London Tram.
Co.

Again in *Barnett, Hoares & Co. v. South London Tram. Co. (r)*, a company was held not liable in damages for a false and fraudulent representation made by its secretary, on the ground that it was not his duty to make representations on behalf of the company.

In the two last cases the company derived no benefit from the misrepresentation. This circumstance was material on the question whether the agent was or was not acting for and on behalf of the company; but if he had been so acting within the scope of his employment, the fact that the company was not benefited would, it is apprehended, have been immaterial.

Frauds on Stock
Exchange.

Barry v. Croskey.

In *Barry v. Croskey (s)*, it was attempted to make a company liable for alleged frauds on the part of the directors in getting up the company and issuing its shares, and in procuring the recognition of the company by the Stock Exchange Committee, and the appointment of a settling day for its shares. The bill charged that the company had adopted and ratified the acts of the directors, and that by the frauds in question the shares of the company had commanded in the market prices considerably higher than would otherwise have been possible. The bill then stated various dealings and transactions in shares of the company between the plaintiff and the broker of one of the directors, and that by these dealings and transactions, which were in fact time bargains, the plaintiff had lost money in consequence of the frauds of which he complained. The plaintiff by his bill sought to have all the contracts into which he had entered with the directors cancelled, and to be repaid all the moneys paid by him under those contracts. To this bill the company demurred; and the demurrer was allowed on the ground that the frauds complained of were, according to the plaintiff's own statements, such as could not

that the person deceived did not know that the agent was not in fact acting for the company, and *qu.* whether sufficient weight was given

to this circumstance.

(r) 18 Q. B. D. 815.

(s) 2 J. & H. 1.

be attributed to the company, but only to the individuals who were concerned in their perpetration. The company had done nothing in order to induce the plaintiff or any one else to speculate in its shares; the company knew nothing of the plaintiff nor of his dealings, and had not in any way been benefited thereby; the damage moreover sustained by the plaintiff was too remote to be attributed to anything imputable to the company. The Vice-Chancellor observed that "if this were the case not of a company and its directors, but of an individual principal and of his agent, the principal could never be held responsible in the manner for which the plaintiff contends."

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For reasons which have been already explained (Bk. I. c. 3, § 1), a company is not liable in damages for false as distinguished from fraudulent statements of its directors or agents; nor is a company responsible in damages for those acts which can only be regarded as fraudulent by reason of § 38 of the Companies act, 1867 (t).

Companies act,
1867, § 38.

The personal liability of directors and others for frauds committed by themselves has been already fully examined. See Bk. I. c. 3, §§ 1 and 2.

(t) *Ante*, pp. 91, 92.

CHAPTER IV.

OF THE PROPER FORM OF CONTRACTS WITH COMPANIES AND OF
THE EFFECT OF FORM ON LIABILITY.SECTION I.—OF THE RULE REQUIRING CONTRACTS OF CORPORATION
TO BE UNDER SEAL.Bk. II. Chap. 4.
Sect. 1.Contracts of
corporations.

It is a rule of the common law that, subject to one or two exceptions which will be noticed presently, a body corporate is not bound by any contract which is not under its corporate seal; and this rule has always been rigidly adhered to both at law and in equity (*a*).

(*a*) See generally, on this subject, Com. Dig. Franchise, F. 13; Bac. Ab. Corporation; Vin. Ab. Corporation; Grant on Corporations; Pollock on Contracts, 4th ed., p. 146, *et seq.*; *R. v. Bigg*, 3 P. W. 419; *Broughton v. The Manchester and Salford Waterworks Co.*, 3 B. & A. 1; and on the application of the rule in equity as well as at law, see *Winne v. Bampton*, 3 Atk. 473; *Taylor v. Dulwich Hospital*, 1 P. W. 655; *Wilmot v. Corporation of Coventry*, 1 Y. & C. Ex. 518; *Carter v. Dean of Ely*, 7 Sim. 211; *Gooday v. The Colchester Rail. Co.*, 17 Beav. 132; *Preston v. The Liverpool, &c., Rail. Co.*, ib. 114, and 5 H. L. C. 605. An action will in some cases lie against a corporation for money had and received, *Hall v. The Mayor of Swansea*, 5 Q. B. 548; for money paid, *Jefferys v. Gurr*, 2 B. & Ad.

833; for use and occupation, *Love v. The London and North-West. Rail. Co.*, 18 Q. B. 632; and see *Eccl. Comrs. v. Merral*, L. R. 4 Ex. 162; but see *Finlay v. The Bristol Rail. Co.*, 7 Ex. 409. As to actions by corporations on contracts not under seal, see *South of Ireland Coll. Co. v. Waddle*, L. R. 3 C. P. 463, and 4 ib. 617, overruling *East London Waterworks Co. v. Bailey*, 4 Bing. 283. See, also, *McArdle v. Irish Iodine Co.*, 15 Ir. Com. Law Rep. 146; *Copper Miners' Co. v. Fox*, 16 Q. B. 229; *Fishmongers' Co. v. Robertson*, 5 Man. & Gr. 131; *Mayor of Stafford v. Till*, 4 Bing. 75; *Doe v. Tanviere*, 12 Q. B. 998; *The London Dock Co. v. Sinnott*, 8 E. & B. 347; *Doe v. Bold*, 11 Q. B. 127. See as to the engagement of a clerk to a work-house, *Austin v. Guardians of Bethnal Green*, L. R. 9 C. P. 91; and as to the appointment and retainer of a soli-

At common law any seal affixed by the proper authority will suffice (*b*); but any director or other agent of a limited company under the Companies act, 1862, who uses a seal without the company's name engraved upon it makes himself liable to a penalty of 50*l*. (See sects. 41 and 42 of that act.) There is a similar provision in the Industrial and provident societies act, 1870 (39 & 40 Vict. c. 45, § 10, sub-s. 1, and § 18, sub-s. 2).

Even a resolution of the members of the body corporate is not equivalent to an instrument under its seal (*c*); and a corporation will not be compelled to execute a contract which it has been resolved shall be entered into by it (*d*). A distinction was at one time supposed to exist between executed and executory contracts; but except where the equitable doctrines of part performance are applicable, a corporation is no more bound by a contract not under its seal, of which it has had the benefit, than it is by a similar contract which has not been acted upon by either party (*e*).

citor by an incorporated company, *Thames Haven Dock Co. v. Hall*, 5 Man. & Gr. 274; *Farrell v. The Eastern Counties Rail. Co.*, 2 Ex. 344; *R. v. Cumberland*, 5 Ra. Ca. 332, which show that the solicitor on the record will be presumed to be properly appointed. If a solicitor sues a company for payment for his services, it is doubtful whether he must not prove a retainer under seal. See *Arnold v. The Mayor of Poole*, 4 Man. & Gr. 860, and compare *Haigh v. North Bierley Union*, E. B. & E. 873.

(*b*) Grant on Corp., 59. See as to the proper mode of affixing the seal and as to estoppels by instruments under seal improperly affixed, *Mayor, &c., of the Staple of England v. Governor and Co. of Bank of England*, 21 Q. B. D. 160.

(*c*) *Gibson v. The East India Company*, 5 Bing. N. C. 262; *Arnold v. The Mayor of Poole*, 4 Man. & Gr. 860; *Mayor of Ludlow*

v. Charlton, 6 M. & W. 815; *Smart v. West Ham Union*, 10 Ex. 867; *R. v. The Mayor of Stamford*, 6 Q. B. 433; *Cope v. The Thames Haven Co.*, 3 Ex. 841; *Dunstan v. The Imperial Gas Co.*, 3 B. & Ad. 125.

(*d*) *Wilmut v. The Corporation of Coventry*, 1 Y. & C. Ex. 518; *Taylor v. Dulwich Hospital*, 1 P. W. 655; *Carter v. Dean of Ely*, 7 Sim. 211.

(*e*) *Mayor of Kidderminster v. Hardwick*, L. R. 9 Ex. 13; *Mayor of Ludlow v. Charlton*, 6 M. & W. 815; *R. v. Stamford*, 6 Q. B. 433; *Paine v. The Strand Union*, 8 Q. B. 326; *Lamprell v. The Billericay Union*, 3 Ex. 283; *Diggle v. The London and Blackwall Rail. Co.*, 5 Ex. 442; *Homersham v. The Wolverhampton Waterworks Co.*, 6 Ex. 137; *Arnold v. The Mayor of Poole*, 4 Man. & Gr. 860; *Cope v. The Thames Haven Co.*, 3 Ex. 841. Courts of equity did not interfere in these cases. See *Crampton v. Varna Rail.*

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Exceptions to
the general
rule.

But strict as is the rule in question, it is and always has been subject to qualification. There are, it is said, some matters of so trivial a nature that they can be done so as to bind a corporation in the absence of any instrument under its seal (*f*); and what is more to the present purpose, it is held that if a corporation is created for a particular purpose, it will be bound by unsealed contracts entered into on its behalf in the ordinary course and *bonâ fide* for the purpose for which it is created (*g*). Upon this principle the East India Company was held liable to be sued upon bills of exchange accepted on its behalf, although its seal was not upon them (*h*). So gas companies have been held bound by agreements, not under seal, for the supply of gas (*i*) and gas meters (*k*); a navigation company has been held bound by a contract, not under seal, for the navigation of its ships (*l*); a railway company has been held bound to pay for rails, oil, and paint, &c., supplied to it on the order of its officers (*m*); a colliery company for pumping machinery supplied for the purposes of its colliery (*n*); a poor law union for coals supplied on similar orders (*o*); and a municipal corporation owning a dock for refusing to admit a

Co., 7 Ch. 562; *Kirk v. The Bromley Union*, 2 Ph. 640; *Ambrose v. The Dunmow Union*, 9 Beav. 508; *Jackson v. The North Wales Rail. Co.*, 13 Jur. 69; *The Directors of the Midland Great West. Rail. of Ireland v. Johnson*, 6 H. L. C. 798. As to the effect of affixing the company's seal after the contract has been partly performed, see *Melliss v. Shirley Local Board*, 14 Q. B. D. 911, reversed on another point, 16 Q. B. D. 446.

(*f*) See as to this, *South of Ireland Coll. Co. v. Waddle*, L. R. 3 C. P. 463, and 4 ib. 617; and *Eaton v. Basker*, 7 Q. B. D. at p. 532.

(*g*) See as to the last condition, *Ebbw Vale Co.'s claim*, 8 Eq. 14, which, properly understood, is not inconsistent with the text.

(*h*) *Edie v. The East India Co.*,

2 Burr. 1216, and *Murray v. The East India Co.*, 5 B. & A. 204.

(*i*) *Church v. The Imperial Gas Light Co.*, 6 A. & E. 846.

(*k*) *Beverley v. The Lincoln Gas Co.*, 6 A. & E. 829. The judgment in this case deserves more attention than it has received.

(*l*) *Henderson v. The Australian Royal Mail Steam Navigation Co.*, 5 E. & B. 409.

(*m*) *Ebbw Vale Co.'s claim*, 8 Eq. 14; *Denton v. East Anglian Rail. Co.*, 3 Car. & Kir. 16. Compare *Copper Miners' Co. v. Fox*, 16 Q. B. 229, where the corporation was held not liable for iron rails.

(*n*) *South of Ireland Coll. Co. v. Waddle*, L. R. 3 C. P. 463, and 4 ib. 617.

(*o*) *Nicholson v. Bradfield Union*, L. R. 1 Q. B. 620.

ship which they had agreed to admit in its turn (*p*). On the other hand it was held in a well-considered case, that a dock company was not bound by an unsealed agreement for cleansing its docks (*q*); and still more recently that poor law guardians are not bound by an unsealed agreement engaging a clerk (*r*). The exception in question, therefore, must still be applied with caution (*s*).

Another qualification of the general rule is founded upon the equitable doctrine of part performance. If a corporation has entered into an unsealed agreement which has been partly performed, and if the nature of the agreement and other circumstances are such as would induce a Court to decree specific performance of the contract if the parties to it were ordinary individuals, the Court will hold the corporation bound by the agreement, and will enforce it accordingly against or in favour of the corporation as the case may require (*t*).

A corporation may obviously ratify, under seal, a contract previously entered into but not under seal (*u*); but whether

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Part performance.

Ratification.

(*p*) *Wells v. The Mayor of Hull*, L. R. 10 C. P. 402.

(*q*) *London Dock Co. v. Sinnott*, 8 E. & B. 347. But see on this case, *South of Ireland Coll. Co. v. Waddle*, *ubi sup*.

(*r*) *Austin v. Guardians of Bethnal Green*, L. R. 9 C. P. 91. Compare *Scott v. Clifton School Board*, 14 Q. B. D. 500.

(*s*) These exceptions do not apply to non-trading corporations, the contracts of which are required by special statutes to be under seal. See the following cases under the Public health act, 1875 (38 & 39 Vict. c. 55, §§ 173 & 174); *Young & Co. v. Mayor of Leamington Spa*, 8 Q. B. D. 579, 8 App. Ca. 517; *Eaton v. Basker*, 6 Q. B. D. 201, reversed 7 Q. B. D. 529, on the ground that the act did not require the contract in question to be under seal; *Hunt v. Wimbledon Local Board*, 3 C. P. D. 208, 4 C. P. D. 48.

(*t*) See *Melbourne Banking Corporation v. Brougham*, 4 App. Ca. 156 at p. 168; *Crook v. Scaford*, 10 Eq. 678, and 6 Ch. 551; *London and Birmingham Rail. Co. v. Winter*, Cr. & Ph. 57; *Earl of Lindsey v. Great Northern Rail. Co.*, 10 Ha. 664; *Laird v. Birkenhead Rail. Co.*, Johns. 500; *Wilson v. West Hartlepool Rail. Co.*, 34 Beav. 187, and 2 De G. J. & Sm. 475; *Marshall v. Corporation of Queenborough*, 1 Sim. & Stu. 520; *Macwell v. Dulwich College*, 7 Sim. 222, note; *Stevens' Hospital v. Dyas*, 15 Ir. Ch. 405. In *Crampton v. Varna Rail. Co.*, 7 Ch. 562, the contract was not one which could be specifically enforced, and in *Leominster Canal Co. v. Shrewsbury and Hereford Rail. Co.*, 3 K. & J. 654, there was nothing amounting to part performance in the sense in which that expression is used in equity.

(*u*) See *ante*, book ii., c. 2, § 4.

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Estoppel by
record.

any other ratification of a contract required to be under seal will bind the corporation is questionable (*x*). It has, indeed, been said, that a corporation which sues upon an unsealed contract thereby irrevocably ratifies it by matter of record; and that the invalidity of the contract sued upon cannot avail as a defence to the action; and further, that if the corporation is afterwards sued upon the same contract, it would be estopped from denying its validity (*y*). These propositions have, however, been denied by high authority and cannot be relied upon (*z*).

Effect of a
judgment.

If, however, a corporation is sued upon an unsealed agreement and judgment is obtained against it, the corporation will not be allowed afterwards to repudiate the agreement, as against the person who has obtained the judgment, unless the judgment can be shown to have been obtained by fraud; or unless the agreement itself can be impeached for fraud and the question of fraud was not in issue in the action in which judgment was obtained (*a*).

Seal improperly
affixed.

Before leaving the present subject, it may be observed that although an instrument sealed with the corporate seal is *primâ facie* valid, yet if the seal is essential to its validity, and if it be proved that the seal was improperly affixed, *e.g.*, was affixed by a person having no authority to use it, the instrument is void as a corporate act (*b*). But those persons who in practice conduct a company's business, have implied authority

(*x*) See the observations of Lord Blackburn, L. R. 9 Ex. 261.

(*y*) *Fishmongers' Co. v. Robertson*, 5 Man. & Gr. 192.

(*z*) *Mayor of Kidderminster v. Hardwicke*, L. R. 9 Ex. 13; *Copper Miners' Co. v. Fox*, 16 Q. B. 229.

(*a*) See *Williams v. St. George's Harbour Co.*, 2 De G. & J. 547; *Hullett's case*, 2 J. & H. 306. In *The Athenæum Life Assur. Soc. v. Pooley*, 1 Giff. 102, and 3 De G. & J. 294, debentures were set aside, although in *Agar v. Athenæum, &c., Co.*, 3 C. B. N. S. 725, judgment had been obtained on another of like nature. But in the latter case

the only plea was *non est factum*, and no question of fraud, even if there were any in that case, was raised. As to what fraud will avoid a deed at law, see *Wright v. Campbell*, 2 Fos. & Fin. 393.

(*b*) See *Mayor, &c., Staple of England v. Governor and Co. of Bank of England*, 21 Q. B. D. 160; *Bank of Ireland v. Trustees of Evans' Charities*, 5 H. L. C. 389; *Colchester v. Lowten*, 1 V. & B. 243, 244; *D'Arcy v. Tamar, &c., Rail. Co.*, L. R. 2 Ex. 158. Compare *Ex parte The Contract Corporation*, 3 Ch. 105.

to use its seal for the purposes of such business (c); and a corporation will be estopped from disputing the authority to — fix the seal if negligence imputable to the corporation has conduced to the misuse of the seal and to the misleading of the person relying on it (d).

SECTION II.—STATUTORY EXCEPTIONS TO THE FOREGOING RULE.

The general rule, that a corporation is not bound by any contract not under its common seal, applies to all incorporated companies, save where it has been abrogated by statute; whence it follows, that in order that an incorporated company may be bound by a contract entered into on its behalf, the contract must fall within one of the exceptions already referred to, or be under the common seal of the company, or be entered into in the manner and form directed by the statute which empowers the company to contract in some other mode (e).

It is important, therefore, to ascertain what statutory enactments there are bearing upon this subject.

The Banking act, 7 Geo. 4, c. 46, and the Letters Patent act, 7 Will. 4 & 1 Vict. c. 73, leave the common law untouched as regards the question now under consideration. But companies regulated by these acts are not incorporated by them.

The Joint-stock companies registration act, 7 & 8 Vict. c. 110, §§ 44–46; the Joint-stock companies banking act, 7 & 8 Vict. c. 113, § 22; and the Joint-stock companies act of 1856, § 41, all contained provisions on this subject; but these acts are now repealed, and it is not necessary further to allude to them (f).

(c) See *Ex parte Contract Corp.*, 3 Ch. 105.

(d) See the first two cases in note (b).

(e) *Homersham v. The Wolverhampton Waterworks Co.*, 6 Ex. 137; *Diggle v. The London and Blackwall Rail. Co.*, 5 Ex. 442; *Cope v. The*

Thames Haven Co., 3 Ex. 841; *Copper Miners' Co. v. Fox*, 16 Q. B. 229; and see *Ernest v. Nicholls*, 6 H. L. C. 401.

(f) Upon 7 & 8 Vict. c. 110, § 45, relating to bills and notes, see *Hulford v. Cameron's Coalbrook Co.*, 16 Q. B. 412; *Edwards v. Cameron's*

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Sect. 2.

(1) Metropolitan
gas act.

(2) 8 & 9 Viet.
c. 16.

(1) By the Metropolis gas act, 1860 (*g*), the contracts of gas companies regulated by that act and entered into in accordance with it are binding without any seal, if signed by two or more directors, or by the company's secretary, or other officer, by the authority of two or more directors.

(2) The Companies clauses consolidation act, 8 & 9 Viet. c. 16, renders it lawful for the directors of a company to which that act applies to appoint committees (§ 95), and enacts (§ 97) that the power of the committees as well as the power of the directors to make contracts on behalf of the company may lawfully be exercised as follows:—

“With respect to any contract, which if made between private persons, would be by law required to be in writing and under seal, such committee or the directors may make such contract on behalf of the company in writing and under the common seal of the company, and in the same manner may vary or discharge the same.

“With respect to any contract, which if made between private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, then such committee or the directors may make such contract on behalf of the company in writing, signed by such committee or any two of them, or any two of the directors, and in the same manner may vary or discharge the same.

“With respect to any contract which, if made between private parties, would by law be valid though made by parol only, and not reduced into writing, such committee or the directors may make such contract on behalf of the company by parol only, without writing, and in the same manner may vary or discharge the same.”

Cases on this
act.

This enactment does not render a company liable on a contract entered into by its directors in writing, but not pur-

Coalbrook Co., 6 Ex. 269; *Aggs v. Nicholson*, 1 H. & N. 165; *Healey v. Story*, 3 Ex. 3; *Allen v. The Sea, Fire, and Life Insurance Co.*, 9 C. B. 574; *Gordon v. The Sea, Fire, and Life Insurance Co.*, 1 H. & N. 599. As to § 44, relating to other contracts, see *Ridley v. The Plymouth Grinding Co.*, 2 Ex. 711; *Ex parte Eagle Insur. Co.*, 4 K. & J. 549; *Hambro' v. Hull and London Fire Insur. Co.*, 3 H. & N. 789; *British Empire Co. v. Browne*, 12 C. B. 723. As to § 29, relating to contracts

with directors, see *Stear's case*, Johns. 480; *Ernest v. Nicholls*, 6 H. L. C. 401; *Curtis v. Anchor Insur. Co.*, 2 H. & N. 537; *Poole v. National Provincial, &c., Assurance Society*, ib. 687; *Murray's Ex. ca.*, 5 De G. M. & G. 746; *Tewersham v. Cameron's Coalbrook, &c., Rail. Co.*, 3 De G. & S. 296; *Baker's case*, 1 Dr. & Sm. 55.

(*g*) 23 & 24 Viet. c. 125, § 20. Quære what the words “entered into in accordance with this act” really mean.

porting to bind the company (*h*); nor on a contract required to be under seal or signed by two directors, but which is neither under seal nor so signed, although the company may have had the benefit of the contract (*i*). Moreover, notwithstanding the general words of the last clause of the enactment, it has been decided that where a company has entered into a contract in proper form for the execution of certain specified works, it is not bound to pay for extra works not done under the contract, although they may have been done by the orders and under the superintendence of the officer appointed by the directors to see the specified works properly executed (*k*). At the same time, where the company has had the benefit of a contract which, if entered into between ordinary individuals would be valid, although not in writing, it will be presumed, in the absence of evidence to the contrary, that such contract was duly made by the directors of the company or a committee of them, or by an agent duly appointed, so as to be binding on the company. Upon this principle a railway company has been held liable to pay for the use and occupation of land occupied by it for the purposes of its business (*l*); and to pay for sleepers furnished to the company at the request of its engineer (*m*); although there was nothing in either case to show that any express written or parol contract had been entered into on behalf of the company by its directors or any committee of them.

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Sect. 2.

Ordinary individuals can appoint agents verbally, and the

The Statute of
frauds and the
Companies
clauses act.

(*h*) See *Serrell v. The Derbyshire, &c., Rail. Co.*, 9 C. B. 811; and *McCollin v. Gilpin*, 5 Q. B. D. 390 affirmed 6 Q. B. D. 516, the case of a company governed by the Companies act, 1862.

(*i*) *Leominster Canal Co. v. The Shrewsbury and Hereford Rail. Co.*, 3 K. & J. 654. See, too, *Diggles v. London and Blackwall Rail. Co.*, 5 Ex. 442; *Midland Great Western Rail. Co. of Ireland v. Johnson*, 6 H. L. C. 798. But see as to cases of part performance, *ante*, p. 223.

(*k*) *Homersham v. Wolverhampton*

Waterworks Co., 6 Ex. 137. See, further, as to extra works, *Ranger v. The Great Western Rail. Co.*, 5 H. L. C. 72; and *Nixon v. The Taff Vale Rail. Co.*, 7 Ha. 136; *Kirk v. The Bromley Union*, 2 Ph. 640; *Lamprell v. The Billericay Union*, 3 Ex. 283.

(*l*) *Lowe v. The London and North-Western Rail. Co.* 18 Q. B. 632. See *Finlay v. The Bristol and Exeter Rail. Co.*, 7 Ex. 409.

(*m*) *Pauling v. The London and North-Western Rail. Co.*, 8 Ex. 867. See further on this subject, *ante*, p. 222.

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Sect. 2.

4th and 17th sections of the Statute of frauds, which in certain cases require contracts to be evidenced by some writing signed by the party to be charged, or his agent, do not render it necessary that the agent there spoken of should be appointed in writing (*n*). Hence a written contract entered into on behalf of a railway company for the purchase of land, and signed by its agent, is apparently binding on the company, although the agent may not have been appointed under seal or by any writing signed by two directors or members of a committee (*o*).

The Lands
clauses act.

It is beyond the scope of the present work to treat of the method in which companies governed by special acts of Parliament and the Lands clauses act can obtain land for the purpose of their undertakings; but it is not altogether irrelevant to observe that where parties have agreed to refer questions of disputed compensation under that act to arbitration, the appointment of an arbitrator on the part of the company may be made by the secretary (*p*).

(3) The Compa-
nies act, 1856.

(3) The Companies act of 1856 contained a clause (*q*) similar to that which occurs in the Companies clauses consolidation act (*r*); and although the act of 1856 is repealed, it has been decided that companies formed and registered under it may still be bound by unsealed contracts (*s*). The Companies act, 1862, contained no similar clause: but this defect has been cured by the Companies act, 1867 (*t*). Under it a memorandum signed by a director is sufficient to bind the company so far as the Statute of frauds is concerned (*u*).

The Companies
acts, 1862 and
1867.

(*n*) *Coles v. Trecothick*, 9 Ves. 250; *Clinan v. Cooke*, 1 Sch. & Lef. 31. *Maclean v. Dunn*, 4 Bing. 722, shows that a verbal ratification of a previously unauthorised agreement signed by an agent renders the agreement binding on the principal.

(*o*) See the cases on the Companies act, 1867, in note (*u*). See, also, *Wilson v. West Hartlepool Rail. Co.*, 34 Beav. 187, and 2 De G. J. & Sm. 475, where, however, this point was not alluded to.

(*p*) *Collins v. South Staffordshire Rail. Co.*, 7 Ex. 5.

(*q*) 19 & 20 Vict. c. 47, § 41.

(*r*) *Ante*, p. 226.

(*s*) *Prince v. Prince*, 1 Eq. 490.

(*t*) 30 & 31 Vict. c. 131, § 37, which is similar to 8 & 9 Vict. c. 16, § 97, above set out. See, as to the act of 1862, *South of Ireland Coll. Co. v. Waddell*, L. R. 3 C. P. 463, and 4 ib. 617, and *Totterdell v. Fareham Brick Co.*, L. R. 1 C. P. 674.

(*u*) *Jones v. Victoria Graving Dock*, 2 Q. B. D. 314. See, also, *Beer v. London and Paris Hotel Co.*, 20 Eq. 412.

The act also provides for the appointment by a company under its common seal, of agents to execute deeds abroad, and renders deeds executed by them as valid as if sealed by the company (*x*). This provision has been extended by a subsequent act of Parliament (*y*), which authorises companies governed by the Companies act, 1862, and carrying on business in foreign countries, to keep duplicate common seals there, having engraved upon them the name of the place in which they are to be used. The act, however, only applies to companies expressly authorised by their articles of association, or a special resolution to exercise the powers given by the act; and the persons entrusted with the seals must be specially empowered to use them by some instrument in writing under the common seal of the company. Instruments sealed by such persons in the place to which the seal entrusted to them applies, are as binding on the company as if such instruments had been sealed in this country with the ordinary common seal.

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Sect. 2.

Deeds executed
abroad.

Companies seals
act, 1864.

(*x*) § 55.

(*y*) 27 & 28 Viet. c. 19. It has not been thought necessary to print

this act in the appendix, and its general effect only is attempted to be given above.

*The Companies' Seals Act 1864
will be found in the appendix
of Statutes p. 1015.*

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Sect. 3.

SECTION III.—OF BILLS OF EXCHANGE AND PROMISSORY NOTES.

Bills of
Exchange act,
1882.

By the Bills of exchange act, 1882 (*c*), a bill of exchange may be made payable to the holder of an office for the time being. The older cases therefore to the effect that a bill payable to the secretary or treasurer for the time being of a company, is invalid (*d*), are no longer law.

In general the persons liable to be sued on a bill of exchange as drawer, indorser, or acceptor, are the persons who have signed it as such and no others (*e*); but this rule does not affect the provisions of the Companies act, 1862, nor any act relating to joint-stock banks or companies, or the Bank of England or Bank of Ireland (*ee*).

The power of a corporation to bind itself by drawing, accepting, or endorsing a bill is left by the act to depend upon the law for the time being in force relating to corporations (*f*). This power, so far as regards companies, has been already alluded to (*g*).

Instrument
under seal.

It is doubtful whether an instrument under seal can by the law merchant be a negotiable instrument (*h*); but now by the Bills of Exchange act, 1882 (*hh*), if an incorporated company has power to draw, accept, or indorse a bill, and it does so under its corporate seal, the company is liable to be sued on the bill.

Companies act,
1862.

The Companies act, 1862, expressly enacts that promissory notes and bills of exchange shall be deemed to be made, accepted, or endorsed on behalf of a company registered under the act, if made, accepted, or endorsed in the name or by or

(*c*) 45 & 46 Vict. c. 61, § 7 (2), and see as to promissory notes, § 89 (1).

(*d*) *Yates v. Nash*, 8 C. B. N. S. 581; *Storm v. Sterling*, 3 E. & B. 832, and *Cowie v. Sterling*, 6 E. & B. 333.

(*e*) 45 & 46 Vict. c. 61, § 23, and see § 89, as to promissory notes.

(*ee*) *Ib.*, § 97 (3).

(*f*) *Ib.*, § 22.

(*g*) Bk. i., c. 2, § 2, and *ante*,

p. 185.

(*h*) See *Crouch v. Crédit Foncier of England*, L. R. 8 Q. B., at p. 382. In *Ex parte City Bank*, 3 Ch. 758, the holder of a debenture payable to bearer, and under the seal of the company, was held entitled to prove for its amount, and *per* Selwyn, L. J., it was a promissory note. See, also, *Ex parte Colborn and Strachbridge*, 11 Eq. 478.

(*hh*) See 45 & 46 Vict. c. 61, § 91.

on behalf or on account of the company, by any person acting under its authority (*i*). 11. II. Chap. 4.
Sect. 3.

Moreover, if any director, manager, or officer of a limited company signs on behalf of the company any bill or note without adding the word "limited," he is personally liable to pay the same, unless it is duly paid by the company (*h*).

Directors and others constantly make promissory notes, and draw and accept bills in such a manner as to make it very difficult to say whether they personally, or only the companies for whom they act, are liable upon the instrument (*h*). The question is in every case one of construction: is the bill or note the bill or note of the company or not? Does it really purport so to be? for, although given for the purposes of the company, the bill or note may not even purport to bind it. If on the true construction of the instrument the bill or note is the bill or note of the company, the company will be liable upon it, and not the individuals whose names are on it (*m*), unless the bill or note is the bill or note of both. On the other hand, if on the true construction of the bill or note it is not the bill or note of the company, the persons whose names are upon it will be liable upon it, whether they intended to be so or not. Liability of
directors.

The following cases illustrate these principles. A bill drawn on the directors of a company, and accepted for the company by its manager and three of its directors, binds the three directors who accept the bill, but no one else (*n*). *A fortiori*, a bill drawn on the agent of a company, and accepted by him simply in his own name, binds him and not the company (*o*). On the other hand, a bill drawn on a company and accepted by its directors, secretary, or other authorised agent on its behalf or as its agent, binds the company and not those who accept the bill, except so far as they are members of the

(*i*) § 47. See *Ex parte Overend, Gurney & Co.*, 4 Ch. 460; *Re Barber & Co.*, 9 Eq. 725.

(*k*) § 42; *Penrose v. Martyn*, E. B. & E. 499.

(*l*) See as regards firms, Partn. 180, *et seq.*

(*m*) This supposes that the bill is not *ultra vires*, for if it is those who

give it will be liable, *West London Commercial Bank v. Kitson*, 13 Q. B. D. 360. See, also, as to not adding "limited," *ante*, note (*k*).

(*n*) *Bull v. Morrell*, 12 A. & E. 745.

(*o*) *Duearrey v. Gill*, 1 Moo. & M. 450, and 4 C. & P. 121; *Thomas v. Bishop*, 7 Mod. 189.

Bk. II. Chap. 4. company (*p*). But to this last rule there is an exception, as Sect. 2. — already noticed (*q*).

Examples of the foregoing rules.

Thomas v. Bishop. In *Thomas v. Bishop* (*r*), the bill was drawn on *John Bishop, cashier of the York Buildings Company*, and was accepted by Bishop in his own name, without reference to the company, and he was held by Lord Hardwicke to be personally liable on the bill.

Serrell v. The Derbyshire, &c., Railway Company. In *Serrell v. The Derbyshire, Staffordshire, &c., Railway Company(s)*, a cheque was drawn on the bankers of a company, and was signed by three directors, and countersigned by the secretary, and on the cheque was a date stamp, with the name of the company in a circle round the date: but the company was held not liable upon the cheque, for it did not purport to be a cheque of the company. The persons who signed the cheque had not even signed it as directors.

Balt v. Morell. In *Balt v. Morell* (*t*), the bill was drawn on *The Directors of the Imperial Salt and Alkali Company*, and was accepted for the *Imperial Salt and Alkali Company*, and signed

Richard Parker, Manager,
J. Ruinsford,
James Parker, } Directors.
Richard Garrett, }

The three last named persons only were held liable on the bill.

Nicholls v. Diamond. In *Nicholls v. Diamond* (*u*), the bill was drawn on "*Mr. James Diamond, purser, West Downs Mining Company*," and was accepted thus, "*James Diamond, accepted per proc. West Downs Mining Company*." Diamond was held liable on this bill.

Mare v. Charles. In *Mare v. Charles* (*x*), a bill was drawn on *W^m. Charles* for goods supplied to a mine, and was "*accepted for the company, W^m. Charles*," and this acceptance was held to render *Charles* solely liable.

Promissory notes.

Similar principles are applicable to promissory notes. In the following cases the makers were held personally liable upon them:—

Penkivil v. Connell.

WE, the directors of the Royal Bank of Australia, for ourselves and other shareholders of this company, jointly and severally promise to pay, &c., value received on account of the company.

T. W. SUTHERLAND,
J. CONNELL,
M. BOYD,
A. DUFF, } Directors (*y*).

(*p*) See *Edwards v. Barnard*, 32 Ch. D. 447; *Edwards v. Cameron's Coalbrook Co.*, 6 Ex. 269; *Halford v. Cameron's Coalbrook Co.*, 16 Q. B. 442, and *Eastwood v. Bain*, 3 H. & N. 738.

(*q*) See, *ante*, note (*k*).

(*r*) 7 Mod. 180.

(*s*) 9 C. B. 811.

(*t*) 12 A. & E. 745.

(*u*) 9 Ex. 154.

(*x*) 5 E. & B. 978.

(*y*) *Penkivil v. Connell*, 5 Ex. 381.

See, also, *Heuley v. Storey*, 3 Ex. 3.

*Midland Counties Building Society.*Bl. H. Chap. 4.
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We jointly and severally promise to pay, &c.

W. R. HEATH,	} Directors.
S. B. SMITH,	

Bottomley *v.*
Fisher.

W. D. FISHER, Secretary &c.

*Midland Counties Building Society.*Two months after demand in writing we promise to pay Mr. Thomas Price *v.* Taylor.
Price £100, for value received.

W. R. HEATH,	} Trustees.
JOHN TAYLOR,	

W. D. FISHER, Secretary &c.

Even if the company's seal is affixed and attested the directors signing the note will be liable if they promise to pay, as in *Dutton v. Marsh* (b), where the note ran thus :—

WE, the directors of the *Isle of Man Slate Co., Limited*, do promise to pay J. D. £1,600, with interest at 6 per cent. till paid, for value received.

Signed by four directors.

The company's seal attested was in one corner.

In *Miller v. Thompson* (c) the following instrument, drawn on a joint-stock bank, by the manager of one of its branches, was held to be the promissory note of the directors of the bank, and to be binding on them personally ;

*London Trades' Joint Stock Banking Company.**Dorking, Surrey, 24th August, 1839.*

Six months after date, pay, without acceptance, to the order of John Cogan Francis, Esquire, £100, value received.

(Signed) For the Directors,

THOMAS NEWHAM, Manager.

(Addressed) The London Trades' Joint Stock Banking Company, 33, Gracechurch Street, London.

On the other hand, companies have been held bound by notes in the following forms :—

(z) *Bottomley v. Fisher*, 1 H. & C. 234.

211. (b) L. R. 6 Q. B. 361.

(a) *Price v. Taylor*, 5 H. & N. 540. (c) 3 Man. & Gr. 576.Compare *Lindus v. Melrose*, *infra*, p.Notes of com-
panies.

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Aggs v.
Nicholson.

We, two of the directors of the Ark Life Assurance Society by and on behalf of the Society, do hereby promise to pay, &c., value received.

(Signed by two directors, and sealed with the seal of the Company) (*d*).

Maclae v.
Sutherland.

We, directors of the Royal Bank of Australia, for ourselves and other shareholders of the Company, jointly and severally promise to pay, &c., for value received, on account of the Company.

J. W. SUTHERLAND, Chairman.

ADAM DUFF, }
JOHN MITCHELL, } Directors (*e*).

Entered, BENJAMIN WOOD, Secretary.

Lindus v.
Melrose.

We jointly promise to pay, &c., for value received in stock, on account of the London and Birmingham Iron and Hardware Company, Limited.

JAMES MELROSE, }
G. N. WOOD, } Directors (*f*).
JOHN HARRIS, }

EDWIN GUESS, Secretary.

The following instruments have also been held to be promissory notes binding on companies :—

Allen v. Sea,
Fire, &c., Com-
pany.

To the CASHIER,

Sea, Fire, and Life Assurance Society.

CREDIT A., or order, with the sum of, &c., on account of this Corporation.

A. DAVIS, }
W. OGILVIE, } Directors (*g*).

Entered, F. F. A., Accountant.

UNION BANK POST BILL.

Forbes v.
Marshall.

At sixty days after sight of this our first bill of exchange (second and third of same tenor and date not paid), we promise to pay, on account of the proprietors of the Union Bank of Calcutta, &c., value received.

J. RENNIE, }
W. P. GRANT, } Directors (*h*).

H. W. ABBOTT, Secretary.

(*d*) *Aggs v. Nicholson*, 1 H. & N. 165.

(*e*) *Maclae v. Sutherland*, 3 E. & P. 1, held to be binding on the members of the company jointly.

(*f*) *Lindus v. Melrose*, 2 H. & N. 293, and 3 ib., 177, held to bind the company and not the directors signing. Compare *Price v. Taylor*, 5 H.

& N. 540, *ante*, p. 233.

(*g*) *Allen v. The Sea, Fire, and Life Assurance Co.*, 9 C. B. 574.

(*h*) *Forbes v. Marshall*, 11 Ex. 166. The above instrument had an acceptance written across it, and might, it seems, have been treated as a bill of exchange.

CHAPTER V.

LIABILITY OF COMPANIES IN RESPECT OF CONTRACTS NOT BINDING
ON THEM BUT OF WHICH THEY HAVE HAD THE BENEFIT.

It is obvious that one person may be benefited by a contract made by others without being himself in any way bound by it. A loan to A. cannot be recovered from B. simply because the money lent has come into his hands (*a*). So if the directors of a company enter into a contract which is not binding on the company, either upon the ground that the contract is *ultra vires* or upon any other ground, the company is not liable on the contract simply because it has had the benefit thereof (*b*).

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It has been already seen that a company is not, under ordinary circumstances, liable on contracts entered into by its promoters before its formation, although it may have had the benefit of such contracts (*c*). Further, a company which has benefited by a contract, not binding on it, is not to be deemed to have thereby ratified that contract; nor to have incurred an obligation *quasi ex contractu*, similar to that which would have been incurred if the contract had been binding on the company in the first instance (*d*).

At the same time, a company is liable to refund money which it has received without consideration, *e.g.*, premiums paid to it in respect of policies which it had no power to

Recovery of consideration which has failed.

(*a*) Partn. 189. See *Emly v. Lye*, 15 East, 7, and other cases there cited.

(*b*) See, in addition to the cases cited below, *The Worcester Corn Ex. Co.*, 3 D. G. M. & G. 180; *Fisher v. Tayler*, 2 Ha. 218.

(*c*) *Ante*, Bk. ii. c. 1, § 2.

(*d*) *Ex parte Williamson*, 5 Ch.

309; *Cork and Youghal Rail. Co.*, 4 Ch. 748; *Hill's case*, 9 Eq. 605; *Chambers v. Manchester and Milford Rail. Co.*, 5 B. & S. 588. See, also, *per Parke, B.*, in *Homersham v. Woleerhampton Waterworks Co.*, 6 Ex. 142, and the cases in the last few notes.

Bk. II. Chap. 5. grant (e); and money received in respect of shares the contract to take which afterwards fails or is rescinded (ce).

Exception to
general rule.

There is, however, a very important exception to the general rule against liability by reason of benefits received. It has been long settled in equity that although an infant is not liable at law for money borrowed although expended in necessities, nevertheless a person who *bonâ fide* advances money to an infant is entitled, on the administration of the infant's estate, to rank as a creditor in respect of so much of the money advanced as has in fact been expended in necessities (f). A similar rule has been applied to money lent to married women and expended in properly maintaining them (g). There is a further well settled rule that agents and trustees are entitled to be indemnified by their principals and *c'estuîs que trustent* against all expenses properly incurred in the exercise of their authority or the execution of their trust. From these doctrines there has been developed a rule to the effect that a company is liable to refund money improperly borrowed by its directors but in fact *bonâ fide* applied in discharging debts or liabilities of the company which could have been enforced against it, or *bonâ fide* applied for any other legitimate purpose for which it might have come under liability. These last words are added because with reference to the matter in hand there can, it is conceived, be no difference between paying a person for goods already supplied and paying cash for goods which might have been obtained from him on credit (h).

This doctrine has grown out of the celebrated decision in the *German Mining Company's case* (i), which will be hereafter referred to when considering the rights of directors to indemnity (Bk. III., c. 2, § 3). The following cases show the application of the doctrine to other persons, and the limit of its application.

(e) *Phoenix Ass. Co. Barges' and Stock's case*, 2 J. & H. 441.

(ce) *Ante*, pp. 33 and 72, note (g).

(f) *Marlow v. Pitfield*, 1 P. W. 558.

(g) *Jenner v. Morris*, 1 Dr. & Sm. 218; *Deare v. Soutten*, 9 Eq. 151.

(h) This, however, has not yet been actually decided. Some of the

cases may have gone too far, but the tendency in this direction has been checked by more recent decisions. See *Ex parte Williamson*, 5 Ch. 309, and the decisions subsequent to it noticed in the text.

(i) *Ex parte Chippendale*, 4 De G. M. & G. 119.

In *Re The Cork and Youghal Railway Company (k)*, the holders of some invalid Lloyd's bonds (*l*) were held not entitled to rank as creditors of the company for the amounts of the bonds, but were held entitled to be paid so much of those amounts as they could prove had been properly applied for the legitimate purposes of the company; and an inquiry on this head was directed.

In the *Blackburn Building Society v. Cunliffe Brooks & Company (m)*, a building society was not only held not to be liable to repay money improperly borrowed by its directors but was held entitled to recover from the lenders the sums repaid to them out of the funds of the society. But here again an exception was made in respect of those sums which could be proved to have been applied in discharging the debts and liabilities of the society.

The same principle affords an explanation of certain cases in which transferees of debentures, issued *ultra vires* but in the name of a company, have been held entitled to recover from the company the value of the consideration received by it for such debentures.

Thus, in the grossly fraudulent case of the *Athenæum Life Assurance Society v. Pooley (n)*, where debentures of a company given in exchange for Westminster improvement bonds, were decided to be invalid in the hands of a *bonâ fide* purchaser for value, the purchaser was held entitled to an inquiry whether the company had received any benefit from the bonds. Again in the similar and subsequent cases of *Wood's Claim* and *Brown's Claim (o)*, Westminster bonds were sold to an insurance company for money debentures and shares. The transaction was held invalid; and it appearing that the bonds were worth more than the company gave for them, and that the company had had the benefit of the excess, the company was debited with such excess in an account directed between the company and the vendor; and he, on the other hand, was

(k) 4 Ch. 748. See, also, *National Permanent Benefit Building Soc.*, 5 Ch. 309; *Margdalena Steam Nav. Co.*, Johns. 690.

(l) As to which see *ante*, p. 197.

(m) 9 App. Ca. 857, and 22 Ch. D. 61, and 29 ib. 902, noticed *ante*, p. 190.

(n) 3 De G. & J. 294.

(o) 9 W. R. 366, and 10 ib. 662.

Ek. II, Chap. 5.
*Cork & Youghal
Railway Com-
pany.*

*Blackburn
Building Society
v. Cunliffe & Co.*

*Athenæum As-
surance Society
v. Pooley.*

Wood's Claim.

Bk. II. Chap. 5. debited with the money paid to him by the company, and with the sums realised by him by the sale of the debentures and shares.

Ex parte
Williamson.

The mere fact that the company has had the use of the money is not enough to create an obligation to repay it; so to hold would render nugatory all prohibition against borrowing. Accordingly where the managers of a building society borrowed money for the society, but in excess of their powers, and the money so borrowed was advanced to members on the security of their shares, it was held that the lenders had no claim against the society either as creditors at law or by reason of the application of the money (*p*).

The following case also shows that the doctrine in question, cannot be extended so as to defeat a company's special act.

Baroness Wen-
lock v. River
Dee Company.

In *Baroness Wenlock v. River Dee Company* (*q*) a company was created by act of Parliament for the purpose of embanking the river Dee and improving the lands near its mouth. Limited powers of borrowing and of mortgaging were conferred by the act. The directors borrowed money largely in excess of their powers; but the money to a great extent at least was *bonâ fide* applied for the legitimate purposes of the company *i.e.*, in doing the work which the company was formed to do, and in paying off pre-existing mortgages, some of which were valid and others invalid. The money thus borrowed was held not recoverable as a debt (*r*); but so much of the money as had been applied in paying off existing valid mortgages and in payment of any debts and liabilities properly incurred was held to be recoverable (*s*). But the money applied in paying off one of the invalid mortgages was held to be no charge on the lands, although the money raised by such invalid mortgage had been spent in embanking the river and reclaiming the land adjoining it. The ground of this decision (*t*) was that to hold the money so applied to be a charge would be to contravene the terms of the company's special act.

(*p*) *Ex parte Williamson*, 5 Ch. 399.

(*q*) 10 App. Ca. 354; 19 Q. B. D. 155; and 36 Ch. D. 674; 38 ib. 534.

(*r*) 10 App. Ca. 354, *ante*, p. 189.

(*s*) *Ib.*, and 36 Ch. D. 675, note.

(*t*) 38 Ch. D. 534, and 36 ib. 674.

The mortgage above referred to as invalid was the mortgage for £6405 to the Lands Improvement Co.

CHAPTER VI.

OF THE LIABILITY OF INDIVIDUAL MEMBERS OF COMPANIES TO CREDITORS.

THE liabilities of directors of companies to their members, Bk. II. Chap. 6. Sect. 1. the liabilities of members to calls, and their liabilities as contributories in winding-up proceedings will be discussed hereafter in Books III. and IV. In the present chapter it is proposed to examine the separate liability of members of companies to creditors and others apart from all questions as to their liabilities *inter se*, whether before or after a winding-up order. For this purpose it is necessary to distinguish directors from other members; for although what is true of members is also true of directors as members, it frequently happens that directors incur liabilities by their own acts in addition to those to which they are subject simply in their characters as members.

SECTION I.—OF THE LIABILITIES OF DIRECTORS.

1. *For their own acts.*

It has been already seen that the directors of a company are Torts and frauds. the agents of the company, but not of each other, unless clearly so constituted (*a*). It has also been seen that directors are responsible for the frauds which they may themselves commit or authorise (*b*). On similar principles it is conceived

(*a*) *Ante*, c. 2, § 2.(*b*) Bk. i. c. 3, § 1 (3) and § 2.

Bk. II. Chap. 6. that they are personally responsible for any torts which they
 Sect. 1. may themselves commit or direct others to commit, although
 it may be for the benefit of their company (*c*).

It was held in a case in which a company infringed a patent, that the directors were personally liable to the costs of a suit to restrain the infringement (*d*). But it would be contrary to principle to hold directors personally responsible for the negligent or other acts of other servants of the company unless the directors are themselves personally implicated in such acts.

Contracts.

With respect to contracts directors may bind themselves personally, although acting for the company, *e.g.* by putting their names to bills of exchange or promissory notes so worded as to be their bills or notes and not those of the company (*e*), or by entering into covenants (*f*), or other contracts so worded as to bind them individually (*g*). Such cases turn on the true interpretation of the documents which may be in question.

But if a contract is so worded as to bind the company, the directors who sign it are not liable upon it; unless indeed the terms of the contract are such as to bind both them personally and the company, which is sometimes the case (*h*). This is in accordance with the ordinary rules applicable to contracts with agents (*i*). The only exception to this rule is, that a director contracting for a limited company and suppressing the word "limited," is liable personally on the contract (*k*).

Position of agent
 who exceeds his
 authority.

Formerly it was thought that if an agent entered into a contract on behalf of a principal, and such contract did not bind

(*c*) See *Mill v. Hawker*, L. R. 9 Ex. 309, and 10 ib. 92.

(*d*) See *Betts v. De Vitre*, 5 N. R. 165, and 3 Ch. 441; and see an article in 10 Jur. N. S. (part 2), p. 475.

(*e*) *Ante*, c. 4, § 3.

(*f*) See, as to covenants by agents, *Appleton v. Binks*, 5 East, 148; *Hancock v. Hodyson*, 4 Bing. 269; *Hall v. Bainbridge*, 1 Man. & Gr. 42; *Pickering's claim*, 6 Ch. 525.

(*g*) As in *McCollin v. Gilpin*, 6

Q. B. D. 516, and 5 ib. 390, where three directors promised to pay money advanced to the company on the security of plant, &c. belonging to it, and see *infra*, p. 243.

(*h*) *Lindus v. Melrose*, 2 H. & N. 293, and 3 ib. 177; *Aggs v. Nicholson*, 1 H. & N. 165; *Russell v. Reece*, 2 Car. & Kir. 669.

(*i*) See Partn. 177, &c.

(*k*) 25 & 26 Vict. c. 89, §§ 41 and 42; *Penrose v. Martyr*, E. B. & E. 499.

the principal, he not having authorised it, the agent was him-
 self bound by the contract. According to this doctrine, a con-
 tract ostensibly entered into by A. through B. was treated as a
 contract by B., although it was not the intention of either
 party to the contract that B. should be in any way bound by
 it. The propriety of thus making contracts for persons has,
 however, been very properly questioned and denied: and it is
 now held that an agent contracting as such without authority,
 is not bound *by the contract* at all, but that he is liable in
 damages for the consequences ensuing from his having
 assumed to act with an authority which in fact he did not
 possess. It is also held that he is thus liable although he
 acted *bonâ fide* and in the belief that he had the authority he
 assumed (*l*).

Bk. II. Chap. 6.
Sect. 1.

This result has been arrived at by the fiction of an implied
 warranty of authority; but it really is an exception to the
 general rule that an action will not lie for a misrepresen-
 tation unless fraudulent (*m*).

Warranty of
authority.

The rule in question is as applicable to directors as to other
 kinds of agents (*n*). But with respect to directors, it must
 not be forgotten that in most cases the limits of their authority
 can be readily ascertained, and are supposed to be known (*o*);
 and a person who deals with directors whom he knows, or is
 supposed to know, to be exceeding their authority, cannot
 complain of them if he finds that their acts are repudiated.

Personal liability
of directors who
exceed their
powers.

(*l*) See on this subject the cases
 referred to in the next ten notes,
 and *Jenkins v. Hutchinson*, 13 Q. B.
 744; *Levis v. Nicholson*, 18 Q. B.
 503; *Randell v. Trimen*, 18 C. B. 786;
Collen v. Wright, 7 E. & B. 301, and
 8 ib. 647; *Simons v. Patchett*, 7 ib.
 568; *Eastwood v. Bain*, 3 H. & N.
 738, where the plaintiff had not sus-
 tained damage. As to the measure
 of damages, see *Ex parte Panmure*,
 24 Ch. D. 367; *Meek v. Wendt &*
Co., 21 Q. B. D. 126.

(*m*) See *ante* Bk. I. c. 3, § 1, and
Firbank's exors. v. Humphreys, 18 Q.
 B. D. 54. See, also, Lord Black-
 burn's observations in *Browlie v.*

Campbell, 5 App. Ca. p. 952, where
 the difficulty of drawing the line
 between warranty, fraud, and es-
 toppel is pointed out. See, also,
 Pollock on Contracts, Appendix,
 note L.; Holmes on the Com. Law,
 130.

(*n*) *Godwin v. Francis*, L. R. 5 C.
 P. 295; *Ferguson v. Wilson*, 2 Ch.
 77.

(*o*) See as to this, *ante*, p. 165.
Wilson v. Miers, 10 C. B. N. S. 348,
 was an action against directors for
 exceeding their authority, but the
 Court was of opinion that there was
 no excess, and decided against the
 plaintiff on that ground.

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He runs the risk of such repudiation. In the absence, therefore, of fraud on their part, such a person will be unable to obtain any redress against them. Moreover, they are not liable for honest mistakes as to the legal extent of their authority (*p*).

Thus, where a person advanced money to a company on the security of an invalid Lloyd's bond of the company, the directors who issued it were held not to be personally liable to repay the money advanced (*q*). So where a person bought new preference stock of a railway company which both he and the directors *bonâ fide* believed they had power to issue, but which in truth they had not, it was held that he had no remedy against them, for there was nothing more than a common mistake of law (*r*).

Liability for
acts *ultra*
vires.

But directors, like other agents, impliedly warrant all facts necessary to confer the authority which they profess to exercise. And if the company is governed by a private act of Parliament the contents and effect of that act are regarded as matters of fact (*s*). Therefore directors who had accepted bills on behalf of a company, which had no power under its private acts of Parliament to accept bills, were held liable to the holders who had no notice in fact that the company was not empowered to accept bills (*s*). So where a company had power to borrow, but the power had been already exhausted, and the directors nevertheless raised more money, they were held personally liable to repay it (*t*). So where the directors of a benefit building society had power to borrow if a rule enabling them to do so had been passed, and they borrowed money for the society in the absence of any rule enabling them so to do, it was held that they were personally liable to repay it (*u*). So where directors of a company authorised the manager to overdraw the company's account, they were held liable for the

(*p*) *Beattie v. Lord Ebury*, L. R. 7 Ch. 777, and 7 H. L. 102. Compare the cases in the next four notes.

(*q*) *Rashdall v. Ford*, 2 Eq. 750. See on this case, 13 Q. B. D. 363.

(*r*) *Eaglesfield v. Marquis of Londonderry*, 4 Ch. D. 693.

(*s*) *West London Commercial Bank*

v. Kitson, 12 Q. B. D. 157, and 13 Q. B. D. 360.

(*t*) *Weeks v. Propert*, L. R. 8 C. P. 427; *Chapleo v. Brunswick Building Soc.*, 6 Q. B. D. 696.

(*u*) *Richardson v. Williamson*, L. R. 6 Q. B. 276, explained by Melish, L. J., in 7 Ch. 801.

over-draft, for although the company had no power to borrow Bk. II. Chap. 6. Sect. 1. without the consent of a meeting of shareholders, they had power to do so with such consent (*x*). So where a company had power to issue debenture stock to a limited extent, and the directors, after the power was exhausted, issued more debenture stock, they were held personally liable to the holders of the unauthorised stock. The damages were held to be the value which the stock would have had if it had been authorised (*y*).

Further, where a person purports to contract as an agent, Contracts with promoters of companies. and he has in truth no principal, so that the contract, unless binding on the party to it, is wholly void, he is treated as having contracted on his own behalf, and is personally liable accordingly. Thus, if a person contracts on behalf of a company not yet formed, he is liable on that contract; and he is not relieved from such liability by the subsequent adoption of the contract by the company when formed (*z*); unless the contract is so worded as to exclude personal liability.

Again, if directors contract as principals, which is quite Express personal liability. consistent with their acting on behalf of the company (*a*), they will be bound personally by their contract provided it is not actually illegal. The fact that the contract is one which would not bind the company is not *per se* sufficient to render it void as against the directors personally. Therefore, where the directors of a company disagreed and divided into two parties, and one party retired, and the other party covenanted to indemnify them, this covenant was held binding on the directors who entered into it, irrespectively of the question how far the whole transaction was one which the directors had power to enter into on the part of the company (*b*). But if the contract is illegal no action can be maintained upon it; and therefore where the directors of a railway company agreed that it

(*x*) *Cherry v. Col. Bank of Australasia*, L. R. 3 P. C. 24.

(*y*) *Firbank's exors. v. Humphreys*, 18 Q. B. D. 54.

(*z*) *Kelner v. Baxter*, L. R. 2 C. P. 174; *Scott v. Lord Ebury*, ib. 255.

(*a*) *McCollin v. Gilpin*, 5 Q. B. D. 390, affirmed 6 Q. B. D. 516, *Dutton v. Marsh*, L. R. 6 Q. B. 361,

and the cases on promissory notes, *ante*, p. 232 *et seq.* See, also, *Kay v. Johnson*, 2 Hem. & M. 118, in which a decree for the specific performance of an agreement for a lease was made against directors personally.

(*b*) *Haddon v. Ayers*, 1 E. & E. 118; *Barker v. Allan*, 5 H. & N. 61.

Bk. II. Chap. 6. should pay the expenses which might be incurred by another
 Sect. 2. company in attempting to obtain an act of Parliament for the formation of a line which, when made, was to be handed over to the first company, it was held that this was an agreement to the effect that the first company should do that which was altogether illegal, and that an action against the directors for a breach of the agreement could not be sustained (c).

2. *For the acts of each other.*

Directors not the
 agents of each
 other.

Although the directors of a company are the agents of the company, and although, as a member of the company, each of the directors is liable for the acts of its agents on the same ground as other members, still, unless a director has done something to make his co-directors his agents in some other sense than this, he is no more liable for their acts than any other shareholder. In this respect directors are like promoters, each being answerable for his own acts and for the acts of the others so far as he has made them his agents, but no further (d). It must however be borne in mind that the liability here referred to is liability to persons dealing with directors as representing their company. The duties and liabilities of directors to shareholders will be referred to hereafter in Book III.

SECTION II.—OF THE LIABILITIES OF SHAREHOLDERS.

Passing now to the consideration of the personal liabilities of shareholders of companies in respect of transactions which impose liabilities on the companies of which they are members, it is necessary to distinguish one company from another, and especially unincorporated from incorporated companies.

(c) *Macgregor v. Dover and Deal Rail. Co.*, 18 Q. B. 618.

(d) See *Brown v. Byers*, 16 M. & W. 252; *Heraud v. Leaf*, 5 C. B. 157; *Bramah v. Roberts*, 3 Bing. N. C. 963; *Lord Londesborough's*

case, 4 De G. M. & G. 411; *Walker's case*, 8 De G. M. & G. 607. See, also, *Weir v. Barnett*, 3 Ex. D. 32 and 238; *Cargill v. Bower*, 10 Ch. D. 502.

1. *As to the extent of liability.**(a.) Of liability at Common Law and of attempts to restrict it.*

By the common law of this country every member of an unincorporated partnership, whether it be an ordinary firm or a joint-stock company with transferable shares, is personally liable for all the debts and engagements of the partnership contracted whilst he is a member of it (*c*). As may be supposed, many attempts have been made from time to time to restrict the application of this rule and to form companies on such terms as to prevent their members from being ruined in the event of the companies suffering serious loss. These various attempts have ceased to be of much practical importance owing to the facilities of forming incorporated companies by means of registration; but they have still great historical interest and deserve notice on that account; moreover, there are still insurance companies which issue policies on the terms that they are to be paid solely out of the funds of the companies.

Attempts to
limit liability.

The attempts referred to may be ranged under two heads, according as there has or has not been some special agreement with the creditors.

So inflexible is the doctrine of unlimited liability, and so important is it that no doubts shall be cast upon it, that judges have frequently denounced in the strongest terms the conduct of those who have endeavoured to inveigle the public into taking shares in companies by asserting that "no one shall be liable beyond the amount of his subscription." Nothing can be more delusive or worthless than such statements as applied to unincorporated bodies, or to bodies not governed by special acts of Parliament; for although the subscribers themselves may stipulate with each other for such a restricted liability, nothing is more clear than that, as to the rest of the world, each shareholder is liable for the whole amount of the debts of

Without special
contract with
creditors.

(*c*) Partn., bk. ii. c. 2, and see, as to companies, *Keasley v. Codd*, 2 Car. V. & B. 157; *R. v. Dodd*, 9 East, 516; *Robinson's Executor's case*, 6 De & P. 408, note; *Curten v. Drury*, 1 G. M. & G. 572.

Bk. II. Chap. 6. the company (*f*). Nor will notice that a stipulation of this
 Sect. 2. kind has been entered into between the shareholders prevent a creditor from holding each of them liable to the full extent of his demand (*g*).

By special con- Notwithstanding, however, this general rule, if a person
 tract with credi- chooses to deal with a company upon the terms that its funds,
 tors, and they only, shall be available to make good his demands, he cannot afterwards depart from those terms and hold the members individually liable as if no such restriction had been agreed to (*h*).

It is, however, to be borne in mind, that members of unin-
 corporated companies, like other partners who contend for
 restricted liability, have the *onus probandi* on themselves, and
 if, owing to any circumstance, they fail in establishing their
 contention, the general rule of unlimited liability applies to
 them as a matter of course (*i*).

Limiting liability The ordinary mode of restricting liability, is to contract
 to funds of com- that the funds of the company shall alone be liable to the
 pany, demands against it. Upon contracts in this form, it is to be
 observed that—

1. A contract by a person to pay out of his own property
 without limitation, is in fact an absolute contract to pay ; for
expressio eorum quæ tacite insunt nihil operatur.

2. Upon the same principle, a contract by a corporation to
 pay out of its funds generally is, as regards the corporation,
 neither more nor less than a contract to pay absolutely ; for
 a corporation as such has nothing except its funds to pay
 out of (*k*).

3. An express contract to pay out of certain specified

(*f*) See *R. v. Dodd*, 9 East, 516, and the cases in the last note and the next.

(*g*) See *Greenwood's case*, 3 De G. M. & G. 459. *The State Fire Ins. Co., Meredith's case*, and *Conver's case*, 1 N. R. 510, V.-C. W.

(*h*) *Alchorne v. Saville*, 6 Moo. 202 ; *Halket v. The Merchant Traders' Loan Assoc.*, 13 Q. B. 960 ; *Hallett v. Dowdall*, 18 Q. B. 2 (the

judgment on the bill of exceptions) ; *Durham's case*, 4 K. & J. 517.

(*i*) See *Luckombe v. Ashton*, 2 Fos. & Fin. 705, and *ante*, note (*g*).

(*k*) *Sunderland Marine Insur. Co. v. Kearney*, 16 Q. B. 925, in which the liability of the individual members of the company was not in question.

funds, excludes an implied contract to pay in some other manner (*l*). B. H. Chap. 9.
Sect. 2.

4. But a person who undertakes to pay out of certain funds, is absolutely bound to pay if those funds exist and are available; so that if, the funds existing and being available, he does not choose to pay out of them, he must pay out of his own property (*m*).

5. On the other hand, a person who undertakes to pay out of certain funds, is under no obligation to pay unless those funds exist (*n*), or unless their non-existence is owing to his own default (*o*), or unless he has also undertaken that they shall exist; in which last case his undertaking to pay amounts to an absolute undertaking, and the qualification as to the funds goes for nothing (*p*).

In conformity with these principles, it has been held that the promoters of a company are not liable to persons employed by them upon the terms that such persons shall look for payment to certain specified funds, and not to the promoters individually (*q*); that upon a contract to pay out of the funds of a joint-stock company, all those who in point of law are bound by the contract, are personally liable to satisfy the Success of
attempt so to
limit liability.

(*l*) See *Alexander v. Worman*, 6 H. & N. 100; *Giles v. Smith*, 11 Jur. 334, C. P.; *Landman v. Entwistle*, 7 Ex. 632; *Mather v. Blackmore*, 1 H. & N. 762; *Taft v. Harrison*, 10 Ha. 489. Compare *Cope's case*, 1 Sim. N. S. 54.

(*m*) *Higgins v. Hopkins*, 3 Ex. 163; *Hallett v. Dowedall*, 18 Q. B. 2. But if an incorporated company promises to pay out of its funds only, and it has funds, it does not follow that the shareholders are personally liable, *Re the Athenæum Society*, and *Prince of Wales Society*, Johns. 80, affirmed 3 De G. & J. 660.

(*n*) The Statute of Limitations does not begin to run until they do exist. See *in re Kensington Station act*, 20 Eq. 197.

(*o*) As in *McIntyre v. Belcher*, 14

C. B. N. S. 654, where the defendant discontinued the business, out of the profits of which he was to pay the plaintiff. See, also, *Telegraph Despatch Co. v. McLean*, 8 Ch. 658; *Worthington v. Sedlow*, 2 B. & Sim. 508. Compare *King v. Accumulative Ass. Co.*, 3 C. B. N. S. 151; *Rhodes v. Forwood*, 1 App. Ca. 256; *Railway and Electric Appliances Co.*, 38 Ch. D. 597, noticed *infra*, p. 249, note (*a*).

(*p*) See *Pilbrow v. Pilbrow's Atmospheric Co.*, 5 C. B. 440.

(*q*) *Giles v. Smith*, 11 Jur. 334, C. P.; *Landman v. Entwistle*, 7 Ex. 632. Compare *Cope's case*, 1 Sim. N. S. 54; *Cullen v. Duke of Queensberry*, 1 Bro. C. C. 101, and *Horsley v. Bell*, *ib.* in the note; S. C. 2 Am. 770; *Williams v. Hathaway*, 6 Ch. D. 544.

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Failure of at-
tempt where
contract is not
clear.

Hancock v.
Hodgson.

demands to which those funds are applicable, if any such funds there be (r) ; but that if there are no such funds, then the event on which alone payment has to be made not having arisen, no one is liable to pay (s).

The latter proposition, however, supposes that the contract is not so framed as (notwithstanding what is said about the funds of the company) to amount to an undertaking to pay at all events. The importance of attending to this point appears from *Hancock v. Hodgson* (t). In that case, the projectors of a mining company purchased a copper and tin mine, and covenanted to pay the purchase money by quarterly instalments out of the funds of the company ; but it was provided that in case there should not have been received by the bankers of the company or by the directors for the time being, the deposits or instalments due from the several shareholders, so as to enable the directors to pay the purchase money at the times therein before mentioned, then and in such case the said directors shall be allowed a further time to pay such balance, until six months after the time or times when the said quarterly instalments became due. Upon this covenant and proviso it was held, that the covenantors were personally liable to pay the whole purchase moneys, although the company had no funds ; for that whatever might have been the case without the proviso, that clearly showed that after the expiration of the further period therein mentioned, the payment was to be made by the covenantors at all events, whether the company had funds or not.

Having made the above general observations, it is necessary to examine with greater particularity the effect of contracts by companies to pay out of particular funds, on

1. The rights of creditors against the funds themselves ;

(r) See *Andrews v. Ellison*, 6 B. Moore, 199 ; *Gurney v. Barlins*, 2 M. & W. 87 ; *Darson v. Wrench*, 3 Ex. 359 ; *Reid v. Allan*, 4 Ex. 326 ; *Hallett v. Dowdall*, 18 Q. B. 2, the judgment on demurrer.

(s) See, in addition to the above cases, *Durham's case*, 4 K. & J. 517 ; *Halket v. The Merchant Traders'*

Loan and Insurance Association, 13 Q. B. 960 ; *Hassell v. Ditto*, 4 Ex. 525 ; *The Worcester Corn Exchange Co.*, 3 De G. M. & G. 180 ; *King v. The Accumulative Assurance Co.*, 3 C. B. N. S. 151 ; and compare *Cope's case*, 1 Sm. N. S. 54.

(t) 4 Bing. 269.

and 2. Their rights against the members individually where those funds have been exhausted.

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1. With respect to the rights of creditors against the funds, it may now be considered as settled, that a contract by a company to pay a person out of its funds does not give the creditor any specific charge or lien on those funds, nor any preference over other creditors (*u*) ; but it nevertheless entitles him, even before the time for payment arrives, to prevent the funds from being misapplied (*x*). Where therefore an insurance company had issued policies and made them payable out of its funds, a policy holder whose policy had not become payable was held entitled to an injunction to restrain the company from amalgamating with and transferring its funds to another company, such amalgamation and transfer not being warranted by the deed of settlement of the first company (*y*). It has, however, been held (*z*) that a contract to pay a policy out of particular funds does not amount to a contract to carry on business, nor to a contract not to hand over the funds to other persons (*u*) ; and that a policy holder whose policy is not due cannot support an action for damages which he fears he will sustain, but which possibly he will not. The last ground is perhaps the most satisfactory, and has the advantage of rendering the decision in equity consistent with that at law.

Right against
the funds.

It is, however, by no means uncommon for an unlimited insurance company to limit its liability to policy holders and annuitants to its funds, and to have in its deed of settlement

Where the com-
pany has power
to transfer its
funds.

(*u*) *Albert Life Ass. Co.*, 9 Eq. 706 ; 571.

McIvor's claim, 5 Ch. 424, and the cases in the next note.

(*x*) See *Kearns v. Leaf*, 1 Hem. & M. 681 ; *State Fire Insur. Co.*, ib. 457, and 1 De G. J. & Sm. 634 ; *Athenæum Life Insurance Society*, Johns. 80 & 633, and 3 De G. & J. 660 ; *Law v. London Indisputable Life Policy Co.*, 1 K. & J. 223. These cases will be adverted to hereafter, when the winding up of companies is being considered.

(*y*) *Kearns v. Leaf*, 1 Hem. & M. 861 ; *Aldebert v. Leaf*, ib. Compare *Argus Life Ass. Society*, 39 Ch. D.

(*z*) *King v. Accumulative Life Assur. Co.*, 3 C. B. N. S. 151. See, also, *Lethbridge v. Adams*, 13 Eq. 547.

(*a*) See, also, *Rhodes v. Forwood*, 1 App. Ca. 256, where an agent of a colliery contended in vain that his employer was bound to carry it on. So in *Re Railway and Electric Appliances Co.*, 38 Ch. D. 597, there was no implied covenant to carry on business in order to work a patent. Compare *Telegraph Despatch Co. v. McLean*, 8 Ch. 658, and *McIntyre v. Belcher*, 14 C. B. N. S. 654, noticed *ante*, p. 247, note (*a*).

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or articles of association as originally framed, or as altered in accordance with a power therein contained, power to transfer its funds and its business to another company. Where this occurs, a transfer of the funds cannot be prevented; and upon a proper transfer being made and in the case of life insurance companies confirmed by the Court, the policy holders and annuitants cease to have any claims against the transferring company (*b*).

Extent of mem-
bers' liability.

2. With respect to the extent of the liability of the members of a company upon contracts in which it is specially stipulated that the funds of the company alone shall be answerable, and that no member shall be liable beyond the amount of his share, the limit set by contract is the limit of liability :—

(*a*) Where the
company is
incorporated.

Where the company is an incorporated company, there never was any difficulty in giving effect even at law to all the terms of the contract; and in the case of companies registered under the act 7 & 8 Vict. c. 110, it was held that the members were not liable to have execution issued against them upon judgments obtained against the company on a contract of the description in question; but that the property of the company was alone liable to make good the demands of the judgment creditor; and this was held at law even in cases where the subscribed capital had been exhausted but the whole capital had not been paid up (*c*).

The same principle was acted on in equity, except that a Court of equity compelled the shareholders to pay up rateably so much of the capital as had not already been subscribed (*d*). This can now be done by a properly constituted action.

In all these cases, however, it must be borne in mind that the liabilities which are limited to the funds of the company, are those only which are expressly so limited by the contracts

(*b*)—See *infra*, § 3, p. 258, &c., and as to life assurance companies, see The Life Assurance Companies act, 1870, 33 & 34 Vict. c. 61, § 14.

(*c*) *Halket v. The Merchant Traders' Loan and Insurance Assoc.*, 13 Q. B. 960; *Hassell v. The Same*, 4 Ex. 525; *Durham's case*, 4 K. & J. 517;

Re the Athenæum Life Soc., Johns. 80, and 3 De G. & J. 660, on appeal; *Lethbridge v. Adams*, 13 Eq. 547.

(*d*) *Talbot's case*, 5 De G. & Sm. 386; *Durham's case*, 4 K. & J. 517; *Evans v. Coventry*, 8 De G. M. & G. 835. See clause 7 of the decree.

with the creditors: the liabilities to other persons are unlimited (*c*). Bk. II. Chap. 6.
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Companies governed by the Companies act, 1862, may, although unlimited, limit their liability by special contract (*f*), and where they do so the principles above adverted to will be applicable. But as under the Companies act, 1862, judgments against a company cannot be enforced against its members, questions as to their individual liability can scarcely arise except when a company is being wound up. Companies governed by the
act of 1862.

As regards unincorporated companies, it was extremely difficult, if not impossible, before the passing of the Judicature Acts, to enforce by action at law a contract limiting their liability to their funds (*g*). It was practically necessary to sue in equity. But now it is apprehended that an action can be maintained against the persons having the control of the funds and the persons liable to contribute to them, to enforce the liability to contribute, and the due application of the funds when raised (*h*). (h) Where the
company is not
incorporated.

(*b.*) *Of limited liability by Statute.*

Passing now to the subject of limited liability by statute, the first point which has to be borne in mind is that the moment a society of any kind is incorporated, its members cease by common law to be in any way liable for the debts and engagements of the body corporate. Moreover, although by common law it has always been lawful for the Crown to create corporations, the Crown has no power by common law to create a corporation and at the same time to render its members indi- Limited liability
by statute.

(*e*) See the *Albert Life Ass. Co.*, 9 Eq. 706; *Professional Life Ass. Co.*, 3 Eq. 668, and 3 Ch. 167; *Lithbridge v. Adams*, 13 Eq. 547.

(*f*) See § 38, cl. 6. *Accidental Death Ins. Co.*, 7 Ch. D. 568.

(*g*) See *Hallett v. Dowdall*, 18 Q. B. 2, and the observations of Mellish, L. J., in *Grain's case*, 1 Ch. D. 322; *Alchorne v. Sacille*, 6 B. Moore, 202, note. *Hallett v. Dowdall* was noticed at length in the earlier editions of

this treatise, but it has not been thought necessary to reproduce the former observations on it.

(*h*) See *Law v. The London Indisputable Life Policy Co.*, 1 K. & J. 223; *Talbot's case*, 5 De G. & Sm. 386; *Durham's case*, 4 K. & J. 517; *Robson v. McCreight*, 25 Beav. 272; *Evans v. Coventry*, 8 De G. M. & G. 835. See, as to the effect of a transfer by the company of its business, *Hort's case*, 1 Ch. D. 307.

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vidually liable for its debts (*i*), the whole of that branch of the law which relates to the liability, as distinguished from the non-liability, of the members of incorporated companies for the debts and engagements of such companies, is of modern growth and is based upon statutory enactments. These enactments will be examined hereafter in connection with the subjects of execution and winding up, but it may be useful to state generally in the present place that—

Chartered companies.

1. The liability of the members of a company governed by the Letters Patent act depends on the terms of its charter or letters patent, the Crown being empowered by the act in question to limit their liability or not. (See 7 Will. 4 and 1 Vict. c. 73, §§ 4 & 29.)

Companies governed by 8 & 9 Vict. c. 16.

2. The liability of the members of a company governed by the Companies clauses consolidation act is limited to the extent of their unpaid-up shares in the capital of the company (8 & 9 Vict. c. 16, § 36).

Companies empowered to sue and be sued.

3. The liability of the members of a company empowered by a special act of Parliament to sue and be sued by a public officer depends on the terms of such act, but will almost invariably be found to be unlimited (*k*).

Banking companies governed by 7 Geo. 4, c. 46.

4. The liability of the members of a banking company governed by 7 Geo. 4, c. 46, is unlimited. (See 7 Geo. 4, c. 46, §§ 11, 12, 13.)

Companies act, 1862.

5. Subject to the exceptions presently to be noticed, the extent of the liability of the members of a company formed and registered under the Companies act, 1862, depends upon whether the company is registered with limited liability or not. If the company is registered with limited liability, its members are not liable beyond the amount for which they have undertaken to be responsible; but if the company is not so registered, its members are liable to the full amount of the com-

(*i*) This power was conferred upon the Crown by 6 Geo. 4, c. 91, § 2, which was followed by 4 & 5 Will. 4, c. 94, and was with it repealed and replaced by 7 Will. 4 & 1 Vict. c. 73.

(*k*) See *Aldridge v. Cato*, L. R. 4 P. C. 313, as to the liability of a

member of a company empowered to sue and be sued, but not incorporated. The Colonial ordinance in that case was held not to have incorporated the company, and the case may be usefully referred to on the construction of such documents.

pany's debts and engagements, whatever that may be (*l*). The liability, however, of each member is merely a liability to contribute with others; and such liability can only be enforced by winding up the company. No execution can issue against a member upon a judgment obtained against the company.

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The exceptions above referred to are as follows:—

Exceptional
liabilities.

(1.) Even if the company is registered with limited liability, the liability of the directors will be unlimited if the memorandum of association so provides (*m*).

(2.) If a company carries on business for six months with less than seven members, all the members cognisant of the fact are severally liable for the debts contracted by the company during that time, and may be sued accordingly (*n*).

(3.) The act contains stringent provisions to compel limited companies and their officers to use the word "limited" as part of the name of the company in matters relating to its business (*o*); and persons signing or authorising the signature on behalf of such a company of any bill of exchange, promissory note, cheque, or order for money or goods, in which the word limited is not used as directed, are themselves liable for the amount, unless the same is duly paid by the company (*p*).

(4.) The liability of limited banking companies issuing notes is unlimited in respect of such notes (*q*).

(5.) Although a company may be registered without limited liability, the liability of its members may be limited by special contract (*r*).

(6.) The liability of the members of companies not formed under the act but registered under it, is as to all matters occurring after registration the same as the liability of members of companies formed and registered under the act. But as to other matters the extent of liability is the same as if no registration had taken place (*s*). Existing companies with

Companies regis-
tered but not
formed under
the act of 1862.

(*l*) See 25 & 26 Vict. c. 89, § 38.

(*q*) 42 & 43 Vict. c. 76, § 6.

(*m*) 30 & 31 Vict. c. 131, §§ 4 and 5.

(*r*) 25 & 26 Vict. c. 89, § 38, cl. 6.

(*n*) 25 & 26 Vict. c. 89, § 48.

(*s*) See §§ 179 and 196, cl. 5. The

(*o*) §§ 41 and 42.

liability under the repealed act of 7 & 8 Vict. c. 110, was unlimited; see § 25. So was the liability under the repealed act 7 & 8 Vict. c. 113;

(*p*) § 42. See *Penrose v. Martyr*, E. B. & E. 499.

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unlimited liability, whether registered as such under the act of 1862 or not, may be registered as limited companies, and if so registered, the liability of their members as to matters occurring after registration becomes limited also (*t*). But banking companies existing at the date of the passing of the act and registering under it as limited companies, are bound to give certain notices to their customers before the privilege of limited liability can be claimed as against them (*u*).

2. *As to the duration of liability.*

(a.) *Commencement of liability.*

Commencement
of shareholders'
liability.

In ordinary partnerships a person who joins a firm does not become liable to its existing creditors simply by the act of joining it, although he may have been admitted into partnership upon the terms that as between him and his co-partners he shall contribute to the existing debts of the firm (*x*). The same rule applies to the members of unincorporated companies when there is no statutory provision to the contrary. Therefore, where a creditor sued a shareholder in a cost-book mining company for goods supplied to the company before the defendant became a shareholder, the creditor was held not entitled to recover (*y*).

When, however, a person takes shares in a company, he, as between himself and other shareholders, takes those shares with all the rights and liabilities attaching to them, so that his co-shareholders have a perfect right to insist upon his contributing with them towards the liquidation of debts contracted before he joined the company (*z*). And even as regards

see § 7. The liability under the acts of 1856 and 1857 was substantially the same as that under the Companies act, 1862.

(*t*) See §§ 179, 180, and 42 & 43 Vict. c. 76, §§ 4 & 5.

(*u*) See § 188.

(*x*) Partn., bk. ii., c. 2, § 3, p. 201, *et seq.*

(*y*) *Thomas v. Clarke*, 18 C. B. 662. See, too, *Thomas v. Hobler*, 4

De G. F. & J. 199.

(*z*) *Taylor v. Ifill*, 1 N. R. 566, V.-C. W.; *Cape's Executor's case*, 2 De G. M. & G. 562; *Mayhew's case*, 5 ib. 837. See, too, *Horsley v. Bell*, 1 Bro. C. C. 101, note. *Sanderson's case*, 3 De G. & S. 66, *contra*, cannot be regarded as correct on this point. See *Henderson v. Sanderson*, 3 H. L. C. 698.

creditors, the liability of a shareholder to them seldom depends upon the ordinary principles of partnership law ; for most companies are governed by statutory enactments, which must not be overlooked. These enactments will be examined hereafter, but it may be stated generally, that in all companies regulated by 7 Geo. 4, c. 46, by 8 & 9 Vict. c. 16, or by the Companies act, 1862, an incoming shareholder is, so long as he remains a shareholder, liable to creditors in respect of debts incurred by the company before he became a shareholder (*a*). The Letters Patent act (7 Will. 4 and 1 Vict. c. 73, § 24) is so worded as to be capable of receiving a different construction in this respect ; but probably a different construction would not be put upon it ; for it would be highly inconvenient to apply different principles to different companies if it can be avoided, and there certainly is no sufficient reason for any distinction between them with reference to the liability alluded to (*b*).

(*b*.) *Termination of liability.*

A member of an ordinary partnership may, even during the continuation of the partnership, determine the authority of his co-partners to bind him, by giving proper notice (*c*). This is, in truth, only an instance of the more general proposition, that an agent's authority is determinable by his principal at any time before the authority has been acted on. But as the directors of an incorporated company are the agents of the company, and not of the individual members, a notice by one of them to the effect that he will not be responsible for the future acts of its directors, would, it is conceived, be simply inoperative. As regards incorporated companies, the only mode in which a shareholder can escape liability for future acts of the directors is by duly severing his connection with the company.

When a shareholder ceases to be such, he obviously determines the authority conferred by himself upon the company

(*a*) The same was true of companies governed by the repealed acts, 7 & 8 Vict. cc. 110 and 113, and the Joint Stock Companies acts, 1856 and 1857.

tended to be raised in *Philipson v. Egremont*, 6 Q. B. 587, but it was not decided.

(*c*) Partn., bk. ii., c. 2, § 3, p. 210, *et seq.*

(*b*) This point was apparently in-

1. Termination of shareholders' liability in respect of future acts.

Bk. II. Chap. 6. and its agents to bind him. If he is a shareholder in a com-
 Sect. 2. —————pany which has no register of its members accessible to the
 public, he is in the position of a dormant partner, and conse-
 quently he cannot be made liable for what occurs after his re-
 tirement; and no notice of retirement is necessary except to
 those who knew him to be a shareholder (*d*). But a person
 Effect of continu- who is a shareholder in a company which has a register of its
 ing on register. members accessible to the public, is *primâ facie* in a different
 position; and reasoning from analogy, a retiring shareholder
 ought in such a case to take care to have his name removed
 from the register, for so long as it is there he holds himself
 out as a shareholder (*e*). But here, as in other cases, the
 Statutes must liability of shareholders turns on the statutes applicable to the
 be looked to. companies in which they are shareholders, and reliance
 must not be placed upon the general principles applicable to
 partnerships.

The Letters Patent act expressly enacts that a person ceas-
 ing to be a shareholder in a company to which that act applies,
 shall for all purposes of liability be considered as a continuing
 shareholder until the fact that he is not so has been regis-
 tered (*f*). But as regard's companies governed by other
 statutes, it will be found that their liability for future debts
 depends not so much on what appears from the company's
 register, as on the fact of membership, of which the register is
 only *primâ facie* evidence (*g*).

2. Termination
 of shareholders'
 liability in re-
 spect of past
 acts.

Again, with respect to the liability of a late shareholder in a
 company for those debts and engagements of the company to
 which he was liable when he was a shareholder, it is necessary
 to consult the statute or charter by which the company in
 question is governed. Without referring to particular enact-
 ments at length, it may be stated generally that the ordinary

(*d*) See, Acc. *Northey v. Johnson*,
 19 L. T., 104 Q. B. 1852, the case of
 a shareholder in a cost-book mine.

(*e*) This is consistent with the
 cases which show that a person
 whose name is put on a register of
 shareholders without his authority
 does not hold himself out as a share-
 holder. See *Lyster's case*, 4 Eq. 233;

Birch's case, 2 De G. & J. 10; *Loft-
 house's case*, ib. 69; *Powis v. Butler*,
 4 C. B. N. S. 469, affirming S. C., 3
 ib. 645. See, also, *Partn.*, p. 40 *et seq.*

(*f*) 7 Will. 4 & 1 Vict. c. 73, §
 21.

(*g*) See the section in the next
 chapter on Execution against Com-
 panies and their Shareholders.

principles of partnership and corporation law have not been materially departed from in the case of companies, except as regards time (*h*). Bk. II, Chap. 6.
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The Joint-stock banking act, 7 Geo. 4, c. 46, § 13, contains provisions continuing the liability of shareholders in respect of past debts until the lapse of three years after they had ceased to be shareholders (*i*). Summary of
acts.

The Letters Patent act, 7 Wm. 4 & 1 Vict. c. 73, § 24, continues the liabilities of late shareholders, but it does not contain any provision limiting the duration of such liabilities.

The Companies clauses consolidation act contains no provision continuing the liability of a shareholder, after he has ceased to be such (8 & 9 Vict. c. 16, § 36).

The liability of shareholders in a company formed under the Companies act, 1862, is continued, as to debts contracted before their retirement, for one year after they have ceased to hold shares (25 & 26 Vict. c. 89, § 38).

The liability of a retired shareholder to contribute to the debts of a company must not be confounded with his liability to creditors. For notwithstanding the continuance of his liability to creditors, he may be entitled to a complete indemnity from the other shareholders, and may not therefore be a contributory with them, and this is a common case. On the other hand, a shareholder may be freed from liability to creditors, but not be freed from liability to the other shareholders, to contribute with them to the payment of debts for which they only are directly liable. This, although not so common a case as the other, is still a possible case, and affords a striking illustration of the difference (constantly lost sight of by non-lawyers) between direct and indirect liability to the debts of a company (*k*). This subject will be examined hereafter. Liability to contribute not to be
confounded with
liability to
creditors.

(*h*) See, as to partners, Part., bk. ii., c. 2, § 3, pp. 223 *et seq.*

(*i*) The repealed acts, 7 & 8 Vict. c. 110, § 66; c. 113, § 10; and 19 & 20 Vict. c. 47, § 62, as to unlimited companies, contained similar provisions. But the 7 Geo. 4, c. 46, and 7 & 8 Vict. c. 110, and c. 113, only render a late shareholder liable

for debts contracted whilst he was a shareholder. The act of 1856 rendered him liable for debts contracted before he became a shareholder, and whilst he continued to be so.

(*k*) See *Ex parte Gouthwaite*, 3 Mac. & G. 187.

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3. *On the commencement and termination of liability in the case of amalgamating companies.*

Commencement
of liability.

The position of a company which amalgamates with another by agreement is analogous to that of a man who enters into partnership with another. As the two partners do not become jointly liable to their respective separate creditors, and neither partner becomes liable to the debts of his co-partner, so the two companies do not become jointly liable for each other's engagements, nor do the shareholders in the one company become debtors to the creditors of the other company. If the agreement to amalgamate is valid, it will bind the two companies as between themselves; but such an agreement will not *per se* give the creditors of either any *locus standi* against the other: and if the agreement to amalgamate is *ultra vires* and invalid as between the two companies, securities given by one company in respect of the debts of the other will be invalid also (l).

Where companies are amalgamated by statute, special provision is always made with respect to these matters.

The principle of *Edwards v. The Grand Junction Railway Co.* (m) applies to the case of two companies amalgamating. The amalgamating company will not be allowed to exercise powers acquired by means of agreements with its component companies or their projectors, except upon the terms of complying with those agreements, provided they are such as the amalgamated company would itself have been bound by if it had entered into them (n).

(l) See Partn. pp. 239 *et seq.*, the *Era Ass. Co.*, 2 J. & H. 400, and the *Saxon Assurance Society*, 2 J. & H. 408, and *Ernest v. Nicholls*, 6 H. L. C. 401. As to the effect of amalgamation in discharging sureties, see *The Eastern Union Rail. Co. v. Cockrane*, 9 Ex. 197, and *The London, Brighton, and South Coast Rail. Co. v. Goodwin*, 3 Ex. 320. In these cases the surety was not discharged; but the statute amalgamating the

two companies contained an express provision on the subject.

(m) *Ante*, p. 150.

(n) See *The Earl of Lindsey v. Great Northern Rail. Co.*, 10 Ha. 664; *Preston v. Liverpool and Manchester Rail. Co.*, 1 Sim. N. S. 586, on demurrer; *Stanley v. Chester and Birkenhead Rail. Co.*, 9 Sim. 264, and 3 M. & Cr. 773. See, also, *Port of London Assur. Co.'s case*, 5 De G. M. & G. 465, reversed in 6

Partners cannot get rid of their liabilities to creditors by retiring from the firm (*o*) ; and it is wholly immaterial whether all retire, so as to put an end to the firm altogether, or whether some only retire ; the principle in each case being that a creditor is not affected by agreements come to between his debtors. Precisely the same principle renders it impossible for the members of a company to get rid of their liabilities as between themselves and their creditors, by simply agreeing to dissolve, or by transferring their rights and (so far as they can) their liabilities to some other company. Although, therefore, a company may have transferred all its assets and liabilities to another company, the transferring company will still remain liable to those of its creditors who have not expressly or impliedly released it from their claims (*p*). What amounts to an implied release is often very difficult to determine ; nor are all the cases on the subject easy to reconcile (*q*).

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Termination of
liability.

Amalgamating
companies.

In the first place, holders of policies of insurance must not be confounded with ordinary creditors. The holder of a subsisting policy is not a creditor at all ; and in order that he may become a creditor of the company which issued the policy, he must keep up his policy with the company, and the event insured against must happen whilst the policy is so kept up. Consequently it was held in many cases that if an insurance office had transferred its business to another company, a holder of a policy who had notice of the transfer and who paid his future premium to the new office, ought to be treated as having agreed to accept the new office in lieu of the old ; and unless this inference could be rebutted he was held to have discharged the old office. The following cases illustrate this :—

Position of
policy-holders.

H. L. C. 401, *sub nom. Ernest v. Nicholls* on the ground that the amalgamation was altogether invalid.

(*o*) Part. 223 *et seq.*

(*p*) See, in addition to the cases cited below, *Hardinge v. Webster*, 1 Dr. & Sm. 101, in which the creditor was a member of the transferring company, and the defendant

was a member of both companies.

(*q*) As pointed out by Lord Hatherley, in *Re The Family Endowment Soc.*, 5 Ch. 118, see p. 133, clear proof is required to show that a person having a claim against one company on a written contract has abandoned it for a claim against another company which it may be difficult to prove.

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A. Original company held to be discharged.

- (a) The original having had, by its deed of settlement, express power to transfer its business, and the policies having been issued subject to this power.

Hort's case, 1 Ch. D. 307.

Grain's case, ib.

Harman's case, ib. 326.

Cocker's case, 3 Ch. D. 1.

Dowse's case, ib. 384. A case of an annuity.

- (b) The policy-holder having accepted the new office after notice of the transfer.

National Provincial Life Ass. Soc., 9 Eq. 306.

International, &c., Life Ass. Soc., 9 Eq. 316.

Merchants' and Tradesmen's Ass. Soc., 9 Eq. 694.

Times Life Ass. Soc., 5 Ch. 381.

Anchor Ass. Co., 5 Ch. 632.

Spencer's case, 6 Ch. 362.

Fleming's case, 6 Ch. 393.

Evens' claim, 16 Eq. 354.

Miller's case, 3 Ch. D. 391.

B. Original company held not to be discharged.

- (a) The policy-holder having had no sufficient notice of the transfer.

Manchester and London Life Ass., 9 Eq. 643, and
5 Ch. 640.

Conquest's case, 1 Ch. D. 334.

- (b) The policy-holder having refused to accept the new company.

Griffith's case, 6 Ch. 374.

35 & 36 Vict.
c. 41, § 7.

In order, however, to remove the difficulty of determining in these cases whether a policy-holder has or has not released the old office, it has been enacted by 35 & 36 Vict. c. 41, § 7, as follows :—

§ 7. Where a company, either before or after the passing of this act, has transferred its business to or been amalgamated with another company, no policy-holder in the first-mentioned company, who shall pay to the other company the premiums accruing due in respect of his policy, shall by reason of any such payment made after the passing of this act, or by reason of any other act done after the passing of this act, be deemed to have abandoned any claim which he would have had against the first-mentioned company on due payment of premiums to such company, or to have accepted in lieu thereof the liability of the other company, unless such abandonment and acceptance have been signified by some writing signed by him or by his agent lawfully authorised.

But even in the case of policy-holders who have apparently accepted the new office, in lieu of the old, if it should appear that the amalgamation was *ultra vires* so that the new company is not liable to pay the policy, the old office will not be discharged (*r*). Bk. II. Chap. 6.
Sect. 2

As regards persons who are actually creditors of the transferring company, they are not held to have released their original debtor simply by receiving payments from the new company and giving receipts to it (*s*); there must be some clear and distinct agreement to accept the new company as the debtor in lieu of the old; and where an annuitant who knew of the amalgamation had done nothing more than for several years receive his annuity from the new company and give receipts to it, the Court held that he had not ceased to be a creditor of the old company (*t*). But creditors whose claims are limited to the funds of a company which has power to transfer those funds and its business, lose their rights against the company after it has transferred its funds and business to another (*u*). Actual creditors.

The amalgamation of Life Insurance Companies is now regulated by 33 & 34 Vict. c. 61, § 14, which prohibits amalgamation otherwise than by an order of the High Court to be obtained as there mentioned (*r*). 33 & 34 Vict.
c. 61.

(*r*) See *Re Saron Life Assurance Society*; *The Anchor's case*, 2 J. & H. 408, and on appeal, 1 De G. J. & Sm. 29. *parte Gibson*, 4 Ch. 662, where there was notice, but a refusal to accept the new company.

(*s*) *India and London Life Ass. Co.* 7 Ch. 651, a case of an annuitant; (*t*) *Family Endowment Society*, 5 Ch. 118; *Nat. Prov. Life Ass. Soc.*, 9 Eq. 306.

Commercial Bank Corp. of India and the East, 16 W. R. 958, where (*u*) *Dowse's case*, 3 Ch. D. 384.

there was no sufficient notice of the transfer of the business; and see *Ex* (*v*) See *Re Argus Life Ins. Co.*, 39 Ch. D. 571.

CHAPTER VII.

OF ACTIONS BETWEEN COMPANIES AND NON-MEMBERS.

Bk. II. Chap. 7.
Sect. 4.

General obser-
vations.

IN order to complete the subjects discussed in the preceding chapters it is necessary to examine the remedies by which the obligations and liabilities already alluded to can be enforced.

The remedies which alone are of sufficient importance to require consideration in a treatise like the present are actions, defences by way of set-off, proceedings to enforce judgments, and proceedings to wind up companies. The subject of winding up will be discussed hereafter, and the present chapter will be confined to actions, set-off, and execution.

SECTION I.—ACTIONS BY AND AGAINST COMPANIES.

1. *Incorporated companies.*

Actions by
and against
incorporated
companies.

An incorporated company, whether it is incorporated by charter, special act of Parliament, or registration, must sue and be sued by its corporate name (*a*); and as a general rule an incorporated company cannot sue or be sued in respect of any contract entered into or act done prior to its incorporation (*b*). But to this rule there are statutory exceptions, and by the Companies act, 1862, a company formed before

(*a*) See *Re Hodges*, 8 Ch. 204; *Fell v. Burchett*, 7 E. & B. 537, where a shareholder in a registered company was unsuccessfully sued. Compare *Barton v. Hutchinson*, 2 Car. & K. 712. The company should be sued in its corporate name simply. *Pil-*

brow v. Pilbrow's Atmospheric Rail. Co., 3 C. B. 730. As to service of writs, &c., see R. S. C. 1883, Ord. ix., r. 8, and Companies act, 1862, § 62.

(*b*) See *ante*, p. 146, and the next note.

November, 1862, but registered under the act, may apparently sue and be sued in its corporate name in respect of such matters as it might have sued or have been sued for if no registration had taken place *(c)*.

The law relating to actions by and against companies which are being wound up, will be examined in that portion of the treatise which relates to the winding up of companies; but it may be observed here generally, that when a company registered under the Companies act, 1862, is being wound up, actions, whether by or against it, must be brought in its registered name *(d)*, and not as under the Winding-up acts of 1848-9, in the name of the official manager or liquidator *(e)*.

A foreign company *(f)*, and also a limited company if there is reason to suppose that its assets will be insufficient to pay the defendant's costs, can be compelled to give security for the costs of actions instituted by it *(g)*. An affidavit, showing reasonable ground for supposing that the company cannot pay the costs, will, if unanswered, induce the Court to order secu-

Actions by and against companies being wound up.

Security for costs when company sues.

(c) This it is conceived is the general effect of 25 & 26 Vict. c. 89, §§ 193-195. In *Hall Flax Co. v. Wellesley*, 6 H. & N. 38, calls made before registration were sued for afterwards in the company's registered name, and were recovered. So in *Queensbury Industrial Society v. Pickles*, L. R. 1 Ex. 1, where a society registered under 25 & 26 Vict. c. 87, recovered in its registered name a debt owing to it before registration; and compare that case with *Dean v. Mollard*, 15 C. B. N. S. 19, and *Linton v. Blakeney Industrial Society*, 3 H. & C. 533, where societies registered under the same act were held not liable to be sued in their registered names in respect of debts contracted before registration. The only general conclusion to be drawn from these cases is that the exact language of each act must be closely attended to.

See, further, *Langton v. Smith*, 3 Best & Sm. 938.

(d) 25 & 26 Vict. c. 89, § 95.

(e) 11 & 12 Vict. c. 45, § 50, *et seq.* There were, however, some cases in which he could not sue. See, as to this, *Re Weiss*, 15 C. B. 331; *Russell v. Croysdill*, 11 Ex. 123.

(f) *Kilkenny, &c., Rail. Co. v. Fielden*, 6 Ex. 81; *Limerick, &c., Rail. Co. v. Fraser*, 4 Bing. 394.

(g) *Western of Canada Oil Co. v. Walker*, 10 Ch. 628; 25 & 26 Vict. c. 89, § 69. *City of Moscor Gas Co. v. International Financial S. Co.*, 7 Ch. 225; *Washoe Mining Co. v. Ferguson*, 2 Eq. 371. The section, however, did not apply to pure cross suits; *Accidental and Marine Insur. Co. v. Mirati*, 3 Eq. 209; nor to petitions of appeal, *Re Marine Estates Co.*, Jan. 1867, L. J. J. *Ex parte Peppleton* 14 L. B. D. 379.

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Sect. 1.

rity to be given (*h*). And in the absence of any evidence to the contrary, the fact that the company is in liquidation affords a sufficient reason for ordering security (*i*). The amount and kind of security are in the discretion of the Court, and depend on the nature of the case (*k*). In injunction actions a limited company's undertaking to abide by such order as the Court may make as to damages is not sufficient (*l*).

An unlimited company, although it is insolvent and being wound up, cannot be ordered to give security for costs of an action (*m*).

Actions by the
Attorney-
General.

Actions by the Attorney-General to restrain companies from exceeding their statutory powers may be brought in cases where, owing to the absence of any special injury to a particular individual, an action by a stranger will not lie (*n*).

Actions after
amalgamation.

Where companies are amalgamated by act of Parliament, it is generally enacted that actions pending against either company may be continued against the amalgamated company, and in such cases it is only necessary to state the amalgamation on the proceedings (*o*).

At common law incorporated companies act in legal proceedings by their agents, appointed under seal (*p*).

(*h*) *Southampton Steamboat Co. v. Rawlins*, 9 Jur. N. S. 887, and 2 N. R. 544, in which *Caillaud's, &c., Co. v. Caillaud*, 26 Beav. 427, *contra*, was not followed.

(*i*) *Northampton Coal, &c., Co. v. Midland Wagon Co.*, 7 Ch. D. 500; and as to appeals, see *Diamond Fuel Co.*, 13 Ch. D. 400; *Photographic Artists' Ass.*, 23 Ch. D. 370.

(*k*) R. S. C. Ord. lxx. r. 6, as to the old practice, see *Imperial Bank of China v. Bank of Hindustan*, 1 Ch. 437, modifying *Australian Steam Ship Co.*, 4 K. & J. 407.

(*l*) *Anglo-Danubian Co. v. Rogerson*, 3 N. R. 185, and 10 Jur. N. S. 87.

(*m*) *United Ports Co. v. Hill*, L. R. 5 Q. B. 395. This does not apply to appeals.

(*n*) See *Att.-Gen. v. Shrewsbury*

Bridge Co., 21 Ch. D. 752; *Att.-Gen. v. Great Northern Rail. Co.*, 1 Dr. & Sm. 154, and *Ware v. Regent's Canal Co.*, 3 De G. & J. 212. It may be inferred from the judgment in the latter case that a definite injury to the public need not be proved in order to support such an action.

(*o*) See 26 & 27 Vict. c. 92, § 43.

(*p*) See, as to bankruptcy, 46 & 47 Vict. c. 52, § 148. As to registered companies, see 25 & 26 Vict. c. 89, § 64. See, as to the service of writs on companies, R. S. C. Ord. ix. r. 8, *Pillbrow v. Pillbrow's Atmospheric, &c., Co.*, 3 C. B. 730; and as to companies registered under the Companies act, 1862, see 25 & 26 Vict. c. 89, § 62, and *Towne v. London and Limerick Steam Ship Co.*, 5 C. B. N. S. 730; and as to foreign companies, see *Ingate v. Lloyd Austriaco*,

As between the parties to an action instituted by an incorporated company, a retainer under seal of the solicitor acting for it will, if necessary, be presumed (*q*); but in an action by that solicitor against the company for his costs, it is questionable whether a proper retainer under seal must not be proved (*r*), if such retainer is essential, which depends on the nature of the company (*s*).

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Retainer under
seal when
presumed.

The directors of a company have, it is conceived, power to institute and defend actions in the name of the company, and to do for it whatever may be necessary, having regard to the ordinary course of legal proceedings. It has been held that a bond given by an incorporated company as a security for costs in an action to which it is party, and in the ordinary course, is not *ultra vires* (*t*).

In a case where a company was restrained from infringing a patent the directors were ordered to pay the costs (*u*).

In an action by or against an incorporated company, any member or officer may be examined on interrogatories (*v*); and he need not be made a party to the action for purposes of discovery only (*y*).

Directors may be
interrogated.

2. Companies empowered to sue and be sued by public officers.

Cost-book mining companies are empowered to sue for calls by their purser (*z*). Banking companies governed by the

Statutory enact-
ments enabling
companies to sue
and be sued.

4 C. B. N. S. 704; *Newby v. Von Oppen*, L. R. 7 Q. B. 293; *Lhonoue Limon & Co. v. Hong Kong Banking Corp.*, 33 Ch. D. 446.

(*q*) *Thames Haven Dock Co. v. Hull*, 5 Man. & Gr. 274.

(*r*) Compare *Arnold v. Mayor of Poole*, 4 Man. & Gr. 860, with *Haigh v. North Bierley Union*, E. B. & E. 873.

(*s*) *R. v. Cumberland*, 5 Ra. Ca. 332. See as to companies registered under the act of 1862, § 37.

(*t*) *Young v. Brompton Waterw. Co.*, 1 Best & Sm. 675. See as to references to arbitration, *Fariell v. Eastern Counties Rail. Co.*, 2 Ex. 344.

(*u*) See *Betts v. De Vitre*, 5 N. R. 165, V.-C. Wood, and 3 Ch. 429 and 441.

(*v*) R. S. C. Ord. xxxi. rr. 1 and 5. As to the person to examine, see *Berkeley v. Standard Discount Co.*, 9 Ch. D. 643; 12 Ch. D. 295, and 13 Ch. D. 97; *Re Alexandra Palace Co.*, 16 Ch. D. 58.

(*y*) *Wilson v. Church*, 9 Ch. D. 552.

(*z*) See 32 & 33 Vict. c. 19, § 13; but this enactment only applies to calls and to companies subject to the jurisdiction of the Stannary Courts.

Bk. II. Chap. 7. Sect. 1. 7 Geo. 4, c. 46 (extended by 27 & 28 Vict. c. 32), and companies formed under the Letters Patent act, 7 Wm. 4 & 1 Vict. c. 73 (a), are empowered by statute to sue and be sued in the name of an individual appointed to sue and be sued on their behalf; and there is a large number of private acts (b) enabling particular companies to sue and be sued in like manner. It is customary to designate such companies as *companies empowered to sue and be sued* (c), and amongst them will be found most existing unincorporated companies formed, for other than mining purposes, before the passing of the Joint-stock companies registration act of 1844.

Who are represented by public officers.

A company which, without being incorporated, is empowered to sue and be sued by a public officer, is sufficiently represented by that officer in all actions between the company as a body on the one side, and a stranger on the other (d). But, as will be seen hereafter (e), a public officer does not represent one set of shareholders as against another set; for he is only the representative of the shareholders as a body.

Whether public officers must be sued.

It does not follow that, because a company is empowered by some private statute to sue and be sued by a public officer, therefore a creditor may not sue any one or more of the shareholders. Creditors are not deprived of their common law rights by an act of Parliament which is consistent with their retention of those rights; and there are several instances of special statutes under which it has been held, that, although a creditor might sue the public officer, it was not incumbent on him to do so (f).

(a) § 1, repealed by 37 & 38 Vict. c. 35. Industrial and Provident Societies were formerly empowered to sue and be sued by a public officer, *Burton v. Townhill*, 5 E. & B. 797. By 39 & 40 Vict. c. 45, § 11, such societies are incorporated by being registered under that act.

(b) There are also some colonial statutes to the same effect. The validity of one of them was unsuccessfully disputed in *Bank of Australasia v. Nias*, 16 Q. B. 717. See, too, *Bank of Australasia v. Harding*, 9 C. B. 661; and *Kelsall v. Marshall*,

1 C. B. N. S. 241.

(c) A good account of the progress of legislation relating to these companies will be found in *Tan Savelau v. Moore*, 1 Russ. 441.

(d) See *Pendlebury v. Walker*, 4 Y. & C. Ex. 424; *Mew v. Maltby*, 2 Swanst. 277.

(e) See book iii., c. 9, § 24.

(f) *Blewitt v. Gordon*, 6 Jur. 825, per Coleridge, J.; S. C., 1 Dowl. N. S. 815; *Pentland v. Gibson*, 1 Ale. & Nap. 310; *Beech v. Eyre*, 5 Mab. & Gr. 415.

Another observation to be made with respect to these private acts is, that the public officers created by them have no powers except those expressly conferred upon them. Where, therefore, a company was empowered to sue and be sued in the name of its secretary, and to institute actions and suits in his name, it was held that he had no power to petition on behalf of the company for a commission of bankruptcy against one of its debtors (*g*).

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Powers of
public officers.

Questions sometimes arise as to whether a public officer can sue or be sued in respect of a contract not expressly entered into with the company. These questions will all be found to turn on the language of the act applicable to the company to which the questions relate; but speaking generally, it may be said that a public officer may sue or be sued upon contracts which are contracts of the company in point of substance, although not in point of form (*h*).

On what con-
tracts public
officers may sue
and be sued.

A promissory note payable to the order of a person who is in fact a trustee for a company empowered to sue by a public officer ought, if undorsed, to be sued upon by the payee and not by the public officer (*i*).

Bills and notes.

A public officer may sue for a libel on the company represented by him (*k*).

Libels.

By far the greater number of decisions to be met with in the books relating to public officers, have turned upon the Banking act of 7 Geo. 4, and to these decisions, so far as they relate to actions between companies governed by the act on the one hand, and strangers on the other, it is now proposed to direct the reader's attention.

Public officers
of banking
companies.

(*g*) *Guthrie v. Fisk*, 3 B. & C. 178; and see *Ex parte Guthrie*, 1 Gl. & Jam. 245. Some of the older acts only empower companies to sue by their public officers, and are altogether silent about their being sued. See the act which was in question in *Mene v. Malby*, 2 Swanst. 277. More modern acts are much more comprehensive in their terms. See now Bankruptcy Rules 1886, r. 258. and c.f. p. 549-550

929; *Smith v. Goldsworthy*, 4 Q. B. 430; *Wills v. Sutherland*, 4 Ex. 211, and on appeal, 5 Ex. 715; *Skinner v. Lambert*, 4 Man. & Gr. 477. See also, *Cobham v. Holcombe*, 8 C. B. N. S. 815.

(*i*) See *McDowell v. Doyle*, 7 Ir. Com. Law Rep. 598. See as to bills payable to officers for the time being, 45 & 46 Vict. c. 61, § 7, cl. 2, *ante*, p. 230.

(*k*) *Williams v. Beaumont*, 10 Bing. 260.

(*h*) *Soulby v. Smith*, 3 B. & Ad.

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Decisions on
7 Geo. 4, c. 46.

The Banking act of 7 Geo. 4, c. 46 (*l*), has been decided to require imperatively, that all actions by or against companies governed by it shall be brought by or against their public officers, and not otherwise (*m*). What is to be done if there is no public officer is not clear (*n*); perhaps now, in such a case, a creditor could sue the company in its mercantile name; or sue some of the members on behalf of the whole company (*o*).

The fact that the company has stopped payment does not prevent it from suing and being sued by its public officer (*p*); and if a banking company changes its name, the public officer of the new company represents the old company (*q*). Whatever number of public officers a company may have, one only should sue or be sued (*r*). The bankruptcy of a public officer does not prevent his being sued as such (*s*).

Effect of changing public officer.

The change of a public officer *pendente lite* does not affect the action (*t*). If an action is brought by a public officer, and he dies or is removed, and no steps are taken by his successor to prosecute the action, it may, after the lapse of the usual time, be dismissed with costs for want of prosecution (*u*).

Action by a person who assumes to be a public officer.

It is to be observed, that if a person who is not a public officer, sues as if he were, the company which he assumes to represent is not a party to the action, and consequently

(*l*) Amended by 1 & 2 Vict. c. 96, 3 & 4 Vict. c. 11, and 27 & 28 Vict. c. 32.

(*m*) *Steward v. Greaves*, 10 M. & W. 711; *Chapman v. Milcain*, 5 Ex. 61. Compare *Robertson v. Sheppard*, 1 Man. & Gr. 511. See as to laying intent to defraud in indictments for forgery, *R. v. Carter*, 1 Car. & K. 741; *R. v. Beard*, 8 Car. & P. 143; *R. v. James*, 7 Car. & P. 553; and *R. v. Burgiss*, ib. 490; and as to an affidavit to hold to bail, *Spencer v. Newton*, 6 A. & E. 630. The Industrial Provident Societies act, 17 & 18 Vict. c. 25, was also imperative, *Burton v. Tunnahill*, 5 E. & B. 797.

(*n*) See *Steward v. Greaves*, 10 M. & W. 711. An indictment will lie

for stealing the property of the company although there is no public officer, *R. v. Pritchard*, 7 Jur. N. S. 557.

(*o*) See R. S. C. Ord. xvi. rr. 9 and 14.

(*p*) *Davidson v. Cooper*, 11 M. & W. 778; *Needham v. Law*, ib. 400.

(*q*) *Wilson v. Craven*, 8 M. & W. 584.

(*r*) *Holmes v. Binney*, 4 Bing. N. C. 454.

(*s*) *Steward v. Dunn*, 11 M. & W. 63.

(*t*) See *Wibb v. Taylor*, 8 Jur. 39; *Todd v. Wright*, 11 Jur. 471; *Barneswall v. Sutherland*, 9 C. B. 380, and *Paterson v. Ironside*, 14 Jur. 722, note.

(*u*) *Burmester v. Von Stentz*, 23 Beav. 32.

will not be affected by the judgment in it; hence the fact, that the plaintiff is what he pretends to be, is material and traversable (*x*); and declarations and affidavits by public officers have been held bad for not stating with sufficient precision the character in which the plaintiff on the record was suing, and the existence of the company he assumed to represent (*y*).

Although, as has been seen, a public officer may sue on behalf of a company which has stopped payment, there can be no public officer under the 7 Geo. 4, c. 46, of a company which has not begun to carry on the business of bankers under that act (*z*).

In an action against a public officer as a nominal defendant, he may deny that he fills the office he is assumed to fill (*a*). But this defence will be of no avail, if the only evidence to support it is that the company has ceased to carry on business (*b*). A plea of the bankruptcy of a person sued as a public officer will not be allowed to stand, if the plaintiff will give an undertaking not to issue execution against the person or property of the defendant himself (*c*).

Under the 7 Geo. 4, c. 46, public officers are appointed by their respective companies; and returns are required to be made to the Stamp Office, in the form given in the schedule to the act, stating the names and places of abode of the persons so appointed (*d*). The most formal evidence of the appointment of a particular individual to be a public officer of a com-

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Company must
have begun
business.

Plea that person
sued is not a
public officer.

Appointment of
public officers
under 7 Geo. 4,
c. 46.

(*x*) See *Barnewall v. Sutherland*, 9 C. B. 380; *Steward v. Dunn*, 11 M. & W. 63.

(*y*) See *Esdaille v. Maclean*, 15 M. & W. 277; *McIntyre v. Miller*, 13 ib. 725; *Fletcher v. Crosbie*, 9 ib. 252; *Christie v. Peart*, 7 ib. 491; *Spiller v. Johnson*, 6 ib. 570; *Davidson v. Bower*, 4 Man. & Gr. 626. See as to affidavits *Ex parte Torkington*, 9 Ch. 298; *Ex parte Lowenthal*, ib. 324. Compare *Robinson v. Sheward*, 1 Man. & Gr. 511, where the character in which the plaintiff was suing did not appear on the

record, and was not in issue.

(*z*) *Roe v. Fuller*, 7 Ex. 220; *Steward v. Dunn*, 11 M. & W. 63; *Fletcher v. Crosbie*, 9 M. & W. 252; and compare *Davidson v. Bower*, 4 Man. & Gr. 626.

(*a*) Qu. whether the denial must not be supported by affidavit, *Wood v. Marston*, 7 Dowl. 835.

(*b*) See *Needham v. Law*, 11 M. & W. 400; *Davidson v. Cooper*, ib. 778.

(*c*) *Steward v. Dunn*, 11 M. & W. 63; *Wood v. Marston*, 7 Dowl. 865.

(*d*) 7 Geo. 4, c. 46, § 4.

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pany, is the return made by the company to the Stamp Office in pursuance of the statute. But it has been frequently decided that the appointment may be proved otherwise than by such returns, *e.g.*, by parol testimony, and that an informality in a return is of no importance, if satisfactory evidence *aliunde* of the alleged appointment is forthcoming (*e*).

Interrogating
public officer.

It has been decided that if a public officer brings an action, he may be interrogated by the defendant (*f*).

Public officers
of companies
governed by
7 Wm. 4 &
1 Vict. c. 73.

The law relating to public officers of companies formed under the Letters Patent act, 7 Wm. 4 & 1 Vict. c. 73, will be found in §§ 3, 13, 22, 23, 24 and 25 of that act. There have been no decisions upon it bearing upon the present subject, but it seems clear that a company governed by it must sue and be sued by its public officer, if there is one; but if there is not, then any member of the company may be sued.

3. Other unincorporated companies.

Difficulty of
suing before the
Judicature Acts.

Unincorporated companies not empowered by statute to sue and be sued by a public officer, must sue and be sued like ordinary partnerships (*g*). This observation applies to unincorporated cost-book companies (*h*). Consequently, before the passing of the Judicature acts, it was extremely difficult for unincorporated and unprivileged companies to sue at law at all, and various unsuccessful attempts were made to avoid the necessity of joining all the proper persons as co-plaintiffs (*i*).

(*e*) *Edwards v. Buchanan*, 3 B. & Ad. 788; *R. v. Carter*, 1 Car. & K. 741; *R. v. Beard*, 8 C. & P. 143; *R. v. James*, 7 C. & P. 553.

(*f*) *McKenna v. Rolt*, 3 Jur. N. S. 714, Ex.

(*g*) As to which, see Partn. book ii., c. 3, pp. 264, *et seq.*

(*h*) Such companies can sue for calls by their purser, *ante*, p. 265, but there is no statutory enactment enabling them to sue and be sued generally by that officer.

(*i*) See as to all such attempts, *Radenhurst v. Bates*, 3 Bing. 470;

and as to agreements to enable actions to be brought by the chairman for the time being of the directors of a company, *Hall v. Bainbridge*, 1 Man. & Gr. 42; by the directors for the time being of a company, *Phelps v. Lyle*, 10 A. & E. 113; *Woolmer v. Toby*, 4 Ra. Ca. 713; by the purser for the time being of a cost-book company, *Hybart v. Parker*, 4 C. B. N. S. 209; by the managers of a mutual marine insurance society, *Gray v. Pearson*, L. R. 5 C. P. 568; *Corner v. Maxwell-Irwin*, Ir. R. 10 C. L. 354. On

But even as the law stood before those acts, there was no great difficulty in the way of a creditor who sought to obtain payment of a debt owing by the company. For although if he did not sue all the shareholders who in strictness ought to have been sued, he might have been met by a plea in abatement, yet inasmuch as such a plea was of no avail unless it disclosed the names of *all* the persons who ought to have been made defendants, and unless it was verified by affidavit, and unless it was strictly proved if issue was taken upon it, it was practically impossible for a member of a large company seriously to obstruct or embarrass a creditor by having recourse to a plea in abatement, founded on the non-joinder of the other shareholders (*j*).

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The alterations made in the law respecting parties to actions by the Judicature acts and rules, have, however, removed the difficulty in the way of unincorporated companies suing; for an action may now be maintained by or against some of the shareholders on behalf of themselves and others having a common interest in the action (*k*); or, where no change has occurred amongst the shareholders, an action may be brought in the name of the company (*l*).

Alterations made
by the Judica-
ture Acts.

Actions in this form will have to be adverted to hereafter when treating of actions between companies and their members; but it may be observed here that even before the Judicature acts, suits in equity by some persons on behalf of themselves and others having a common interest, were frequently instituted to enforce equitable rights, *e.g.*, to enforce the rights of the mortgagees of a company's undertaking (*m*); to rescind a contract for fraud (*n*); to enforce specific per-

Actions by some
on behalf of
themselves and
others.

the other hand a contract made with an agent of a company might be sued on by the agent, unless the contract was on the face of it made with the company through its agent. See *Clay v. Southern*, 7 Ex. 717, and so it may now.

(*j*) *Crellin v. Culvert*, and *Crellin v. Brook*, 14 M. & W. 11, may be referred to as illustrating the above

observation.

(*k*) R. S. C. Ord. xvi. r. 9.

(*l*) *Ib.* rr. 14 & 15. See Partn. book ii., c. 3, § 1, p. 265 *et seq.*

(*m*) *Tripp v. Chard Rail. Co.*, 11 Ha. 241.

(*n*) *Small v. Attwood*, Younge, 457 *et seq.*; *Fenn v. Craig*, 3 Y. & C. Ex. 213.

Bk. II. Chap. 7. formance of an agreement (*o*) ; to obtain an account (*p*), or an
 Sect. 1. injunction (*q*).

Some on behalf
 when firm is
 sued.

So a suit against some of the members of a numerous partnership or unincorporated company, might be maintained to enforce an equitable right if it was a right against the whole body, and one which all the members thereof had a common interest in opposing (*r*). But suits in this form could not be maintained to enforce purely legal rights, on the ground that it was inconvenient to sue at law (*s*).

Now actions in this form are maintainable in all the divisions of the High Court. Such actions, however, are occasionally attended with inconvenience, for although judgment may be obtained, it may be found practically useless.

Meux v. Maltby. The case of *Meux v. Maltby* (*t*) illustrates this. A suit was there instituted against the treasurer and the directors of a company, to obtain the benefit of an agreement made with the plaintiff by the former owner of property which had become vested in the company. The agreement was an agreement for a lease, and the Court made a decree in the plaintiff's favour, but found itself unable to decree the execution of any lease to him. The defendants had no power to convey the legal estate in the land, and all the Court could do was to declare the plaintiff entitled to a lease, and to restrain the officer from bringing any action to disturb the plaintiff's possession.

(*o*) *Clay v. Rufford*, 8 Ha. 281 ;
 and see *Douglas v. Horsfull*, 2 Sim.
 & Stu. 184.

(*p*) *Gordon v. Pym*, 3 Ha. 223.

(*q*) *Lund v. Blanchard*, 4 ib. 290.

(*r*) See *Pare v. Clegg*, 29 Beav.
 589, where a suit was instituted by
 the creditor of a benefit society
 against its trustees, and one of each
 class of its members. See, also,
Adair v. The New River Co., 11 Ves.
 429 ; *Meux v. Maltby*, 2 Swanst.
 277 ; *Fenn v. Craig*, 3 Y. & C. Ex.

216 ; *Cullen v. Duke of Queensberry*,
 1 Bro. C. C. 101, and 1 Bro. P. C.
 396 ; *The City of London v. Rich-*
mond, 2 Vern. 421.

(*s*) *Allison v. Herring*, 9 Sim. 583.

(*t*) 2 Swanst. 277. See, too, *Lund*
v. Blanchard, 4 Ha. 290, where an
 injunction restraining a defendant
 from suing the plaintiffs, was held
 not to preclude the defendant from
 suing other persons on behalf of
 whom the plaintiffs filed their bill.

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SECTION II.—OF SET-OFF BY AND AGAINST COMPANIES.

In actions between companies on the one hand and non-members on the other, there is little to be said upon the subject of set-off, except that the ordinary rules are applicable; the most important rule being that joint debts cannot be set-off against separate debts (*u*), and that the debts of a body corporate cannot be set-off against the separate debts of its members. Unliquidated damages may be set-off in an action by the company although it is being wound up (*c*).

It is only when a company sues or is sued by one of its own members, or by some person claiming under him, or when one member of a company, having obtained judgment against it, seeks to enforce such judgment against a co-member, or when a company is being wound up, that questions of set-off present peculiar difficulties. These are matters, however, which will be more conveniently discussed hereafter, and the only observation which requires to be made here is, that in actions between a company on the one hand and one of its own members on the other, the member is so far treated as a stranger to the company, that cross debts existing between him and the company may be set off against each other (*y*), but that cross demands between himself and other members individually cannot be gone into. As regards incorporated companies, this follows from the circumstance that they are distinct from the members composing them; and as regards unincorporated companies, it follows from the doctrine that a debt due from or to several persons jointly, cannot be set off against a debt due to or from some or one of them only.

Set off where a
company sues a
member.

Moreover, if a member of an unincorporated joint-stock company is a creditor of the company, and is in a position to sue the other members or any of them, it is no defence that if the company were wound up, and its accounts taken, the plaintiff would be found indebted to the company as a shareholder thereof. In such a case as that now supposed, the

Set-off where
one member sues
another for a
debt owing by
the company.

(u) Partn. book ii., c. 3, § 2, p. App. Ca. 434.

290, *et seq.*(y) *Garnet Mining Co. v. Sutton*,(x) *Mersey Steel and Iron Co. v.* 3 B. & Sm. 321.*Naylor & Co.*, 9 Q. B. D. 648, and 9

L.C.

Bk. II. Chap. 7. plaintiff sues as a non-member; and if his demand is one
 Sect. 2.

capable of being enforced, he will not be prevented from enforcing it, simply because in his character of member, he is indebted to his co-shareholders. This is well illustrated by a case before Lord Cottenham, which may be conveniently noticed here, although it will have to be referred to again in connection with another subject. In the case in question,

Rheam v. Smith. *Rheam v. Smith* (z), the plaintiff and one of the defendants were members of an unincorporated joint-stock company; the defendants were the bankers of the company, and had sued the plaintiff for a debt due by the company to the defendants as bankers. The plaintiff thereupon filed a bill against the bankers and the company, upon the ground that he ought not, as between himself and the bankers (one of whom was a shareholder), to pay more than what, on taking the accounts of the company, would be found to be due from the plaintiff in respect of the debt in question. The bill accordingly prayed that the accounts of the company might be taken, and its affairs wound up, and that provision might be made for due payment of the debts of the company, and that in the meantime the action, and all proceedings therein, might be stayed. A demurrer to the bill was overruled by the Vice-Chancellor, who, it is said, treated the case as one in which a partnership of A. and B. was suing a partnership of A., C., and D., in which case it would be contrary to equity to allow the debt to be recovered without first ascertaining for what proportion of it A. was himself liable (a). But on appeal to the Lord Chancellor, the decision below was reversed, and the demurrer was allowed: the Lord Chancellor observing,—

“It really seems to me that, if the principle upon which this demurrer is said to have been overruled by the Vice-Chancellor were admitted, it might lead to the most frightful consequences; for it comes to this, that if a railway company, or any company carrying on great works, and who may have become indebted to some contractor in half-a-million of money for work done, upon that contractor applying for payment of his debt, can find

(z) 2 Ph. 726.

(a) The fact that such an action could not be maintained at law, is not noticed in the report. But it is

clear that although one partner might under certain circumstances sue another at law, A. and B. could not possibly have sued A. and C.

out that he, or any one connected with him in business, holds a single share in the company, they may say, No, we cannot pay our debt: you must first break up the company, and ascertain whether its assets are sufficient for payment of its debts, for if not, you or the persons connected with you will be liable to contribute to the very sum which you seek to recover. It is impossible to stop short of that if the principle be once admitted. After some difficulty a rule has been established at law, enabling creditors of these great companies to enforce their claims against individual shareholders, leaving them, of course, to their right to contribution against their co-partners. The rule, no doubt, leads sometimes to hardship upon the party sued, but the balance of convenience is in its favour, and for that reason it has been adopted: because it would be a still greater hardship upon parties dealing with such companies, if the enforcement of their claims were to be embarrassed by the necessity of treating all the members of the company as jointly responsible. This suit, however, is an attempt to induce a court of equity to interfere with that rule, for the plaintiff, by his bill, asserts in effect nothing short of this proposition:—If I can find out that you, who are suing me at law, have a single share in the company against whom the claim is made, then there is an end to your legal right; equity will interfere, and though your money may have contributed to the establishment of the company, you shall not be permitted to recover a single farthing against any member of the company until the concern is altogether wound up.”

It must not, however, be inferred from this case, that if a member of a company has a demand against it, and seeks to enforce that demand against some member of it, he may not be met by some defence based on the rights of the members *inter se*. This subject will be examined in the third book, when the rights of members *inter se* are discussed (*b*).

The general rule that an assignee of a debt is in no better position than his assignor, is undoubted; and, as a general rule, where a debt due from a company is assigned, the assignment cannot defeat the right of the company to set off against the assignee, what may be due from the assignor to the company before the company has notice of the assignment, and when payment by the company is demanded (*c*); nor defeat the

Set-off against
holders of
securities.

(*b*) See *Woodhams v. Anglo-Australian Co.*, 2 De G. J. & Sm. 162.

(*c*) *Ashworth's case*, 10 W. R. 771, V.-C. W.; and see *Athenæum Life Assurance Society v. Pooley*, 1 Giff.

102, and 3 De G. & J. 294. See, also, *Watkins v. Clark*, 12 C. B. N. S. 277; *Watson v. Mid Wales Rail. Co.*, L. R. 2 C. P. 593.

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company's right to set off what may become due after such notice under the same contract as created the debt assigned (*d*). At the same time, it is possible for a company to deprive itself of this right of set-off; and if, being indebted, it gives to its creditor a document which shows that the debt is to be paid without reference to the state of other accounts which may exist between him and the company, the company cannot, when sued for such debt, set off demands which it may have against him for other matters. The decisions on this subject will, however, be more conveniently referred to hereafter when treating of the proof of debts in winding-up proceedings (*e*).

SECTION III.—EXECUTION AGAINST COMPANIES AND SHAREHOLDERS ON JUDGMENTS AGAINST THEIR COMPANIES.

Judgments
against com-
panies.

By the common law, a judgment against an incorporated company can only be executed except against the property of the company; and a judgment against an individual cannot by common law be executed against any person or property, except the person or property of the individual named in the judgment. In order, however, to give creditors a more extensive remedy than they would have at common law upon a judgment obtained against companies, either in their corporate names or in the names of their public officers, the legislature has rendered such judgments enforceable against the individual members of the companies. For this purpose three schemes have been had recourse to.

Modes of exe-
cuting such
judgments
against the
members.
First mode.

The first in point of time was applicable to companies empowered to sue and be sued, and was as follows:—A creditor having obtained judgment against the public officer, was allowed to proceed upon that judgment by *scire facias* against any of the shareholders in the company at the time the judgment was obtained; and, if necessary, also against such of the

(*d*) See, as to this, *Government of Newfoundland v. Newfoundland Rail. Co.*, 13 App. Ca. 199; and Partn. 364.

(*e*) See *infra*, book iv. c. 1, § 9, and *Aslatt v. Farquharson*, 10 W. R. 458.

late shareholders as were members of the company when the debt was contracted. 1st. II. Chap. 7.
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The next device was a mere modification of the last, and consisted in the application of it to judgments against companies by their corporate names, which judgments were made enforceable against shareholders and former shareholders in substantially the same manner as that above explained: a qualification, however, was added, to the effect that recourse should not be had against individual shareholders until efforts had been made in vain to obtain payment from the company, and as to some companies, that recourse should not be had against any shareholder except to the extent of his shares. Second mode.

The third and last device was altogether different, and was the result of the course adopted by creditors, who, when they could not obtain satisfaction from companies, singled out some unfortunate shareholder, and compelled him to pay the whole amount for which judgment had been recovered. This course was in the highest degree cruel; and Parliament was induced, when legislating on joint-stock companies, in 1856, to leave out all those clauses, found in the preceding acts, enabling creditors to execute judgments against individual shareholders, and to provide, instead, that creditors should have the power, upon non-payment of the debts due to them from the company, to cause it to be wound up. The same view prevailed when the acts relating to joint-stock companies were remodelled in 1862. Consequently, a creditor of a company registered under the Companies act, 1862, can only execute a judgment obtained against the company by proceeding against the corporate property, and, if necessary, by having recourse to a petition for winding up the company. Third mode.

Such is a general outline of the manner in which a creditor of a company has been enabled to obtain satisfaction of a judgment recovered against it. To fill up this outline so far as is possible, without alluding to repealed statutes and to the winding up of companies, is the object of the remainder of the present section.

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Execution
against cor-
poration.

1. Execution against the company.

A judgment against a corporation is executed against the corporate property in the same way as a judgment against an individual is executed against his property; and a judgment against a public officer may, it is conceived, be executed against him and his property as if he were an ordinary individual, where the right of the judgment creditor is not in this respect modified by statute (*f*).

Fraudulent
dispositions
of company's
property.

What is property of a company must be determined by ordinary principles of the law of property. It must be borne in mind that unsecured creditors of companies, whether limited or unlimited, have no lien on their assets (*g*); and cannot prevent a sale or other disposition thereof (*h*); and it is clearly competent for all companies to divide profits amongst their shareholders, and to that extent to convert what was property of the company into the separate estates of the members. But any division of the property of a company amongst its members which is not warranted by the constitution of the company can be impeached by the company itself (*i*); and any division of the assets of a company which would not leave enough to pay the creditors of the company, would *primâ facie* be a fraud upon them; and even if not a fraud upon them would probably be *ultra vires* (*k*).

Protected
property.

The rolling stock and plant of railway companies (*l*) are protected from seizure by statute (*m*); but a judgment creditor

(*f*) See *Harrison v. Timmins*, 4 M. & W. 510; *Wormwell v. Hailstone*, 6 Bing. 668, where the nominal defendant was held not liable to execution; and *Corpe v. Glyn*, 3 B. & Ad. 801, where he was held not liable to an attachment. See *infra*, as to particular companies.

(*g*) But see, as to cost-book companies, 32 & 33 Vict. c. 19, §§ 24 & 36, and 50 & 51 Vict. c. 43, § 4, giving miners a lien for their wages.

(*h*) *Mills v. Northern Rail. of Buenos Ayres Co.*, 5 Ch. 621.

(*i*) See *Society of Practical Knowledge v. Abbott*, 2 Beav. 559.

(*k*) See, as to this, *Stringer's case*, 4 Ch. 475; *Carliff Coal Co. v. Norton*,

2 Eq. 558, affirmed by Lord Chelmsford, 2 Ch. 405. The decision in this case was probably right under the peculiar circumstances affecting the real plaintiff, but some of the principles laid down in the case deserve serious reconsideration.

(*l*) The term includes railway and dock companies, see *East and West India Docks Co.*, 38 Ch. D. 576; *Gt. North. Rail. Co. v. Tahourdin*, 13 Q. B. D. 320. Compare *Exmouth Docks Co.*, 17 Eq. 181. As to tramway companies, see *Brentford, &c., Tram. Co.*, 26 Ch. D. 527.

(*m*) 30 & 31 Vict. c. 127, § 4, made perpetual by 38 & 39 Vict. c. 31.

of such a company can obtain a receiver of the earnings of the company (*u*), and can issue execution against its unprotected property, and obtain a sale of its surplus lands (*o*). Bk. II, Chap. 7.
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A corporation cannot be attached for contempt or for disobedience to an order made upon it (*p*). But if an order is made upon a corporation, and its directors or officers set the order at defiance, an attachment against them personally will, if necessary, be granted (*q*). By the Rules of the Supreme Court, 1883, Ord. XLII. r. 31, it is provided that:— Attachments.

“Any judgment or order against a corporation wilfully disobeyed, may, by leave of the Court or a judge, be enforced by sequestration against the corporate property, or by an attachment against the directors or other officers thereof, or by writ of sequestration against their property” (*r*). Executions
against com-
panies.
Attachments.

Acts of Parliament are sometimes met with which empower a company to sue and be sued by a public officer, but which, instead of giving any remedy against him or the other shareholders individually, render the funds of the company alone liable to its creditors. In such a case no execution against the public officer of the company, or against any of its shareholders, can be issued (*s*); but an action against the public officer will nevertheless lie, even although there may be no funds, and the plaintiff may consequently have no means of enforcing his judgment after he has obtained it (*t*). If there are funds they can be got at; but before the Judicature act it was said that the only mode in which a creditor could get at them was by *mandamus*, or by a bill in equity (*u*). Under Acts
rendering the
company's funds
alone liable.

(*u*) *Manchester and Milford Rail. Co.*, 14 Ch. D. 645; *Southern Rail. Co.*, 5 L. R., 1r. 165. The line must have been begun, see *Birmingham and Lichfield Rail. Co.*, 18 Ch. D. 155. Only one receiver will be appointed, *Mersey Rail. Co.*, 37 Ch. D. 610, which see as to priorities.

(*o*) *Hull, Barnsley, &c., Rail. Co.*, 40 Ch. D. 119. See as to debenture holders, where one sues on behalf of himself and others, *Hope v. Croydon and Norwood Tramways Co.*, 34 Ch. D. 730. award.

(*q*) *Lacharme v. Quartz Rock Mining Co.*, 1 H. & C. 134, and see *Salman v. Hamburg Co.*, 1 Ch. Ca. 204.

(*r*) This rule takes the place of § 33 of the C. L. P. act, 1860 (23 & 24 Viet. c. 126), which was repealed by 46 & 47 Viet. c. 49.

(*s*) See *Harrison v. Timmins*, 4 M. & W. 510; *Wormwell v. Hailstone*, 6 Bing. 668; *Corpe v. Glyn*, 3 B. & Ad. 801.

(*t*) See *Kendall v. King*, 17 C. B. 483.

(*u*) See the cases in the last two notes. Actions have been brought

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Mandamus in
such cases.

Even before the Common law procedure act of 1854, the 68th section of which considerably extended the power of courts of law to grant a *mandamus* (*x*), it had been held that a creditor of a company, who by virtue of its act of Parliament had no remedy against its shareholders, but only against the funds of the company, was entitled to a *mandamus* to its treasurer and directors, after establishing his debt in an action (*y*). If there are no funds, and the company is not under an obligation to provide any, no *mandamus* can be granted (*z*); but if the company is under an obligation to provide funds, and it will take no measures to raise them, it seems that a *mandamus* will go (*a*). It has, however, been held that a writ of *mandamus* will not be granted if the only reason why payment cannot be obtained by execution in the ordinary way, is, that there is nothing to seize (*b*).

The effect of winding up a company upon executions against it will be examined hereafter in the Fourth Book.

2. *Proceedings against shareholders upon a judgment obtained against a company or its public officer, generally.*

Shareholder can
only be pro-
ceeded against
after judgment
against the
company.

If a company is incorporated, or if it must be sued by a public officer, a creditor cannot proceed by action against a shareholder; but must obtain judgment against the company and then proceed upon that judgment (*c*). It seems to be doubtful, whether a county court judgment against a company can be executed against its shareholders; hence the prudence of suing companies in one of the superior courts (*d*).

in such cases, as in *Cune v. Chapman*, 5 A. & E. 647; but see *Addison v. The Mayor of Preston*, 12 C. B. 108.

(*x*) See *Norris v. The Irish Land Co.*, 8 E. & B. 512, correcting *Benson v. Pull*, 6 E. & B. 273. The section was repealed by 46 & 47 Vict. c. 49. The Supreme Court Rules of 1883, Ord. liii. rr. 1 to 4, have taken its place.

(*y*) See *Corpe v. Glyn*, 3 B. & Ad. 801; *R. v. St. Katharine Dock Co.*, 4

ib. 360.

(*z*) *R. v. The Victoria Park Co.*, 1 Q. B. 288.

(*a*) *Ib.*; and see R. S. C. Ord. liii. r. 1.

(*b*) See *R. v. The Victoria Park Co.*, 1 Q. B. 288.

(*c*) *Fell v. Burchett*, 7 E. & B. 537; and see as to public officers, *ante*, p. 265, *et seq.*

(*d*) See *Taylor v. The Crowland Gas Co.*, 11 Ex. 1.

By the common law, a judgment against A. cannot be executed against B. without a *scire facias*, which, though a judicial writ, is in the nature of an action, and may be pleaded to accordingly. So, before a judgment in the Chancery division against a public officer can be enforced against individual shareholders, an order against them personally must be obtained (*e*). The object of the *sci. fa.* was technically to make the execution conformable to the judgment; but substantially its object was to give the person against whom the judgment was sought to be enforced an opportunity of defending himself; for, *ex hypothesi*, he had not had that opportunity before (*f*).

Proceedings by *sci. fa.* have not been abolished; but a much simpler mode of proceeding has been introduced by the Rules of the Supreme Court, 1883, Ord. XLII. r. 23, which provides that—

“Where a party is entitled to execution against any of the shareholders of a joint stock company upon a judgment recorded against such company, or against a public officer or other person representing such company, the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution accordingly, and such Court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or judge may impose such terms as to costs or otherwise as shall be just.”

This improvement in procedure renders it unnecessary to refer at length to the old rules of practice relating to *sci. fa.*; but as they may be still useful in some cases, a short account of them is given in a note at the end of the present chapter.

A judgment or writ of execution against a company or its public officer may be registered like any other judgment or writ of execution; and in those cases in which a judgment is equivalent to a judgment against all the members of the company individually, and is enforceable against them, it has been supposed to affect them as if it had been in form a judgment

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Sci. fa. against
shareholders.

Judgment in
the Chancery
Division.

Order XLII.
r. 23.

Registry of judgments
against
companies.

(*e*) *Vigers v. Pike*, 8 Cl. & Fin. 652; *Healey v. Chichester and Midhurst Rail. Co.*, 9 Eq. 148.

(*f*) See, generally, as to *sci. fa.*

Com. Dig. Pleader, 3 L.; Bac. Ab. *Sci. fa.*, and the note to *Underhill v. Decereux*, 2 Wms. Saund. 71.

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against them individually and registered accordingly (*g*). But as a judgment against a company or its public officer could not be executed against an individual shareholder of the company without a *sci. fac.*, it could not be reasonable to make that judgment a charge on his property before execution against him could lawfully be sued out (*h*). A judgment registered against a company governed by the act of 1862 obviously does not affect the property of its members.

Discovery of
shareholders.

In order to enable a creditor who has obtained judgment against a company to discover the persons against whom such judgment may be executed, provision has been made by the various statutes relating to companies compelling them to make periodical returns, or to keep registers, of the names and residences of their shareholders, and directing such returns or registers to be open for inspection (*i*).

Right of creditor
to proceed against
individual share-
holders.

A creditor who has obtained judgment against a company, and is in a position lawfully to execute such judgment against the individual members of that company, cannot be restrained from proceeding to execute it against any member or members he may choose to select, provided he acts *bonâ fide* for the purpose of obtaining payment of what is due to him (*k*). But,

(*g*) See *Ex parte Ness*, 5 C. B. 155.

(*h*) See *Harris v. The Royal British Bank*, 2 H. & N. 535. It has been held in Ireland that a judgment obtained against a company ought not to be registered against a former shareholder. See *Hone v. O'Flaherty*, 9 Ir. Ch. 119, where relief against such registration was given. See, also, *Ex parte Thornton*, 2 Ch. 171, as to registering winding-up orders. See now 51 & 52 Vict. c. 51.

(*i*) See 7 Geo. 4, c. 46, § 4, *et seq.*; 7 Wm. 4 & 1 Vict. c. 73, § 6, *et seq.*; 8 & 9 Vict. c. 16, §§ 9, 10, 36; and as to the mode of obtaining inspection, see *Meador v. I. of Wight Ferry Co.*, 9 W. R. 750, Ex., where a mandamus was held not neces-

sary; *R. v. The Derbyshire Rail. Co.*, 3 E. & B. 784, where a mandamus was obtained. As to examining the directors, see *Dickson v. Neath and Brecon Rail. Co.*, L. R. 4 Ex. 87. See, also, R. S. C. Ord. xlii. r. 32, *et seq.*, as to discovery in aid of execution.

(*k*) See *Morisse v. The Royal British Bank*, 1 C. B. N. S. 67; *Green v. Nixon*, 23 Beav. 530. See, also, *Hardinge v. Webster*, 1 Dr. & Sm. 101, where it was held that a member of a company who had obtained judgment against it could not be restrained from enforcing that judgment against another member of the same company. The company was governed by 7 & 8 Vict. c. 110, and had become amalgamated with another com-

as will be seen hereafter, neither a judgment creditor, nor a purchaser from him, will be allowed to use the judgment for the dishonest purpose of aiding some members of the company against the others (*l*). bk. II. Chap. 7.
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Upon a proceeding against a shareholder to enforce a judgment already obtained against a company or public officer, the shareholder is bound by the judgment, and cannot impeach it, except on the ground that the judgment itself was obtained by fraud (*m*). A judgment obtained by default is, in the absence of fraud, as conclusive against the shareholders as any other judgment (*n*).

A judgment obtained by fraud and collusion is however always impeachable by innocent parties affected by it; and however high the tribunal in which the judgment has been pronounced may be, its invalidity on the ground of fraud may be examined by any inferior court which may happen to be called upon to give effect to it (*o*). If, therefore, a shareholder is proceeded against upon a judgment obtained by fraud on the part of the creditor, the judgment may be impeached; and it seems that the shareholder may at his option either apply to the Court in which the judgment was obtained to have it set aside, or rely on the fraud as a defence to a *sci. fa.*, or to an application for leave to issue execution as the case may be (*p*). Exception in
cases of fraud on
the part of the
creditor.

It is to be observed that the fraud here referred to as affording a defence to the *sci. fa.*, is fraud on the part of the judgment creditor in obtaining the judgment. Fraud on a shareholder by the directors of the company, and to which Fraud by com-
pany on share-
holder does not
protect him from
sci. fa.

pany in which the defendant was a shareholder, but the plaintiff was not.

(*l*) See *Woodhams v. Anglo-Australian Co.*, 2 De G. J. & Sm. 162.

(*m*) See *Piddell v. Gwyn*, 1 H. & N. 590; *Bradley v. Eyre*, 11 M. & W. 432; *Fowler v. Rickerby*, 2 Man. & Gr. 760.

(*n*) *Green v. Nixon*, 23 Beav. 530. See, also, *Ex parte Chorley*, 11 Eq. 157.

(*o*) See *Shedden v. Patrick*, 1 McQu. 535; *The Duchess of King-*

ston's case, in 2 Sm. L. C., and the admirable dissertation upon it there.

(*p*) See *Dodgson v. Scott*, 2 Ex. 457; *Edwards v. The Kilkenny Co.*, 2 C. B. N. S. 397; *Philipson v. Egremont*, 6 Q. B. 587; *Bosanquet v. Graham*, 6 Q. B. 601, note; *Green v. Nixon*, 23 Beav. 530. The first two of these cases, and *Harvey v. Scott*, 11 Q. B. 92, show that it is not proper to raise the question of fraud upon a motion for leave to issue a *sci. fa.*

Bk. II. Chap. 7. fraud the creditor is not privy, affords no defence to proceedings by him against the shareholder. This was decided in several cases arising out of the failure of the Royal British Bank, and is a necessary consequence of the principles of the law of partnership (*q*).

Creditor proceeding against shareholder after inducing him to become such.

A shareholder in a company cannot escape from the liability to its creditors which is imposed upon him as a shareholder, except by virtue of some act of theirs: and nothing short of fraud on their part, or of some contract or conduct of theirs precluding them from treating him as their debtor, will afford him a defence as against them so long as their demand exists as between them and the company. This is well illustrated

Bill v. Richards.

by *Bill v. Richards* (*r*), where a shareholder in a railway company pleaded to a *sci. fa.* issued against him by a creditor who had obtained judgment against the company, that he, the shareholder, had at the request of the plaintiff taken shares in the company as a trustee for others, and upon the faith of the plaintiff's statement that by so doing no responsibility in respect of the shares would be incurred. It was not alleged that the plaintiff had been guilty of any fraud; his statement did not relate to any matter of fact; it did not amount to a contract of indemnity, nor to a contract that if he were a creditor of the company he would not endeavour to obtain payment from the defendant. It was quite consistent that all that was meant was, that if the defendant would allow shares to be taken for others in his name they would indemnify him against the consequences, and the defence was therefore held insufficient, although pleaded as a defence on equitable grounds.

No remedy by creditor whose right is limited to company's funds.

The effect which a contract by a company to pay out of its funds, and those only, has in limiting the liability of the shareholders, has been already examined (*s*). Where such a contract has been entered into, no execution on the judgment against

(*q*) *Henderson v. Royal British Bank*, 7 E. & B. 356. See, too, *Daniell v. The Royal Brit. Bank*, 1 H. & N. 681; *Powis v. Harding*, 1 C. B. N. S. 533. *Howard v. Shaw*, 9 Ir. Law Rep. 335, shows that a shareholder sued for a debt of the company cannot escape payment on

the ground that the company was concocted in fraud, and that its deed of settlement was invalid.

(*r*) 2 H. & N. 311. Compare *Batty v. McCundie*, 3 Car. & P. 203; *Connop v. Levy*, 11 Q. B. 769.

(*s*) *Ante*, p. 246, *et seq.*

the company will go against the shareholders at the suit of a person seeking to enforce that contract (*t*). Bk. II. Chap. 7.
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The effect of winding up proceedings on executions against members of companies will be noticed in the Fourth Book.

Having made these preliminary remarks on the subject of executions against shareholders generally, it is proposed to examine more in detail the law relating to proceedings against shareholders in companies governed by the Banking act of 9 Geo. 4, the act of 7 Wm. 4 & 1 Vict. c. 73, the Companies clauses consolidation act, and other companies.

3. *Proceedings against members of particular companies.*

a) Execution against members of companies governed by 7 Geo. 4, c. 46.

The Banking companies act of Geo. 4 requires the public officers of a company governed by that act to be members of the company (*u*), and enacts that execution upon any judgment obtained against a public officer may be issued against any member of the company (*x*). From this it follows that a public officer of a company governed by the act in question is personally liable upon every judgment obtained against him; and that writs can issue against him grounded on such judgment, and that, so far as he is concerned, no intermediate proceeding is necessary (*y*). If, indeed, the public officer named in the judgment has ceased to be a member of the company, then, by the act, he is only liable like other former shareholders; and upon an affidavit by him, the court will stay execution against him until after he has been proceeded against by *scire facias* or its modern equivalent (*z*).

The act in question, 7 Geo. 4, c. 46, allows a creditor, who has obtained judgment against the public officer to execute that judgment— Execution against public officer under 7 Geo. 4, c. 46.
Liability of shareholders under 7 Geo. 4, c. 46.

1. Against any member for the time being of the company; and in case any such execution shall be ineffectual, then

(*t*) *Halket v. The Merchant Traders' Ass.*, 13 Q. B. 960.

(*u*) 7 Geo. 4, c. 46, § 4.

(*x*) § 13.

(*y*) *Harwood v. Law*, 7 M. & W. 203.

(*z*) See *Harwood v. Law*, 7 M. & W. 203.

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2. Against any person who was a member of the company at the time the contract sued upon was entered into; *or*

3. Against any person who became a member at any time after such contract was entered into, but before it was executed; *or*

4. Against any person who was a member at the time when the judgment was obtained.

But persons who are not members for the time being, and so do not fall within the first class, are only liable for three years after they have ceased to be members (*a*).

Members for the
time being.

It appears, therefore, that a creditor must go first of all against the members for the time being, and that until he has done so he cannot go against late members (*b*); and by members for the time being are meant, not members at the time judgment was obtained against the public officer, but members at the time a *sci. fu.* or summons on the judgment is issued (*c*). Members for the time being in this sense can be proceeded against at once, and the statute expressly allows proceedings to be taken against any one or more of them. Their liability, it will be observed, is much more extensive than the liability of ordinary partners; not being confined to debts incurred after they become partners.

A *sci. fu.* (or now a summons under R. S. C. Ord. XLII. r. 23) is the proper mode of proceeding against shareholders under this act (*d*).

The names of the shareholders can be ascertained from the returns made to the Stamp Office (*e*).

Former mem-
bers.

A creditor is not bound to proceed against all the members for the time being before having recourse to former members;

(*a*) 7 Geo. 4, c. 46, § 13.

(*b*) Hence a late member was a competent witness for the public officer. *Needham v. Law*, 12 M. & W. 560.

(*c*) See *Dodgson v. Scott*, 2 Ex. 457. See, too, *Bradley v. Eyre*, 11 M. & W. 432, which turned on a private act in which similar words occurred.

(*d*) *Ransford v. Bosanquet*, 2 Q. B. 972, and *Bosanquet v. Ransford*,

11 A. & E. 520, and *Cross v. Law*, 6 M. & W. 217; *Wittenbury v. Law*, 6 Bing. N. C. 345; *Williams v. Aspinall*, 7 Scott, 822, *contra*, is not to be relied upon. The rule for a *sci. fu.* against present members is absolute in the first instance, and need not be moved for in open court, *Harrison v. Tysan*, 1 Bail Ct. Ca. 111.

(*e*) See 7 Geo. 4, c. 46, § 4, *et seq.*, and see *ante*, p. 110.

but he must make every reasonable effort to obtain payment from the first before he acquires a right to proceed against the last. Acting upon this principle, the Court allowed a *sci. fa.* to issue against a late member, although proceedings against a member for the time being were pending, evidence being given to show that nothing was to be got from him, and that evidence being uncontradicted (*f*). So in another case, a late member was allowed to be proceeded against, although some only of the members for the time being had been sued ineffectually, uncontradicted evidence being given that inquiry had been made as to the solvency of the others, and that there was reason for believing that payment could not be obtained from any of them (*g*). So it was unnecessary for the creditor to issue writs of *ca. sa.* against the existing shareholders before proceeding against former members (*h*). Moreover, a mortgagee who has obtained judgment for his debt, and has done his best to obtain payment by executing that judgment against the members for the time being, is, it seems, entitled to proceed against former members, even without realising his mortgage (*i*). On the other hand, the Court will refuse a creditor leave to proceed against a late member where there is reason to believe that satisfaction can be got with diligence from existing members (*k*); and a return of *nulla bona* to a writ of *fi. fa.* issued against the public officer, together with a loose affidavit as to the insolvency of the members for the time being, will not of itself be sufficient to satisfy the Court that payment from them cannot be obtained (*l*).

With respect to late members, the act, as has been seen, makes three classes of them liable, and renders it lawful for the creditor to proceed against any or all of them, not confining him to one class before having recourse to another (*m*).

Classes of former members.

(*f*) *Dodgson v. Scott*, 2 Ex. 457.

802. See, too, *Cross v. Law*, 6 M.

(*g*) *Harvey v. Scott*, 11 Q. B. 92;

& W. 217.

Field v. Mackenzie, 4 C. B. 705.

(*h*) *Bank of England v. Johnson*, 3

(*h*) *Field v. Mackenzie*, 4 C. B. 132.

Ex. 598.

(*i*) *Ib.* 4 C. B. 725. The mortgage in that case could not be realised at once without great loss.

(*m*) A rule for a *sci. fa.* against a late member must be served personally, or be shown to have reached him, *Esdaille v. Smith*, 18 L. J. Ex. 120.

(*k*) *Eardley v. Law*, 12 A. & E.

Bk. II. Chap. 7. The liability of late members is, in some respects, more extensive than the liability of retired partners at common law, inasmuch as these last are not liable to be sued in respect of debts contracted before they became members. But, on the other hand, the statute limits the duration of a late member's liability to creditors to three years after retirement (*n*). Moreover, there is one class of late members who cannot be proceeded against by one class of their former creditors at all, viz., those members who did not become such until after the creditors' debts had arisen, and who had ceased to be members before judgment obtained against the public officer. Whether the omission of all members of this class to creditors of this class was designed or accidental is not known; but being omitted, their freedom from liability towards such creditors is complete (*o*).

Evidence of membership.

A creditor, being entitled to issue execution only against members for the time being, or, if necessary, against certain classes of late members, must, before he can obtain leave to proceed against any particular person, adduce some evidence to show either that such person is a member for the time being, or that he was a member at the time when the contract with the creditor was entered into, or before the same was executed, or at the time judgment was recovered (*p*). For this purpose recourse is usually had to the memorial of shareholders, directed to be returned to the Stamp Office, which is held to be sufficient if uncontradicted, even although it may be in some respects informal (*q*) or inaccurate as regards the name of the shareholder proceeded against (*r*). The memorial

(*n*) This limitation applies only to creditors, and does not prevent a late shareholder from being a contributory, although three years may have elapsed since he retired from the company. *Gouthwaite's case*, 3 Mc. & G. 187.

(*o*) See *Dodgson v. Scott*, 2 Ex. 457, and *Harvey v. Scott*, 11 Q. B. 92.

(*p*) In *The Bank of England v. Johnson*, 3 Ex. 598, the Court let a *sci. fu.* issue against a person

although there was strong evidence against his having been a member at the time alleged.

(*q*) See *Ex parte Prescott*, Mon. & Ch. 611; *Harvey v. Scott*, 11 Q. B. 92; *Field v. Muckenzie*, 4 C. B. 705 and 717; *Bosanquet v. Shortridge*, 4 Ex. 699. Compare *Prescott v. Bufferij*, 1 C. B. 41, *ante*, p. 110.

(*r*) *Clowes v. Brettell*, 11 M. & W. 461, decided on a private act. See too, *Thompson v. Harding*, 1 C. B. N. S. 555.

is not, however, conclusive, nor is it the only evidence of membership; and it has been decided that a person whose name is omitted from the last return may nevertheless be proved, *aliunde*, to have been a shareholder when the return was made, and that, if there is a dispute as to the fact of membership, proper steps must be taken in order to have that question tried (s).

As between a creditor and an alleged shareholder, the question of membership or no membership depends entirely upon whether the requisites, which, by the company's deed, have to be complied with before a person becomes a member, have been complied with or not; and it may happen that one and the same person is not a member for the purpose of being proceeded against by a *sci. fa.*, although he may be a member for the purpose of being made a contributory on the winding up of the company (t).

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Effect of non-compliance with requisite formalities.

b) Execution against members of companies governed by the Letters Patent act.

The Letters Patent act (7 Wm. 4 & 1 Vict. c. 73) does not require the public officers of a company governed by it to be members of the company; and even if they are members their liabilities are restricted to the extent specified in the letters patent of their respective companies. These circumstances alone, it is conceived, render it improper for a creditor to issue execution against a public officer of a company governed by the Letters Patent act without an order of a court or judge (u) or a *sci. fa.*; for it is clear from the act that he cannot be made personally liable unless he is or has been a member, and in neither case is he liable to the extent to which he would be liable at common law.

Execution against public officer under 7 Wm. 4 & 1 Vict. c. 73.

The act in question appears to empower a creditor who has obtained judgment against the public officer of a company governed by it, to execute that judgment against all or any of

Liability of shareholders under 7 Wm. 4 & 1 Vict. c. 73.

(s) *Bank of England v. Johnson*, 3 Ex. 598; *Prescott v. Buffery*, 1 C. B. 41. *strong*, 4 *ib.* 21; *Bosanquet v. Shortridge*, *ib.* 699, there cited. See, too, *Dodgson v. Bell*, 5 Ex. 967.

(t) See *ante*, p. 54, and *Ness v. Angus*, 3 Ex. 805; *Ness v. Arm-* (u) Under R. S. C. Ord. xlii., r. 23, *ante*, p. 281.

Bk. II. Chap. 7. the shareholders, or late shareholders whom he might have
 Sect. 3. sued for payment at common law; the only qualifications being: 1, that a shareholder who transfers his shares continues a shareholder for all purposes of liability until the transfer has been registered; and 2, that the extent of a shareholder's liability is limited or unlimited, according to the letters patent granted to the company (*x*). This act has not received any judicial interpretation throwing light upon the liabilities imposed by it, and it is by no means clear, that the liability of an incoming shareholder is not more extensive than the ordinary liability of an incoming partner.

The names of the shareholders can be ascertained from the returns made under the act (*y*).

c) Execution against members of companies governed by 8 & 9 Vict. c. 16.

Under 8 & 9
 Vict. c. 16,
 creditor must
 first go against
 the company;

With respect to companies governed by the Companies' clauses consolidation act (8 & 9 Vict. c. 16), there is one important rule which has no analogy with anything met with in the law applicable to ordinary partnerships, or in that applicable to companies governed by the Banking act of 7 Geo. 4, c. 46, or by the Letters Patent act of 7 Wm. 4 & 1 Vict. c. 73. The rule referred to is, that the creditors of a company governed by the Companies' clauses act, are not entitled to proceed against the shareholders personally, if payment can be obtained from the company. In other words, the creditors must have recourse to the assets of the company before they can have recourse to the shareholders individually. When, therefore, an application is made for leave to issue a *sci. fa.* or execution against a shareholder in a company governed by the act in question, evidence must be adduced to satisfy the Court that payment cannot be obtained from the company itself as a body (*z*). The creditor need not show that there is no possi-

and show that he
 cannot obtain
 payment from it.

(*x*) 7 Wm. 4 & 1 Vict. c. 73, §§ 21 & 24; and see upon it *Phillipson v. Egremont*, 6 Q. B. 587. The writer supposes that the returns are now made to the High Court instead of to the Court of Chancery.

(*y*) *Ib.* § 6, *et seq.*

(*z*) The same rule applied to companies governed by the repealed acts of 7 & 8 Vict. cc. 110 and 113. It seems that the *sci. fa.* need not contain any averment that nothing can

bility of the company ever paying him: all that the Court requires is to be satisfied that the creditor applying for leave to proceed against the shareholder has no means of obtaining present payment except from them individually. In order to satisfy the Court upon this head, the creditor must prove that he has made reasonable attempts to obtain payment from the company, and to discover assets *presently* available for his satisfaction, and that such attempts have been unsuccessful. A mere general assertion by a solicitor's clerk that writs of *fi. fa.* have been issued against the company and returned *nulla bona*, is not sufficient; for it is consistent with such an assertion that no attempt has been made to ascertain whether the company has any assets or not (*a*). But if attempts have been made to discover assets, and those attempts have been fruitless, and a writ of *fi. fa.* has issued against the company and been returned *nulla bona*, that will be sufficient until it is shown affirmatively that the company has assets (*b*); and even if the company has assets which have not been taken in execution, still, if the Court is satisfied that they are insufficient to satisfy the plaintiff, the *sci. fa.* will go, or leave to issue execution will be given under R. S. C. Ord. XLII., r. 23 (*c*).

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By the Companies' clauses consolidation act, a judgment recovered against a company to which such act applies, may, if necessary, be executed against any of the shareholders. But no shareholder is liable to a greater extent than the amount unpaid up of his shares in the company (*d*).

Liability of
shareholders
under 8 & 9
Vict. c. 16.

be got from the company, *Hitchins v. The Kilkenny Rail. Co.*, 15 C. B. 459; but if it does, the averment may be traversed, *Marson v. Lund*, 16 Q. B. 344. See *Nixon v. Brownlow*, 1 H. & N. 405.

(*a*) See *Hitchins v. The Kilkenny Rail. Co.*, 10 C. B. 160, and 15 *ib.* 459; *King v. The Parental Endowment Co.*, 11 Ex. 443.

(*b*) *Rastrick v. The Derbyshire Rail. Co.*, 9 Ex. 149; *Nixon v. The Kilkenny Rail. Co.*, 1 H. & N. 47; *Hitchins v. The Kilkenny Rail. Co.*, 15 C. B. 459; *Wyll v. The Darent*

Rail. Co., 2 C. B. N. S. 110; *Ridgway v. The Security, &c., Ass. Soc.*, 18 C. B. 686. The return by the sheriff need not be filed when the *sci. fa.* is moved for; *Ilfracombe Rail. Co. v. Devon and Somerset Rail. Co.*, L. R. 2 C. P. 15; and see *infra* notes (*e*) and (*g*).

(*c*) *Ilfracombe Rail. Co. v. Lord Poltimore*, L. R. 3 C. P. 258; *Rigby v. Dublin Trunk Rail. Co.*, L. R. 2 C. P. 586.

(*d*) 8 & 9 Vict. c. 16, § 36. See *Burke v. Dublin Trunk Rail. Co.*, L. R. 3 Q. B. 47; *Guest v. Worcester Rail.*

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“Any of the
shareholders.”

Evidence of
membership.

The expression, “any of the shareholders,” has been decided to mean any of the shareholders at the time execution against the company is found to be ineffectual, *i.e.*, in ordinary cases, at the time of the sheriff's return of *nulla bona* (*e*). Consequently, not only all persons who have ceased to be shareholders before judgment against the company has been recovered, but also all who have ceased to be so after that time, but before it has been ascertained that execution against the company on such judgment will prove ineffectual, are wholly exempt from liability to the judgment creditor (*f*).

The act requires that every shareholder intended to be proceeded against, is to have sufficient notice in writing before application for leave to issue a *sci. fa.* against him is made (*g*).

Leave to issue a *sci. fa.* will be refused if the Court is of opinion that there is a clear defence to it (*h*). On the other hand a *sci. fa.* may be dispensed with if the shareholder does not desire to contest his liability (*i*). How far these rules apply to proceedings under R. S. C. Ord. XLII., r. 23, has not been decided.

The meaning of the word shareholder in this act of Parliament has been already examined (*k*); and it is only necessary here to observe that the company's register of shareholders, which a creditor who has obtained judgment against the company has a right to inspect (*l*), is, in the absence of evi-

Co., L. R. 4 C. P. 9. In the last case the shares were not in fact paid up.

(*e*) *Nixon v. Green*, 11 Ex. 550, and 3 H. & N. 686; *Nixon v. Brownlow*, 3 H. & N. 686.

(*f*) *Ibid*.

(*g*) 8 & 9 Vict. c. 16, § 36. See *Hitchins v. Kilkenny Rail. Co.*, 10 C. B. 160; *Deereux v. Kilkenny Rail. Co.*, 5 Ex. 834. See *Ilfracombe Rail. Co. v. Devon and Somerset Rail. Co.*, L. R. 2 C. P. 15, and *Edwards v. Kilkenny Rail. Co.*, 1 C. B. N. S. 409, as to serving the notice and rule nisi on the shareholder. See, as to enforcing decrees in equity without a *sci. fa.* *Healey v. Chichester and Midhurst Rail. Co.*,

9 Eq. 148.

(*h*) See as to the discretion of the Court, *Shrimpton v. Sidmouth Rail. Co.*, L. R. 3 C. P. 80; *Lee v. Bude, &c., Rail. Co.*, L. R. 6 C. P. 576; *Burke v. Dublin Trunk Rail. Co.*, L. R. 3 Q. B. 47. However, in *Guest v. Worcester Rail. Co.*, L. R. 4 C. P. 9, the Court allowed a *sci. fa.* to go although the case was clear.

(*i*) *Burke v. Dublin Trunk, &c., Rail. Co.*, L. R. 3 Q. B. 47.

(*k*) *Ante*, p. 104.

(*l*) 8 & 9 Vict. c. 16, § 36. *R. v. The Derbyshire, &c., Rail. Co.*, 3 E. & B. 784; *Moulder v. Isle of Wight Ferry Co.*, 9 W. R. 750, which shows that a mandamus is not necessary.

dence to the contrary, sufficient proof that a person whose name is on it is a shareholder (*n*). But the register is not conclusive evidence, and leave to issue a *sci. fa.* (or, it is presumed, execution, under R. S. C. Ord. XLII. r. 23) against a person who is on it will not be given if he can show that he is not a shareholder (*n*). Neither is the register the only evidence that a person is a shareholder; and a person made a member of the company by its special act, may be proceeded against accordingly, although no shares have been issued (*o*), unless he is to be regarded as having ceased to be a member (*p*). In a case where a creditor was prevented from seeing the register, a *sci. fa.* was allowed to issue against a person sworn to be a shareholder to the belief of the deponent, and which belief was founded on information from officials connected with the company (*q*).

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d) Execution against members of other companies.

Companies empowered by special acts to sue and be sued, and the shareholders in which are liable for the debts of the companies, will generally be found to resemble companies governed by 7 Geo. 4, c. 46 (*r*).

Liability of
shareholders
in other com-
panies.

Execution against partners or shareholders under judgments obtained against them in the name of their firm or company, is governed by R. S. C. Ord. XLII., r. 10, as to which see Part., Bk. II., c. 3, § 3, p. 298 *et seq.*

Unregistered cost-book mining companies are partnerships, and shareholders in them may be proceeded against accordingly (*s*). But by the Stannaries act, 1887 (50 & 51 Vict.

Cost-book
companies.

(*m*) See 8 & 9 Vict. c. 16, §§ 8 and 29.

(*n*) *Edwards v. Kilkenny Rail. Co.*, 14 C. B. N. S. 526; *Mather v. Nat. Assoc. Investment Soc.*, *ib.* 676.

(*o*) *Portal v. Emmens*, 1 C. P. D. 201 and 664, *ante*, p. 104.

(*p*) *Kipling v. Todd*, 3 C. P. D. 350.

(*q*) *Rastrick v. The Derbyshire, &c., Rail. Co.*, 9 Ex. 149. See *ante*, p. 104 *et seq.*

(*r*) See *Clowes v. Brettell*, 10 M.

& W. 506; *Wingfield v. Barton*, 7 Jur. 258; *Wingfield v. Peel*, 13 L. J. N. S. Q. B. 102; and as to friendly societies, *Myers v. Pearson*, 5 H. & N. 99. The 17 & 18 Vict. c. 25, on which the last case turned, was repealed by 25 & 26 Vict. c. 87 (since repealed by 39 & 40 Vict. c. 45, § 4).

(*s*) *Lanyon v. Smith*, 3 Best & Sm. 939; *Tredwen v. Bourne*, 6 M. & W. 461; *Newton v. Daly*, 1 Fos. & Fin. 26; *Peel v. Thomas*, 15 C.

Bk. II. Chap. 7. c. 43), § 6, in the case of execution against any company to
 Sect. 3. — which the act applies, the sheriff is to levy sufficient to pay all wages due at the date of the levy in addition to the judgment debt, and such wages are payable in priority to the judgment debt.

Companies governed by act of 1862.

Shareholders in companies governed by the Companies act, 1862, are not liable to execution on judgments against the company, but must be proceeded against under the winding-up clauses, which will be examined hereafter (t).

The law respecting execution against members of companies governed by the repealed acts of 7 & 8 Vict. cc. 110 and 113, is now obsolete, and is therefore omitted (u).

Note on procedure by Scire facias.

Necessity of *sci. fa.*

In those cases in which a judgment against a company or a public officer was sought to be enforced against a shareholder, a *scire facias* was a necessary preliminary, unless there was some statutory enactment to the contrary (x), and a provision that execution should not issue without leave obtained by motion in open court, was not sufficient to dispense with a *sci. fa.* (y).

Sci. fa. under 7 Geo. 4, c. 46, and 8 & 9 Vict. c. 16.

Under 7 Wm. 4 & 1 Vict. c. 73.

Under 7 & 8 Vict. cc. 110 and 113.

A *sci. fa.* was necessary in the case of banking companies governed by 7 Geo. 4, c. 46 (z), and of companies governed by the Companies' clauses consolidation act (u); and probably also in the case of companies governed by the Letters Patent act, 7 Wm. 4 & 1 Vict. c. 73.

Under the repealed acts 7 & 8 Vict. cc. 110 and 113, leave to issue execution against a shareholder might be obtained without any suggestion or *sci. fa.* But this did not render a *sci. fa.* improper; and in point of fact it was very commonly had recourse to for the purpose of executing judg-

B. 714; *Toll v. Lee*, 4 Ex. 230; *Ellis v. Schmoock*, 5 Bing. 521, are instances of successful actions against individual shareholders in cost-book mining companies.

(t) 25 & 26 Vict. c. 89, §§ 180 and 195.

(u) It will be found in the first edition of the present treatise, vol. i. pp. 458-462.

(x) *Bartlett v. Pentland*, 1 B. & Ad. 704; *Clowes v. Brettell*, 10 M. & W. 506; *Wingfield v. Barton*, 2 Dowl. N. S. 355, and 7 Jur. 258; *Wingfield v. Peel*, 12 L. J. N. S. 102,

Q. B.

(y) See the last three cases. A judgment obtained in a colony may be sued upon in this country in an action in the ordinary form: *Bank of Australia v. Nias*, 16 Q. B. 717.

(z) *Ransford v. Bosanquet*, 2 Q. B. 972.

(a) 8 & 9 Vict. c. 16, § 36; *Hitchins v. The Kilkenny Rail. Co.*, 10 C. B. 160; *Devereux v. The Kilkenny Rail. Co.*, 5 Ex. 834. See, as to enforcing decrees in equity, *Healey v. Chichester and Midhurst Rail. Co.*, 9 Eq. 148.

ments obtained against companies to which these acts applied (*b*). A *sci. fa.*, Etk. II. Chap. 7. however, did not lie against the executors of a deceased shareholder (*c*). Sect. 3.

A writ of *scire facias* is a judicial writ, and is the commencement of a new Nature of *sci. fa.* action, founded on a judgment already obtained. The writ states the recovery of the judgment, and whatever facts are necessary to show that the person against whom the writ is issued is liable to be proceeded against on that judgment; and the shareholder against whom the writ is issued is commanded to appear to show why the plaintiff ought not to have execution against him. The writ is set out in a declaration or statement of claim, which prays that execution may issue against the defendant (*d*); and which may be pleaded or demurred to in the ordinary way (*e*). Issue having been joined, the cause proceeds to trial (*f*). A judgment obtained against a defendant in a *sci. fa.* is executed like any other judgment. But the Court will compel the creditor to limit the amount for which execution is sued out to what may then be really due to him. This is done by putting the creditor on terms when leave to issue a *sci. fa.* is granted (*g*).

A *sci. fa.* issued irregularly, *e.g.*, without leave, where leave is required, Irregular *sci. fa.* will be set aside; but a plea to it, alleging merely an irregularity for which it might be set aside, is bad (*h*).

A judgment creditor of a company may issue as many concurrent writs of *sci. fa.* against as many shareholders as he thinks proper; and so long as his of *sci. fa.* demand is unsatisfied, a defence by any shareholder that the plaintiff is pro-

(*b*) See as to 7 & 8 Viet. c. 110, *Palmer v. The Justice Assurance Society*, 6 E. & B. 1015; *Peart v. The Universal Salvage Co.*, 6 C. B. 478; *Thompson v. The Universal Salvage Co.*, 3 Ex. 310; *Re Weiss*, 15 C. B. 331. And as to 7 & 8 Viet. c. 113, see *Bendy v. Harding*, 1 C. B. N. S. 551; *Thompson v. Harding*, ib. 555; *Dossett v. Harding*, ib. 524; *Morisse v. The Royal British Bank*, 1 C. B. N. S. 67; *Wible v. Stanner*, 1 H. & N. 873. See, too, *Powis v. Butler*, 3 C. B. N. S. 645, and 4 ib. 469; *Fry v. Russell*, 3 ib. 665.

(*c*) *Powis v. Butler*, *ubi supra*.

(*d*) See the pleadings in *Ricketts v. Bowhay*, 3 C. B. 889, where the writ and declarations are set out in full. See, too, *Bradley v. Eyre*, 11 M. & W. 432; *Nunn v. Claxton*, 3 Ex. 712. In some of the forms the writ is directed to the sheriff, but in others it is directed to the individual shareholder.

(*e*) See *Esdaile v. Trustwell*, 1

Ex. 371; *Bank of Scotland v. Fenwick*, ib. 792; *Ness v. Fenwick*, 2 Ex. 598; *Nunn v. Claxton*, 3 Ex. 712, in each of which the declaration was demurred to. Several matters may be pleaded: *Phillipson v. Tempest*, 8 Jur. 60. As to the practice and forms, see 2 Chitty's *Archbold's Practice*, and Chitty's *Forms* thereto.

(*f*) The jury must not be shareholders, *Esdaile v. Lund*, 12 M. & W. 734.

(*g*) See *Harvey v. Scott*, 11 Q. B. 92; *Green v. Nixon*, 23 Beav. 530; *Addison v. Tate*, 11 Ex. 250.

(*h*) *Marson v. Lund*, 16 Q. B. 344; *Bradley v. Warburg*, 11 M. & W. 452; *Ricketts v. Bowhay*, 3 C. B. 889; *Bank of Scotland v. Fenwick*, 1 Ex. 792; *Bosanquet v. Graham*, 7 Jur. 831, Q. B. See as to suing out a *sci. fa.* on a judgment entered up for costs, *Farmer v. Mottram*, 6 Man. & Gr. 684.

Bk. II. Chap. 7. Sect. 3. ceeding against others is bad (*i*). Even the circumstance that judgments have been already obtained against them on the writs issued against them, affords no ground of defence ; for such judgments do not extinguish the right conferred upon the creditor by the prior judgment obtained against the company (*k*). Even before pleas in abatement were abolished it was decided that to a *sci. fa.* against a shareholder the non-joinder of other persons liable to be proceeded against, could not be pleaded in abatement ; and if one *sci. fa.* issued against several shareholders, a declaration upon it against some of them only was not bad on demurrer, even if it were irregular (*l*). Neither is it any objection to a *sci. fa.* by a creditor against a shareholder that other creditors are suing him or are in a position to issue execution against him (*m*) ; although when he has paid the full amount to which he is liable, no other creditor can extract more from him (*n*).

Applications for rule for *sci. fa.* A rule for a *sci. fa.*, or an application for leave to issue execution (in those cases in which no *sci. fa.* is necessary) may, it seems, be moved for, or made, more than once by the same creditor against the same shareholder for the same debt, if the same rule or application has been allowed to drop for any satisfactory reason, or has been refused upon some technical ground which has been removed. At the same time the maxim, *nemo debet bis vexari pro eadem causa*, is applicable, unless some good reason to the contrary can be shown (*o*).

Sci. fa. after elegit. A judgment against a company, the shareholders of which are liable to execution on the judgment, may be executed against them, although the creditor has issued an *elegit* against the company, and has obtained partial satisfaction by an extent under the writ (*p*). The extent does not, in these cases, satisfy the debt. If the creditor has received nothing from the extent, he is entitled to execution for his whole demand ; and if he has obtained any fruits from the extent, he is still entitled to execution for so much as remains due (*q*). If the land extended is of small value compared with what is due to the creditor, he is entitled to execution against the shareholders without delay ; but if the land is of such a value that the creditor will in a short time be able to obtain payment without having recourse to the shareholders,

(*i*) See *Rigby v. Dublin Trunk Rail. Co.*, L. R. 2 C. P. 586 ; *Nixon v. Brownlow*, 1 H. & N. 405 ; *Nunn v. Lomer*, 3 Ex. 471. Compare *Esdaile v. Trustwell*, 2 Ex. 312, and *Esdaile v. Lund*, 12 M. & W. 607.

(*k*) *Burmester v. Crofton*, 3 Ex. 397.

(*l*) *Fowler v. Rickerby*, 2 Man. & Gr. 760, decided on 7 Geo. 4, c. 46. See the argument in *Esdaile v. Lund*, 12 M. & W. 607.

(*m*) *Rigby v. Dublin Trunk Rail. Co.*, L. R. 2 C. P. 586.

(*n*) *Burke v. Dublin Trunk Rail. Co.*, L. R. 3 Q. B. 47.

(*o*) See upon this, *Corder v. The Universal Gas Light Co.*, 6 C. B. 190 and 554 ; *Field v. Mackenzie*, ib. 384 ; *Dodgson v. Scott*, 2 Ex. 457. *Edwards v. Cameron's, &c., Rail. Co.*, 15 Jur. 470, Ex., is a strong authority for not allowing two applications.

(*p*) *Addison v. Tate*, 11 Ex. 250 ; *R. v. The Derbyshire Rail. Co.*, 3 E. & B. 784.

(*q*) See *Addison v. Tate*, 11 Ex. 250, from which it appears that the *sci. fa.* should state what has been done under the *elegit*, and the amount if any obtained by it.

the Court will not, as a matter of course, let immediate execution against bk. II. Chap. 7. them be issued (*r*).
Sect. 3.

Except where judgment has been obtained by fraud, the validity of a judgment which has been recovered against a company or its public officer, cannot be impeached by a shareholder who is proceeded against by *sci. fa.* for, excepting in cases of fraud, nothing is admissible as a defence to a *sci. fa.* which might have been relied on as a defence to the action on the judgment in which the *sci. fa.* issues (*s*). The judgment is conclusive, and nothing can be set up as a defence to a *sci. fa.* upon it, except some matter which is consistent with the validity of the judgment itself (*t*).
Validity of judgment cannot be questioned on *sci. fa.*

Upon the same principle it seems that if judgment is obtained against a person sued as a public officer, a shareholder cannot plead as a defence to a *sci. fa.*, that the person against whom the judgment has been obtained was not the representative of the company (*u*). In such a case application should be made to set aside the judgment (*x*).
Bradley v. Eyre.

(*r*) See *Addison v. Tate*, 11 Ex. 250.

(*s*) See *per* Lord Mansfield in *Cook v. Jones*, Cowp. 727.

(*t*) See the cases noticed, *ante*, p. 283.

(*u*) See *Bradley v. Eyre*, 11 M. & W. 432; *Fowler v. Rickerby*, 2 Man. & Gr. 760.

(*x*) *Ibid.*, and *Bosanquet v. Graham*, 7 Jur. 832, and 6 Q. B. 601, note.

BOOK III.

OF THE RIGHTS AND OBLIGATIONS OF MEMBERS OF
COMPANIES BETWEEN THEMSELVES.

CHAPTER I.

OF THE RIGHT TO TAKE PART IN THE MANAGEMENT OF THE
AFFAIRS OF A COMPANY.Bk. III. Chap. 1.
Sect. 1.

ONE of the peculiarities of companies, as distinguished from partnerships, is that the management of a company's business is entrusted to a few chosen individuals, and that the shareholders are deprived of that right of personal interference which is enjoyed by the members of ordinary firms (*a*). The members of companies form two bodies, whose interests are or should be the same, but whose powers and functions are different; the one body consists of the directors, in whom the general powers of management are vested; and the other body consists of the shareholders, to whom the directors are accountable, and by whom they are generally appointed. Each of these bodies has its own sphere of action, and its own rights and duties, as will be seen more particularly hereafter.

SECTION I.—OF DIRECTORS AND THEIR POWERS.

Managing body. Where there is no statutory or other provision regulating the constitution and powers of the managing body, the majority of the shareholders of the company must determine how its

(*a*) See *Burnes v. Pennell*, 2 H. L. C. 520 and 521.

affairs are to be conducted, and to whom, and under what restrictions, the management of those affairs shall be entrusted (*b*). This is the rule which prevails in cost-book mining companies (*c*), and it is not easy to conceive what, except the will of the majority, can determine a matter of this description under the circumstances now supposed.

The number of persons composing the managing body of a company is generally fixed by the company's special act, charter, deed of settlement, or regulations, and the number making a *quorum* is also usually thereby fixed. As a general rule, a power entrusted to a given number of individuals cannot be properly exercised by any less number; and there are several cases in which this rule has been applied to companies, and in which the acts of directors have been held invalid on the ground that they were not done by the requisite number of directors (*d*). But it does not therefore follow that the number of directors, as originally fixed, cannot be altered by the majority of a meeting of the shareholders; and where the number is not fixed by the legislature or the Crown, it seems that the shareholders may alter it (*e*). Even where the number is fixed by an act of Parliament or a charter, the act or charter may be so worded as to be in this respect directory only (*f*).

It is to be observed that the directors of a company are all those persons who are constituted directors by a company's act, charter, or deed of settlement, and not only such of them as choose to act.

Sometimes provision is made for the transaction of business by persons who are to be deemed to be directors until directors are appointed. Such a provision does not necessarily make such persons directors for all purposes; and a clause to the

(*b*) Agreements by directors depriving the shareholders of this power are invalid, *James v. Eve*, L. R. 6 H. L. 335. The powers of majorities will be examined hereafter.

(*c*) See *Tapping on the Cost-Book*, p. 64.

(*d*) See *ante*, p. 155; and as to

the power of directors to delegate their authority, see p. 156.

(*e*) *Smith v. Goldsworthy*, 4 Q. B. 430.

(*f*) *Thames Haven, Dock, &c., Co. v. Rose*, 4 Man. & Gr. 552. See, too, *Bargate v. Shortridge*, 5 H. L. C. 297.

Ek. III. Chap. 1.
Sect. 1.

Number of
directors.

Varying the
number.

Who are
directors.

Persons deemed
to be directors.

Bk. III. Chap. 1. effect that two directors shall be a *quorum* has been held not
 Sect. 1. to apply to persons who were to be deemed to be directors (*g*).
 So a clause as to the qualification of directors has been held
 not to apply to similar persons (*h*).

Qualifications
 of directors.

Generally speaking, the members of the managing body are required to possess certain qualifications, and to be appointed in some prescribed manner (*i*). But it by no means follows that persons who are in fact acting as duly qualified directors will be prevented from doing so, simply because they have been irregularly appointed (*k*). Still less does it follow that the irregularity of their appointment will render all their acts null and void. Persons dealing with them as directors *bona fide*, and without notice of the irregularity, are entitled to treat them as the agents of the company, and to hold the company bound by their acts, as if they were its duly appointed directors (*l*). But, as between themselves and the shareholders, the irregularity is of greater importance; and it has been held that persons *de facto*, but not *de jure*, directors cannot allot shares, make valid calls or forfeit shares, even where there is a provision rendering valid what may be done by persons acting as directors, notwithstanding the subsequent discovery of a defect in their appointment (*m*).

Irregular
 appointments.

(*g*) *London and Southern Counties Land Co.*, 31 Ch. D. 223.

(*h*) *Lord Claud Hamilton's case*, 8 Ch. 548, and others of that class noticed *infra*, bk. iv., under the head Contributories.

(*i*) As to disqualification by holding other offices, see *Iron Ship Coating Co. v. Blunt*, L. R. 3 C. P. 484; *Eales v. Cumberland Black Co.*, 6 H. & N. 481, or by being interested in contracts, see *Reg. v. Gaskarth*, 5 Q. B. D. 321. As to the effect of giving votes for disqualified persons, see *R. v. Torkesbury*, L. R. 3 Q. B. 629.

(*k*) See *Foss v. Harbottle*, 2 Ha. 461, and *Mozley v. Alston*, 1 Ph. 790. These cases will be noticed hereafter. For a discussion as to the effect of a clause giving validity

to the proceedings of a board notwithstanding any vacancy among its members or defect in their election, see *Newhaven Local Board v. Newhaven School Board*, 30 Ch. D. 350.

(*l*) See as to this, *ante*, pp. 161 and 166.

(*m*) See *London and Southern, &c., Land Co.*, 31 Ch. D. 223; as to allotments, *Garden Gully, &c., Co. v. McLister*, 1 App. Ca. 39; as to calls and forfeiture, *Howbeach Coal Co. v. Teague*, 5 H. & N. 151; and *Miles v. Bough*, 3 Q. B. 845; *Edinburgh, &c., Rail. Co. v. Hebblewhite*, 6 M. & W. 707; *South-Eastern Rail. Co., v. Hebblewhite*, 12 A. & E. 497; *Swansea Dock Co. v. Levien*, 20 L. J. Ex. 447. Compare *Murray v. Bush*, L. R. 6 H. L. 37, turning on 7 & 8 Vict. c. 110, § 30.

Directors are supposed to know the regulations of their own company (*u*); and it might be supposed that if a person became a director and acted as such, he would not be allowed to take advantage of the fact that he was not duly qualified to act in that capacity; but as will be seen hereafter the decisions on this subject are not all in accordance with this view. There are several decisions to the effect that a person may act as a director and be required to hold a certain number of shares as a qualification for his office, and still be at liberty to show that he did not in fact hold such shares, or agree to take them (*o*). Where, however, a company's special act is so worded as to make a director a shareholder, in respect of the number of shares necessary to qualify him, he will be a shareholder in respect of that number of shares whether any definite shares have been allotted to him or not (*p*).

A provision that no person shall be eligible as a director unless he holds a certain number of shares, does not apply to persons who sign a company's memorandum of association, and who by that fact alone are the persons to act as directors until others are appointed (*q*).

Where a person is required to hold a certain number of shares as a qualification for the office of director, those shares must not be nominally paid-up shares (*r*); but a director having the requisite number of shares is not disqualified for the office simply because he may have mortgaged his shares (*s*); it is sufficient if he retains the legal title to them. This was held in a case where the qualification shares were to be held by the directors in their own right (*t*).

(*u*) See *per* Lord Westbury in *C. P. D.* 350.

Lane's case, 1 De G. J. & S. 506. Compare *Marquis of Abercorn's case*, 4 De G. F. & J. 78.

(*o*) *Wheal Buller Consols*, 38 Ch. D. 42, and other cases of that sort. See *infra*, bk. iv., c. 1, Contributions.

(*p*) *Portal v. Emmens*, 1 C. P. D. 664 and 201, and see also *Kincaid's case*, 11 Eq. 192; *Forbes' case*, 19 Eq. 353; *Purcell's case*, 29 W. R. 170. Compare *Kipling v. Todd*, 3

(*q*) *Stock's case*, 4 De G. J. & Sm. 426; and see *Cotterell's case*, 11 W. R. 13; and *Lord Claud Hamilton's case*, 8 Ch. 548.

(*r*) *Roney's case*, 4 De G. J. & Sm. 426; *Currie's case*, 3 De G. J. & Sm. 367.

(*s*) *Cumming v. Prescott*, 2 Y. & C. Ex. 488.

(*t*) *Pulbrook v. Richmond Consolidated Mining Co.*, 9 Ch. D. 610.

Bk. III, Chap. 1.
Sect. 1.
Denying qualification.

Effect of mortgage of shares on qualification.

Bk. III, Chap. 1.
Sect. 1.

Vacancies.

Whether a person once a director has or has not ceased to be so depends (except in the case of his death) upon the regulations of the company (*u*). A director who becomes bankrupt or ceases to attend to his duties does not thereby necessarily vacate his office (*x*).

The power to fill up casual vacancies is frequently given to the remaining directors; in such a case they can fill up a vacancy although a general meeting of shareholders has been held since the vacancy occurred (*y*). But if the number of continuing directors is less than the minimum number requisite for the transaction of any business, they cannot fill up the vacancy (*z*). The rules of the company may, however, allow the continuing directors, however few, to fill up a vacancy, although not to transact any other business until the vacancy is filled up (*a*).

Removal of
directors.

Power to remove directors is often expressly conferred on the shareholders (*b*). It has not yet been decided whether when there is no such express power there is an implied power in the shareholders of a company to remove a director from his office by a resolution duly passed at a meeting properly convened for the purpose, but the better opinion seems to be that there is (*c*). If, however, a director is appointed for a definite period, he cannot be removed before that period has expired unless there is some special provision to that effect (*d*). Where the shareholders have power to remove a director for "any reasonable cause," the shareholders are themselves the judges as to what is and what is not a reasonable cause for removal; and their decision will not be interfered with if they act fairly and in good faith (*e*).

(*u*) *Phelps v. Lyle*, 10 A. & E. 113.

(*x*) *Ib.*, and see *Wilson v. Wilson*, 6 Scott, 540.

(*y*) *Munster v. Cummeil Co.*, 21 Ch. D. 183.

(*z*) See *Newhaven Local Board v. Newhaven School Board*, 30 Ch. D. 350.

(*a*) As in *York Tramways Co. v. Willows*, 8 Q. B. D. 685.

(*b*) There is power to remove under the Companies' clauses act, 1845. See *Isle of Wight Rail. Co. v. Tahourdin*, 25 Ch. D. 320. *London & South Western Ry. Co. v. Macle* 39 Ch. D. 1.

(*c*) See *Browne v. La Trinidad*, 37 Ch. D. 1, and the last case.

(*d*) *Imperial Hydropathic Hotel Co. v. Hampson*, 23 Ch. D. 1. Compare the last note.

(*e*) *Inderwick v. Snell*, 2 Mc. & G. 216. See as to becoming bankrupt,

Directors have no power to vote themselves fees for salaries for their services beyond what the constitution of the company may provide (*f*). Bk. III, Chap. 1.
Sect. 2.
Remuneration
of directors.

The powers of directors as agents of the company have been already examined (Bk. II. c. 2 & 3): their powers to call meetings, allot shares, make calls, forfeit shares, will be noticed hereafter when treating of these subjects.

SECTION II.—OF SHAREHOLDERS AND THEIR POWERS.

The shareholders of a company cannot usually exercise any control over the management of its affairs, except at meetings duly convened; for the directors of a company are the servants, not of the individual shareholders, but of the company; and where the management of the directors is complained of, an aggrieved shareholder should seek redress through the company, and induce it to call the directors to account (*g*). As will, however, be seen hereafter, if the directors are doing that which the shareholders cannot sanction, or that which they have by a proper resolution forbidden, the dissentients may obtain redress by legal proceedings (*h*).

It may, however, happen that the constitution of a company is such that the shareholders are deprived of all control over the managing body in matters not foreign to the objects of the company. Where this is the case, the managers have it in their power to disregard the wishes of the shareholders as to all such matters (*i*).

Phelps v. Lyle, 10 A. & E. 113; absconding from creditors, *Wilson v. Wilson*, 6 Scott, 540. See the cases as to expelling members of clubs, *Duckins v. Antrobus*, 17 Ch. D. 615; *Fisher v. Keane*, 11 ib. 353; *Labouchere v. Wharnclyffe*, 13 ib. 346; and as to removing persons from offices, *Osgood v. Nelson*, L. R. 5 H. L. 636; *Dean v. Bennett*, 6

Ch. 489; *Hayman v. Gov. of Rugby School*, 18 Eq. 28.

(*f*) See *Evans v. Coventry*, 8 De G. Mc. & G. 835, decree, clause 3. See *infra*, ch. 2, § 3.

(*g*) See *Orr v. Glasgow Rail. Co.*, 3 McQu. 799.

(*h*) See *infra*, ch. 9, § 2.

(*i*) *Spurgin v. White*, 2 Giff. 473, is an instance.

Bk. III. Chap. 1.
Sect. 2.

Meetings of
shareholders.

Interference of
court with
meetings.

Individual shareholders, being comparatively powerless, provision is generally made for bringing them together at meetings, and it is not a little important that the right to convene them should to some extent, at all events, be exercisable by the shareholders themselves. If matters are in such a state that nothing can be done without a meeting, and there is no express power to call one, it would seem necessary to imply a power in any shareholder to convene one. This, however, is a case which can seldom happen. It more commonly happens that there is a power to convene a meeting, but that those who have the power will not exercise it. In cases of this kind it has been held that, where those who have the right to call a meeting of the shareholders refuse to exercise that right, for the express purpose of preventing the shareholders from duly assembling, the Court will, if necessary, interfere to protect the shareholders against an abuse of power on the part of those entrusted with the management of the affairs of the company (*k*). So where directors give notice that a meeting will be held on a day when they know that a large number of shareholders will not be in a position to vote, the Court will interfere and restrain such an abuse of power (*l*). Again, if directors convene a meeting to pass resolutions favourable to themselves on questions in which the interests of the directors are opposed to those of the shareholders, by a circular which is misleading, and which contains statements calculated to obtain proxies in their favour without giving the shareholders the information necessary to enable them to form a just judgment as to who are the proper persons to whom to entrust their votes, the Court will grant an injunction to restrain the holding of the meeting or to restrain the directors from laying such resolutions before the meeting (*m*).

The Court, however, is very reluctant to interfere with the holding of meetings of shareholders, especially when they are called for the purpose of investigating and controlling the conduct of the managing body; and the Court will not interfere to restrain such a meeting simply because the notice convening it

(*k*) *Foss v. Harbottle*, 2 Ha. 461 ;
Isle of Wight Rail. Co. v. Tichourdin,
25 Ch. D. 320.

(*l*) *Cannon v. Trask*, 20 Eq. 669.
(*m*) *Jackson v. Munster Bank*, 13
L. R. Ir. 118.

is badly framed, and invites the meeting *inter alia* to pass resolutions which would be invalid if passed (*n*); for the meeting might take some other legal course, *e.g.*, pass some amended resolution which would be valid.

In order that a resolution come to at any meeting, whether of directors or of shareholders, may have any legal effect, it is necessary that the meeting shall be duly convened; that a proper number of persons shall be present (*o*), and there must always be two at least (*p*); that the resolution should relate to a matter upon which the meeting is competent to pass a resolution; and that the resolution should be duly passed.

In order that a meeting may be duly convened, it is necessary that it be convened (1) by those who have a right to convene it, (2) at a proper time, (3) at a proper place, and (4) by a proper notice.

The persons entitled to convene a meeting have been alluded to already; and it is only necessary to add that a meeting convened by the proper persons will not be incompetent to transact business simply because they may themselves have been irregularly convened to consider whether a meeting shall be called or not (*q*).

As regards time: where there is no express provision, a reasonable time must be given (*r*); and perhaps if the time were unreasonably short and were made so purposely, the Court might restrain the holding of the meeting. But if a meeting is held, and no objection is taken to the shortness of the notice convening it, the Court will not interfere (*s*). Where the time for holding a meeting is prescribed, such time must be observed; and there are instances in which resolutions of meetings have been held invalid on the ground that the meetings were not held at the proper times (*t*).

In calculating the time for holding a meeting, where an

(*n*) *Isle of Wight Rail. Co. v. Ta-
hourdin*, 25 Ch. D. 320.

(*o*) See *Howbeach Coal Co. v. Teague*, 5 H. & N. 151, and other cases, *ante*, pp. 157, 158.

(*p*) *Sharp v. Dawes*, 2 Q. B. D. 26.

(*q*) *Browne v. La Trinidad*, 37 Ch. D. 1.

(*r*) *Browne v. La Trinidad*, 37 Ch. D. 1. As to a meeting of directors,

see *Ex parte Smith*, 39 Ch. D. 546.

(*s*) *Browne v. La Trinidad*, 37 Ch. D. 1.

(*t*) *Railway Sleepers Supply Co.*, 29 Ch. D. 204. Compare *Miller's Dale, &c., Lime Co.*, 31 Ch. D. 211.

Bk. III. Chap. 1. interval of not less than a certain number of days is required
 Sect. 2. ----- to elapse between one meeting and another, the rule is that
 the prescribed number of days must be clear days, *i.e.*, exclusive of the days of the meetings (*u*).

Place. As regards place: where no place is prescribed, it is conceived that any reasonably convenient place of meeting may be fixed. But the Court would probably interfere if a place were purposely fixed at which it was known shareholders could not attend.

Notice of object of meeting. A meeting is not duly convened unless every person entitled to attend has notice not only of the time and place at which, but also of the purposes for which it is to be held, so that he may exercise his own judgment whether he will attend or not; and there are numerous cases in which resolutions have been held invalid on the ground that insufficient notice was given of an intention to submit the matters to which they relate to the meeting at which they were passed (*x*). But a notice may be good in part and bad in part, and is not wholly invalid because it extends to something which cannot be done (*y*).

A person who attends a meeting cannot dispute the validity of what is done on the ground that he had not due notice of the time and place at which the meeting was about to be held; and if all entitled to notice have it in fact, but not in the precise form in which it ought to have been given them, the proceedings of the meeting will not necessarily be invalid (*z*).

Every one entitled to be heard must have an opportunity of being heard. But still it is absolutely requisite for the protection of those who are to be affected by the resolutions of others, that such resolutions shall have no effect unless all entitled to a voice in making them had an opportunity of expressing their views. In a case where directors were empowered to meet once a week at their office, without notice or summons, but on such day and at such hour as they should from time to time agree upon, it was held that a resolution come to by a *quorum* assembled

(*u*) *Ib.*

(*x*) A leading case on this head is *Bridport Old Brewery Co.*, 2 Ch. 191. See also *Garden Gully Co. v. McLister*, 1 App. Ca. 39.

(*y*) *Cleve v. Financial Corporation*, 16 Eq. 363; *Isle of Wight Rail. Co. v. Tahourdin*, 25 Ch. D. 320.

(*z*) See *British Sugar Refining Co.*, 3 K. & J. 408.

without notice was invalid, inasmuch as no day or hour for the meeting of the directors had ever been fixed (*a*). Bk. III, Chap. 1.
Sect. 2.

The mode in which notice is to be given varies with almost every company. Such statutory enactments as exist upon the subject will be noticed hereafter. The only general rule which can be laid down is, that notice must be given in the manner prescribed by each company's act, charter, deed of settlement, or regulations. It seems that it is not necessary to give notice of the holding of an adjourned meeting to the persons entitled to attend it; it is apparently sufficient if they had notice of the holding of the original meeting (*b*). But nothing can, without notice, be transacted at an adjourned meeting except the unfinished business of the first meeting (*c*). Mode of giving
notices of
meetings.

There are two kinds of meetings, viz., *ordinary* and *extraordinary*, or, as they are sometimes called, *general* and *special*. Ordinary or general meetings are usually held at stated times, and for the transaction of business generally. Extraordinary or special meetings are held as occasion may require, for the transaction of some particular business, which ought to be specified in the notice convening the meeting. A resolution passed at an extraordinary meeting, upon a matter for the consideration of which it was not avowedly called, or which was not specified in the notice convening the meeting, is altogether inoperative (*d*); and although such resolution may have been confirmed at a subsequent ordinary meeting, it will still be invalid unless it might have been properly passed in the first instance at an ordinary meeting, without previous notice of any intention to enter upon the matter to which the resolution relates (*e*): and if a meeting is convened to confirm resolutions previously passed, the notice ought to state those resolutions or their effect (*f*). Ordinary and
extraordinary
meetings.

Nature of busi-
ness should be
specified.

(*a*) *Moore v. Hammond*, 6 B. & C. 456. *Bank of Hindustan*, 6 Eq. 91; *Anglo-Californian Gold Mining Co. v. Lewis*,

(*b*) See *Wills v. Murray*, 4 Ex. 843, 862; *Scadding v. Lorant*, 3 H. L. C. 418. 6 H. & N. 174; *Stearic Acid Co.*, 9 Jur. N. S. 1066, V.-C. K.

(*c*) *R. v. Grimsshaw*, 10 Q. B. 747. (*e*) *Lawes' case*, 1 De G. M. & G. 421.

(*d*) *Bridport Old Brewery Co.*, 2 Ch. 191; *Imp. Bank of China v.* (*f*) *Dean v. Bennett*, 6 Ch. 489, and 9 Eq. 625.

Bk. III. Chap. 1.
Sect. 2.

One meeting may
be both ordinary
and extraordi-
nary.

One and the same meeting may be both ordinary and extraordinary; ordinary for the purpose of transacting the usual business of the company, and extraordinary for the transaction of some particular business of which special notice may have been given (*g*). If an ordinary meeting is held and adjourned the adjourned meeting continues to be an ordinary meeting, although special notice is given that it is about to be held for special business (*h*).

Bye-laws.

The power of making bye-laws for the regulation of the affairs of a company is not unfrequently reposed in its shareholders: and it is not uncommonly required that all bye-laws shall be sealed with the seal of the company. In such a case nothing which is not so sealed can be regarded as a bye-law (*i*); nor is an unsealed resolution passed at a meeting of the shareholders of an incorporated company, equivalent to a contract under the seal of such company (*j*). At the same time it is clear that, as a general rule, the resolutions of meetings of members of a body corporate do not require to be sealed in order to be binding on its members, as between themselves, and as members. Acts relating to the internal affairs of a corporation, affecting members only, and affecting them merely as members, do not in general require the common seal to render them valid (*k*).

Bye-laws not warranted by the authority which empowers them to be made, are altogether illegal (*l*).

Resolution of a
majority is a
resolution of a
meeting.

Where there is no special provision to the contrary, the resolution come to by the majority of those present at a meeting is the resolution of that meeting (*m*); and the chairman is the person to decide what the result is and all incidental questions requiring instant decision; but his decision is not neces-

(*g*) See *Cuthill v. Kingdom*, 1 Ex. 494; *Graham v. Van Diemen's Land Co.*, 1 H. & N. 541.

(*h*) *Wills v. Murray*, 4 Ex. 843.

(*i*) *Dunston v. Imperial Gas Co.*, 3 B. & Ad. 125.

(*j*) *Ibid.*, and see *ante*, p. 221.

(*k*) *Grant on Corp.* 65.

(*l*) See *Culder, &c., Nav. Co. v. Pilling*, 14 M. & W. 76; *Adley v.*

Whitstable Co., 17 Ves. 315, 19 ib. 304, and 1 Mer. 107.

(*m*) *Horbury Bridge Coal, &c., Co.*, 11 Ch. D. 109, deciding that the regular method of voting is by show of hands, and that an article giving every member one vote for every share only applies to cases where a poll is demanded.

sarily final (*n*). It is not illegal to transfer or procure shares before a meeting so as to multiply votes at it; nor can votes so obtained be disregarded (*o*). Bk. III. Chap. 1.
Sect. 2.

A meeting at which there is not present a sufficient number of persons to transact business, cannot pass any valid resolution (*p*).

It is conceived that an agreement to vote in a particular way, in consideration of some personal benefit, is illegal; for a vote ought to be an impartial and honest exercise of judgment (*q*). But as a matter of law as distinguished from conscience a person may vote on a question in which he happens to have a personal interest opposed to that of the company; and where the question was whether proceedings should be taken by the company to impeach the title of some of the shareholders in it, those shareholders were held entitled to vote in respect of the very shares the title to which was disputed (*r*). So a director may vote as a shareholder on the question whether a contract between the company and himself shall be entered into or be confirmed (*s*). Interested votes.

Absent members are not entitled to vote by proxy unless they are specially empowered so to do (*t*). The right of an absent member to vote by proxy depends on the terms of Proxy.

(*n*) *Indian Zoedone Co.*, 26 Ch. D. 70.

(*o*) *Pender v. Lushington*, 6 Ch. D. 70; *Stranton Iron and Steel Co.*, 16 Eq. 559; *Cannon v. Trask*, 20 Eq. 669; *Moffatt v. Farquhar*, 7 Ch. D. 591, and see *North-West Transportation Co. v. Beatty*, 12 App. Ca. 589, noticed *infra*.

(*p*) *Hornbreach Coal Co. v. Trayne*, 5 H. & N. 151; *Sharp v. Davies*, 2 Q. B. D. 26.

(*q*) See *Elliott v. Richardson*, L. R. 5 C. P. 744, where the agreement was held illegal as opposed to the Companies act, 1862. See, further, *Moffatt v. Farquharson*, 2 Bro. C. C. 338; *Card v. Hope*, 2 B. & Cr. 661. Compare *Bolton v. Madden*, L. R. 9 Q. B. 55, where an agreement be-

tween two subscribers to a charity to vote for each other's nominees, was held not to be illegal.

(*r*) *East Pant Du Mining Co. v. Merryweather*, 2 Hem. & M. 254. See, also, *Meier v. Hooper's Telegraph Works*, 9 Ch. 350. Compare *Atwood v. Merryweather*, 5 Eq. 464, note, and see 8 & 9 Vict. c. 16, §§ 85 and 86, and the Companies act, 1862, Table A, No. 57, as to votes by directors on matters in which they are interested.

(*s*) *North-West Transportation Co. v. Beatty*, 12 App. Ca. 589, where the director had bought up shares to secure a majority.

(*t*) See Grant on Corporations, 256, note (*q*); Com. Dig. Franchise, F. 11,

Bk. III. Chap. 1. the company's regulations, and these must be strictly complied
 Sect. 2. — with (u). A corporation entitled to hold shares in another
 company has the same right to vote by proxy as any other
 member (x). A member who signs a form of proxy in blank,
 and hands it over to another to be used in the ordinary way,
 impliedly authorises that other to fill up the blank with his
 own name (y). It would seem that a person who has himself
 a right to attend a meeting cannot be considered to represent
 another, for whom he holds a proxy, unless he shows some
 intention to act for his principal as well as for himself (z).
 Where voting by proxy is allowed, the appointment of the
 proxy to vote at any one meeting must bear a penny stamp (a);
 and the appointment must specify the day upon which the
 meeting at which it is intended to be used is to be held; and
 the proxy is available only at the meeting so specified, or an
 adjournment thereof (b). If the appointment authorises the
 proxy to vote at more than one meeting, the proxy paper will
 require a ten shilling instead of a penny stamp (c). The ex-
 pense of stamping proxy papers ought to be borne by those
 who want them and not by the company, unless there is some
 provision to that effect (d). Every person who makes or
 executes, or votes or attempts to vote by means of a voting
 paper not duly stamped incurs a penalty of 50*l.*, and his vote
 is absolutely void (e).

Husband and
 wife voting.

The right of a married woman or of her husband to vote in
 respect of shares held by her has not been judicially con-
 sidered. Speaking generally, however, and without reference

(u) *Harben v. Phillips*, 23 Ch. D. 14; *Indian Zoedone Co.*, 26 Ch. D. 70.

(x) *Indian Zoedone Co.*, 26 Ch. D. 70.

(y) *Ex parte Duce*, 13 Ch. D. 429; *Ex parte Lancaster*, 5 Ch. D. 911.

(z) *Ex parte Evans*, 13 Ch. D. 424.

(a) 33 & 34 Vict. c. 97, § 3, and Schedule; 34 Vict. c. 4.

(b) 33 & 34 Vict. c. 97, § 102, pl. 1. See, as to filling up a paper signed in blank, *Ex parte Lancaster*,

5 Ch. D. 911.

(c) 33 & 34 Vict. c. 97, § 3, and Schedule. As to stamps on proxies under the older stamp laws, see *R. v. Kell*, 12 A. & E. 559; *Monmouthshire Canal Co. v. Kendall*, 4 B. & Al. 453; *Trinity House of Hull v. Beadle*, 13 Q. B. 175.

(d) *Studdert v. Grosvenor*, 33 Ch. D. 528.

(e) 33 & 34 Vict. c. 97, § 102, pl. 3.

to the regulations of any particular company, it would seem that if the shares belong to her as part of her separate estate, her husband has no right to vote in respect of them, and her vote is valid notwithstanding his disapproval thereof. But if the shares do not form part of her separate estate, she alone cannot in point of law be a member in respect of them, and cannot therefore vote (*f*); nor is her husband entitled to vote in respect of such shares until he has become a member of the company in respect of them. Nor does it follow from the fact that he is subject to liabilities in respect of his wife's shares, that he is entitled to the privilege of voting in respect of them.

The right of a shareholder to demand a poll has not been decided; but the right would probably be held to exist unless the contrary could be shown (*g*). A person holding a proxy has no right to demand a poll on behalf of his principal (*h*). The demand should be made immediately after the declaration of the show of hands (*i*), and the poll may be taken at once without adjourning the meeting (*k*).

Absentees cannot effectually urge their ignorance of what took place at meetings which they might have attended had they thought proper so to do: and they are bound by the resolutions come to at a duly convened meeting, provided such resolutions relate to matters upon which the meeting was competent to decide (*l*). Moreover, shareholders who receive reports of what takes place at meetings, and who do not object to what is being done, will be considered as acquiescing therein

(*f*) See *R. v. Harrold*, L. R. 7 Q. B. 361.

(*g*) See Grant on Corp. 203; *R. v. Wimbledon Local Board*, 8 Q. B. D. 459; *Campbell v. Maud*, 5 A. & E. 865. If no poll is taken when rightfully demanded the election is void; *R. v. Cooper*, L. R. 5 Q. B. 457. As to demanding a poll on a question of adjournment, see *Macdougall v. Gardiner*, 1 Ch. D. 13.

(*h*) *R. v. Government Stock Investment Co.*, 3 Q. B. D. 442; *Haren Gold Mining Co.*, 20 Ch. D. 151, at

p. 157.

(*i*) *R. v. Thomas*, 11 Q. B. D. 282.

(*k*) *Chillington Iron Co.*, 29 Ch. D. 159; *R. v. D'Oyly*, 12 Ad. & E. 139. Some dicta to the contrary in *Horbury Bridge Coal, &c., Co.*, 11 Ch. D. 109, must be considered as overruled. See also *British Flax Producers Co.*, W. N. 1889, 7.

(*l*) *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43; *Evans v. Smallcombe*, L. R. 3 H. L. 249; *Turquand v. Marshall*, 4 Ch. 376; *Norwich Yarn Co.*, 22 Beav. 165.

Bk. III. Chap. 1. if what is done might have been validly sanctioned by them if
 Sect. 2. present; but not if what is done is altogether illegal, and beyond the power of even all the shareholders (*m*).

The limits of the power of a majority will be examined hereafter.

Minutes of meetings.

Minutes of meetings, and the contents of books kept by the officers of a company, are not, as against third persons, evidence for the company, unless expressly made so by act of Parliament (*n*). Partnership books are, as a rule, evidence against every partner, because every partner is entitled not only to see them, but, in conjunction with his co-partners, to determine what shall be inserted and what not; but this is not the case with shareholders of companies, and consequently unless there is some statutory enactment or agreement to the contrary, the books of a company are no more evidence against ordinary members of the company than they are as against strangers (*n*). The inconvenience resulting from this principle is obviated in modern acts of Parliament by making certain things, *e.g.*, the registers of shareholders, and signed minutes of meetings, *prima facie* evidence as well against shareholders as against strangers.

Shareholders are not, as between themselves and their directors, supposed to know all that is in the company's books (*o*).

Signing minutes.

With respect to minutes of meetings, it is usual for acts of Parliament to require that the minutes of every meeting shall be entered in a book, and be signed by the chairman of the meeting, and to declare that the minutes so entered and signed shall be admissible in evidence in courts of justice. In practice, the minutes of a meeting are commonly made up and entered by the secretary after the meeting is over, and the

(*m*) See *Phoenix Life Assur. Co.'s case*, 2 J. & H. 441; *Irvine v. Union Bank of Australia*, 2 App. Ca. 366. Compare *Evans v. Smallcombe*, L. R. 3 H. L. 249; *Spackman v. Evans*, ib. 171; *Houldsworth v. Evans*, ib. 263; *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43.

(*n*) *Hill v. Manchester Waterworks*

Co., 5 B. & Ad. 866. Compare *Alderson v. Clay*, 1 Stark. 405, and *The Thetford case*, 12 Vin. Ab. 90, pl. 16; *Maguire's case*, 3 De G. & S. 31. See, also, the next note.

(*o*) See *Longworth's case*, 1 De G. F. & J. pp. 27 and 32. See, too, *per* Turner, L. J., in *Stewart's case*, 1 Ch. 587.

chairman signs such minutes at a subsequent period (generally the next meeting). It has been frequently urged that a resolution made at a meeting, the minutes of which were entered and signed after the meeting was over, could not, by such minutes, be proved to have been made. But this objection has always been overruled, even where the minutes of each meeting ought in strictness to have been signed at such meeting (*p*). But where a company brought an action for calls, and the evidence of the making of the calls consisted of minutes which were signed after the commencement of the action, it was held that such minutes were not admissible (*q*).

The maxim *omnia presumuntur rite esse acta* is applicable to the proceedings at meetings; and if minutes of such proceedings are not produced it will be presumed against the company, and in favour of all persons dealing *bonâ fide* with its directors, not only that every resolution proved to have been made was duly passed, but also that all such resolutions and steps were made and taken as were necessary to authorise subsequent acts proved to have been done (*r*). But this presumption will not be made in favour of directors and against the shareholders; and a transaction with directors which is invalid if not assented to by the shareholders must, if relied on by the directors, be proved by them to have been brought to the attention of the shareholders, and to have received their sanction (*s*).

A resolution of a meeting is not an agreement, and does not require an agreement stamp (*t*).

One of the most important rights of shareholders is to inspect the books and accounts of the company, and to have

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Omnia presumuntur rite esse acta.

Inspection of books, &c., by shareholders.

(*p*) *Miles v. Bough*, 3 Q. B. 845; *Southampton Dock Co. v. Richards*, 1 Man. & Gr. 448; *West London Rail. Co. v. Bernard*, 3 Q. B. 873; *London and Brighton Rail. Co. v. Fairclough*, 2 Man. & Gr. 675; *Inglis v. Great Northern Rail. Co.*, 1 McQueen, 112. See, also, *Roney's case*, 4 De G. J. & Sm. 426, which shows that those who sign minutes are treated as admitting their truth.

And compare *Totill's case*, 1 Ch. 85.

(*q*) *Cornwall Great Consolidated Mining Co. v. Bennett*, 5 H. & N. 423.

(*r*) See *Lane's case*, 1 De G. J. & Sm. 504; *Grady's case*, ib. 488; *Stanhope's case*, 1 Ch. 161; *Knight's case*, 2 Ch. 321.

(*s*) See *British Provident Assur. Soc. v. Norton*, 3 N. R. 147, V.-C. K.

(*t*) *Mills v. British Provident Assurance Society*, 1 Fos. & Fin. 607. ¶

Bk. III. Chap. 1. them examined and reported upon by competent persons.
Sect. 3. — This subject will be alluded to more in detail hereafter (*u*).

It may, however, be observed generally, that a right to inspect includes a right to copy if the first is practically useless without the second (*x*); and a shareholder who has a right to inspect need assign no reason for exercising such right, and cannot be refused inspection on the ground that he desires it in order to oppose the directors or other shareholders (*y*). At the same time, the Court will not assist a shareholder in obtaining inspection for an improper purpose; and the right must be exercised at reasonable times and in a reasonable manner (*z*).

SECTION III.—OF THE POWERS OF MAJORITIES.

Disputes between
shareholders.

In the event of a difference arising between shareholders, it becomes necessary to consider whether there is any method of determining which of them is to give way to the other. It is not uncommonly supposed by the public, that the minority of the shareholders, if they are unequally divided, must submit to the majority. But this is by no means the case; for, as will be seen presently, the majority cannot oblige the minority except within certain limits.

Acts which are
ultra vires.

As regards incorporated companies, one limit is set by the doctrines of *ultra vires* which have been already explained (*a*). That which the company cannot do, even with the consent of all the shareholders, it obviously cannot do at the bidding of any majority, however large; and any shareholder can obtain the aid of the Court to prevent an act which is *ultra vires*, even although resolved upon by all the other shareholders (*b*).

Every company incorporated by act of Parliament, by charter, or by letters patent, or by registration, is governed by a law defining its objects and limiting its powers, and such

(*u*) *Infra*, c. 3, § 4.

(*x*) *Mutter v. East. & Midland Rail. Co.*, 38 Ch. D. 92.

(*y*) *Ib.*, and see *Holland v. Dick-*

son, 37 Ch. D. 669.

(*z*) See the cases last cited.

(*a*) *Ante*, p. 162.

(*b*) See *infra*, p. 319 *et seq.*

law cannot be abrogated by any agreement between the members of the company however unanimous they may be (*c*). A registered company cannot alter the nature of its business as defined in its memorandum of association (*d*); nor can even all the members of a chartered company do what they like with its property, *e.g.*, divide it amongst themselves without accounting for its value to the company (*e*); nor can even all the members of a railway company apply the funds of a company to a purpose which is not authorised by the act of Parliament by which the company is governed (*f*).

On the other hand, it is to be observed, that a corporation acts by a majority: the will of the majority is the will of the corporation; and whatever it is competent for the corporation to do can be done by a majority of its members against the will of the minority, unless there is some express provision to the contrary (*g*). It follows from this, that the power of a majority of the shareholders of a company incorporated by charter or act of Parliament, is limited only by that charter or act, unless the powers of the majority are specially restricted in some other way (*h*).

But the doctrines of *ultra vires* have no application to acts resolved upon by all the members of an unincorporated and unprivileged company. Such a company, although formed for one purpose, may, if all the members consent, depart from that purpose to any extent they all may please (*i*). There may be great difficulty in obtaining the assent of all; and in practice it is often impossible to do so. It is seldom, if ever, practically possible to apply to companies the recognised rule applicable to partnerships, *viz.*, the rule that partners who

(*c*) See *Ashbury Rail. Co. v. Riche*, L. R. 7 H. L. 653; *Att.-Gen. v. Great East. Rail. Co.*, 5 App. Ca. 473. *Clipper Co. v. Mounsey*, 4 K. & J. 733; *Exeter Rail. Co. v. Buller*, 5 Ra. Ca. 211. See also the statute 33 Hen. 8, c. 27.

(*d*) *Ibid*, and see *infra*.

(*e*) *Society of Practical Knowledge v. Abbott*, 2 Beav. 559.

(*f*) See *Att.-Gen. v. Great East. Rail. Co.*, *ubi supra*; and the cases cited *infra*, p. 317 *et seq.*

(*g*) See Grant on Corporations, p. 68 *et seq.*; *Australian Aus. St.*

(*h*) Even a special agreement restricting powers expressly conferred by statute may be invalid, see *Walker v. London Tramways Co.*, 12 Ch. D. 705.

(*i*) See *Keene's Executor's case*, 3 De G. M. & G. 272.

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Powers of
majorities in
the cases of
corporations.

Unanimous
resolutions.

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deliberately do not adhere to their partnership articles, are to be treated as having agreed to vary the articles in those respects in which the partners have not observed them (*k*). At the same time, if any members of a company, be they shareholders or directors, choose to ignore the company's regulations, and not to observe the provisions contained in them, those individuals cannot afterwards object to the validity of a course of conduct adopted or acquiesced in by them on the ground that it is not warranted by the regulations; but their adoption or acquiescence in no way affects the rights and obligations of the other shareholders, either *inter se* or as between them and the acquiescing parties. On this ground, the non-observance of prescribed formalities has over and over again been held to be of no consequence as between acquiescing shareholders, and yet to be fatal as between them and other non-assenting shareholders (*l*).

How disputes
must be settled.

Passing now to the consideration of what is to be done where questions arise as to which all the shareholders are not agreed, the first point to determine is, whether the act, charter, or deed of settlement, or regulations by which the company is governed, do or do not contain any express provision applicable to the matter in question; for if they do, such provision ought to be obeyed (*m*). If they do not, then the nature of the question at issue must be examined; for there is an important distinction between differences which relate to matters incidental to carrying on the legitimate business of a company, and differences which relate to matters with which it was never intended that the company should concern itself.

1. Disputes on
matters arising
in ordinary
course of
business.

With respect to the first class of differences, regard must be had to the state of things actually existing; for, as a rule, if the shareholders are equally divided, those who forbid a

(*k*) Partn., p. 408, and as to the difficulty of applying this rule to companies, see *Ex parte Sargent*, 17 Eq. 273; *Keene's Executors' case*, 3 De G. M. & G. 272.

(*l*) Compare, for example, *Keene's Executors' case*, 3 De G. M. & G. 272, and *Straffon's Executors' case*, 1 De G. M. & G. 576. See also

Bush's case, 6 Ch. 246, and L. R. 6 H. L. 37.

(*m*) The general obligation to observe the provisions of companies' deeds of settlement will be found well put in *Ex parte Brown*, 19 Beav. 97, and *Lawes's case*, 1 De G. M. & G. 421.

change must have their way: *in re communi potior est conditio prohibentis* (n). If, however, in a case of this description, Blk. III. Chap. 1. Sect. 3. unprovided for by previous agreement, the shareholders are Power of majority in such cases. unequally divided, the minority must give way to the majority (o). This doctrine has been held to apply where the majority wished to make a division of profits, without first paying an outstanding debt (p); where the majority wished to borrow money (q); where the majority resolved to assign all the joint property to trustees, upon trust for sale and distribution amongst the joint creditors (r); where the majority resolved on leasing part of the property of the company for a temporary purpose (s); where the majority of the subscribers to an abortive company resolved that the subscriptions should be returned (t); and where the majority approved and adopted accounts fairly laid before them (u).

Moreover, the legitimate business of a company includes Matters included in ordinary course of business. whatever is fairly incidental to those things which it is formed to do, and whatever may be necessary for carrying on its business in the way in which it is ordinarily carried on by other people (r). Hence, where the directors of a fire insurance company, the policies of which did not cover losses occasioned by explosions of gunpowder, resolved to pay claims made in consequence of losses so occasioned, and it was proved that other companies generally did the same thing, although not

(n) But see as to the employment of a ship, *Abbott on Shipping*, p. 58, ed. 12; and as to completing contracts already entered into, *Butchart v. Dresser*, 4 De G. M. & G. 545.

(o) See *ante*, p. 315, and *Gregory v. Patchett*, 33 Beav. 595; *Const v. Harris*, T. & R. 518; *Robinson v. Thompson*, 1 Vern. 465.

(p) *Stevens v. The South Devon Rail. Co.*, 9 Ha. 326, and see *Gregory v. Patchett*, 33 Beav. 595.

(q) See *Bryon v. The Metropolitan Saloon Omnibus Co.*, 3 De G. & J. 123, affirming S. C. 4 Jur. N. S. 680; *Australian Auxiliary Steam Clipper Co. v. Mounsey*, 4 K. & J. 733.

(r) *Lord v. Governor and Co. of Copper Miners*, 2 Ph. 740.

(s) *Simpson v. Westminster Palace Hotel Co.*, 2 De G. F. & J. 141. See, also, *Forrest v. Manchester and Sheffield Rail. Co.*, 30 Beav. 40, and on appeal, 4 De G. F. & J. 126.

(t) *Kent v. Jackson*, 14 Beav. 367, and 2 De G. M. & G. 49.

(u) *Kent v. Jackson*, 2 De G. M. & G. 49, and 14 Beav. 367; *Stupart v. Arrowsmith*, 3 Sm. & G. 176. See as to opening accounts already settled, *Morgan's case*, 1 Mac. & G. 235.

(x) *Att.-Gen. v. Great East. Rail. Co.*, 5 App. Ca. 473, and the cases in the next notes.

Bk. III. Chap. 1. bound to do so, it was held that such payments could not be
 Sect. 3. restrained (y). So a railway and ferry company may use its
 ferryboats for excursion trips when not wanted for the ferry (z).
 So directors of a trading company are justified in giving gra-
 tuities to their servants when there had been a very good
 year (a). So banking companies may grant pensions to the
 families of deceased officers (aa).

Changes in
wishes.

In questions of the class now under consideration, the views
of the majority may vary from time to time, and effect must, it
is conceived, be given to them as they change (b).

All members
entitled to be
heard.

A very important rule respecting the powers and votes of
majorities is, that a majority, to have any weight, must act
and be constituted with perfect good faith; for every member
has a right to be consulted, to express his own views, and to
have those views considered by the other members. In the
language of Lord Eldon, "that is the act of all which is the
act of the majority, provided all are consulted, and the
majority are acting *bonâ fide*, meeting not for the purpose of
negating what any one may have to offer, but for the purpose
of negating what, when they are met together, they may after
due consideration think proper to negative. For a majority
of partners to say, We do not care what one partner may
say; we, being the majority, will do what we please, is, I
apprehend, what a court of equity will not allow" (c).

Majorities at
meetings.

Moreover, where powers are conferred on a majority present
at a meeting of not less than a certain number of persons,
unless such meeting be duly convened and the requisite

(y) *Taunton v. Royal Insur. Co.*, 2
Hem. & M. 135. See on this case,
and those cited in note (s), *Joint
Stock Discount Company v. Brown*,
3 Eq. 139.

(z) *Forrest v. Manchester and
Sheffield Rail. Co.*, 30 Beav. 40, and
4 De G. F. & J. 126; and see *Att.-
Gen. Great East. Rail. Co.*, 5 App.
Ca. 473, as to supplying rolling
stock.

(a) *Hampson v. Price's Patent
Candle Co.*, 24 W. R. 754. This
right ceases when the company has

ceased to carry on business, *Hutton
v. West Cork Rail. Co.*, 23 Ch. D. 654.

(aa) *Henderson v. Bank of Austral-
asia*, 40 Ch. D. 170.

(b) See *Exeter Rail. Co. v. Buller*,
5 Ra. Ca. 211, and *Att.-Gen. v.
Gould*, 28 Beav. 485.

(c) *Const v. Harris*, Turn. & R.
525, and see *ib.* 518, and *Blisset v.
Daniel*, 10 Ha. 493; *Great Western
Rail. Co. v. Rushout*, 5 De G. & Sm.
310, and further as to agreements
precluding impartial voting, *ante*, p.
309.

number be present at the meeting the powers in question cannot be exercised; and although it may be true that the required number of persons was summoned, and that the absentees could not have turned the scale, this will not render valid the acts of the majority of those actually present, for that is not such a majority as was originally contemplated (*d*).

Passing now to the second class of differences, viz., those which relate to matters with which the company was never intended to concern itself, it is to be observed that what is *ultra vires* an incorporated company must be *ultra vires* the majority of the members of an unincorporated company formed for similar purposes and with similar powers, and it has been decided over and over again that no majority, however large, can lawfully engage the company in such matters against the will of even one dissentient shareholder. Each member is entitled to say to the others, "I became a member in a concern formed for a definite purpose, and upon terms which were agreed upon by all of us, and you have no right, without my consent, to engage me in any other concern, or to hold me to any other terms, or to get rid of me, if I decline to assent to a variation in the agreement by which you are bound to me and I to you." Nor is it at all material that the new business is extremely profitable (*e*). This principle is applicable to all partnerships and companies, whether great or small, and is evidently one which requires only to be stated to be at once assented to as being just. No cases upon this subject can be referred to with greater advantage than *Natusch v. Irving* and *Const v. Harris*, both of which were decided by Lord Eldon (*f*).

In *Natusch v. Irving* (*g*), a company was formed in the early part of the year 1824 for granting fire and life assurances.

(*d*) See *London and Southern Counties Freehold Land Co.*, 31 Ch. D. 223; *Howbeach Coal Co. v. Teague*, 5 H. & N. 151; *Ex parte Morrison*, De G. 539. See, too, the cases cited *ante*, p. 305, *et seq.*

(*e*) *Att.-Gen. v. Great Northern Rail. Co.*, 1 Dr. & Sm. 154.

(*f*) See, too, *Davies v. Hawkins*, 3 M. & S. 488; *Fennings v. Gren-*

ville, 1 Taunt. 241; *Glassington v. Thwaites*, 1 Sim. & Stu. 131.

(*g*) Gow on Partnership, App. 398, ed. 3. The case is referred to at length in Partn. 316. See, also *The Phoenix Life Insur. Co.*, 2 J. & H. 441. Compare *Bath's case*, 8 Ch. D. 334, where the original deed of settlement authorised the addition of other businesses.

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2. Disputes on matters involving a change in the nature of the business.

One dissentient can forbid a change.

In companies as well as in partnerships.

Fire and Life Insurance Company turning

Bk. III. Chap. 1. The plaintiff was one of the original subscribers. In the Sect. 3. summer of 1824, the act of 6 Geo. 1, prohibiting companies from carrying on the business of marine insurance, was repealed, and shortly afterwards advertisements appeared in the newspapers, stating that the company would commence the business of marine insurance. The plaintiff objected to this extension of the business of the company and he instituted a suit to restrain it and obtained an injunction.

into a Marine Insurance Company.
Natusch v. Irving.

Const v. Harris. In *Const v. Harris* (*h*), the proprietors of Covent Garden Theatre agreed that the profits should be exclusively appropriated to certain definite purposes. Afterwards, the proprietors of seven out of eight shares, entered into an agreement to apply the profits in a different manner, but they had not consulted the owner of the other eighth share, and he disapproved of the alteration. It was held by Lord Eldon, that the majority had no power to depart from the terms of the original agreement; and upon a bill filed by the one dissentient member for a specific performance of that agreement, a receiver of the profits was appointed. In a long and elaborate judgment, Lord Eldon distinctly recognised the principle, that articles which had been agreed on to regulate the rights of the members of a company, cannot be altered without the consent of *all* the members (*i*).

Modern cases illustrative of these principles.

In modern cases the same principle has been constantly recognised and followed (*k*). Indeed it may be said never now to be disputed; the contest always turning on the question, whether the acts of the majority do or do not belong to the class under consideration, rather than to the question whether, if they do, the minority is or is not bound by them. With reference to the former question, it has been held not competent for a majority of shareholders in a company formed for the purpose of making a railway between two places, to make a railway between two other places (*l*); nor for the

(*h*) Turn. & R. 496.

(*i*) See Turn. & R. 517, 523. The judgments in this and the preceding cases are well worthy of attentive perusal.

(*k*) See *Ex parte Morgan*, 1 Mac.

& G. 225; *Davidson's case*, 4 K. & J. 688; *Smith v. Goldsworthy*, 4 Q. B. 430; *Davies v. Hawkins*, 3 M. & S. 488; *Auld v. Glasgow Working Men's Building Soc.*, 12 App. Ca. 197.

(*l*) *Bagshaw v. The Eastern Union*

majority of the members of a fire and life insurance company *to convert the company into a marine insurance company (m)*; Bk. III. Chap. 1.
Sect. 3. nor for a majority of the members of a railway company to engage it in the business of coal sellers (*n*); nor for a majority of the members of any company to employ the property or funds of the company otherwise than as contemplated by themselves and the other members; *e.g.*, by dividing the capital amongst themselves (*o*), or even amongst all the shareholders whether they approve or not (*p*); by making presents to the directors (*q*); by paying the costs of actions, &c., instituted by or against the directors as individuals, and not as trustees or agents of the company (*r*); by paying dividends or interest on shares or share warrants out of capital (*s*); by applying the funds of the company in defraying the expenses of an application to Parliament to alter the constitution or objects of the company (*t*); or in the purchase of shares of

Rail. Co., 7 Ha. 114, and 2 Mac. & G. 389; *Simpson v. Denison*, 10 Ha. 51.

(*m*) *Natusch v. Irving*, *ante*, p. 319; *Phœnix Life Insur. Co.*, 2 J. & H. 441. In *Rogers v. Oxford, &c., Rail. Co.*, 2 De G. & J. 662, the railway company had express power to become a canal company also.

(*n*) *Att.-Gen. v. Great Northern Rail. Co.*, 1 Dr. & Sm. 154. Compare *Att.-Gen. v. Great Eastern Rail. Co.*, 5 App. Ca. 473.

(*o*) *Menier v. Hooper's Telegraph Co.*, 9 Ch. 350; *Griffith v. Paget*, 5 Ch. D. 894.

(*p*) *Holmes v. Newcastle, &c., Abattoir Co.*, 1 Ch. D. 682.

(*q*) *York and North Mid. Rail. v. Hudson*, 16 Beav. 485. See, too, *Rossmore v. Mowatt*, 15 Jur. 238, V.-C. K. B.

(*r*) See *Studdert v. Grosvenor*, 33 Ch. D. 528; *Smith v. Duke of Manchester*, 24 Ch. D. 611; *Pickering v. Stephenson*, 14 Eq. 322; *Kernaghan v. Williams*, 6 Eq. 228.

(*s*) *Leeds Estate, &c., Co. v. Shepherd*,

36 Ch. D. 787; *Oxford Benefit Building Society*, 35 Ch. D. 502; *Dunkelm & Co.*, 25 Ch. D. 752; *Flitcroft's case*, 21 Ch. D. 519; *National Funds Assurance Co.*, 10 Ch. D. 118; *Guinness v. Land Corporation of Ireland*, 22 Ch. D. 349; *MacDonagh v. Jersey Hotel Co.*, 2 Hen. & M. 528. If directors have received from a shareholder any part of the money due upon his shares beyond the amount actually called up, and have agreed to pay interest on the money so advanced, interest must be paid out of capital if there are no profits out of which to pay it. This is not a reduction of capital but spending capital in payment of a lawful debt. *Dale v. Martin*, 11 L. R. Ir. 371; affirming 9 L. R. Ir. 498.

(*t*) *Lyde v. Eastern Bengal Rail. Co.*, 36 Beav. 10; *Munt v. The Shrewsbury and Chester Rail. Co.*, 13 Beav. 1; *Simpson v. Denison*, 10 Ha. 51; *Fance v. The East Lancas. Rail. Co.*, 3 K. & J. 50, and the cases there cited.

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retiring shareholders (*u*); or in subscribing to a public institution as the Imperial Institute (*v*); or in stamping, and paying for, the return of proxy papers of any kind, or in printing and sending out proxy papers in a form calculated to influence the votes of the shareholders (*x*).

Invalid bye-laws.

Upon the same principle bye-laws which are not warranted by the terms of the instrument which confers the power of making them, are altogether invalid (*y*); and a majority cannot, unless empowered so to do by the company's act, charter, deed of settlement, or regulations, or by some statute, forfeit shares (*z*) or reduce the capital of the company (*a*), or issue preference shares (*b*).

Transfer of business.

A company incorporated by charter or special act of Parliament cannot delegate its powers, and cannot therefore transfer its business even for a time to another company (*c*); nor can the majority of the shareholders of any company bind the minority by an agreement to transfer its property and business, unless such power is authorised by the original constitution of the company (*d*), or by statute (*e*). Nor is it competent for the

(*u*) *Trevor v. Whitworth*, 12 App. Ca. 409; *Hope v. International Financial Soc.*, 4 Ch. D. 327; *Hodgkinson v. National Live Stock Insur. Co.*, 26 Beav. 473, and 4 De G. & J. 422; *Gregory v. Patchett*, 33 Beav. 595.

(*v*) *Tomkinson v. South East. Rail. Co.*, 35 Ch. D. 675.

(*x*) *Studdert v. Grosvenor*, 33 Ch. D. 528.

(*y*) *Calder, &c., Nav. Co. v. Pilling*, 14 M. & W. 76; *Adley v. Whitstaple Co.*, 17 Ves. 315; 19 ib. 304; 1 Mer. 107.

(*z*) *Barton's case*, 4 Drew. 535, and 4 De G. & J. 46.

(*a*) *Smith v. Goldsworthy*, 4 Q. B. 430; *Hope v. International Financial Soc.*, 4 Ch. D. 327.

(*b*) *Hutton v. Scarborough Cliff Co.*, 2 Dr. & Sm. 514 and 521; and on appeal, 6 N. R. 10; *Ashbury v.*

Watson, 30 Ch. D. 376; and distinguish *Harrison v. Mexican Rail. Co.*, 19 Eq. 358; and *South Durham Brewery Co.*, 31 Ch. D. 261, where an increase of capital by an issue of preference shares was authorised by articles drawn up at the same time as the memorandum of association. Although these were limited companies, the principles on which they were decided appear to apply to all companies.

(*c*) *Hattersley v. Shelburne*, 10 W. R. 881, and 31 L. J. Ch. 873; *Charlton v. Newcastle and Carlisle Rail. Co.*, 5 Jur. N. S. 1096; *Winch v. Birkenhead, &c., Rail. Co.*, 5 De G. & S. 562; *Beman v. Rufford*, 1 Sim. N. S. 550; *Salomons v. Laing*, 12 Beav. 377. Compare *Clay v. Rufford*, 5 De G. & S. 768.

(*d*) See *Ernest v. Nicholls*, 6 H. L. C. 401; *Eru Assur. Co.*, 2 J.

(*e*) See note (*e*) next page.

majority of one company to purchase the assets and liabilities of another without similar powers (*f*). Whence it follows that two companies cannot amalgamate with each other, unless such a transaction is authorised by the constitutions of both companies, or unless all the shareholders in both consent to the amalgamation (*g*). And where there is power to amalgamate, that power must be strictly pursued, or at least there must be no substantial departure from it (*h*).

The right of a majority of shareholders to apply to the Legislature or the Crown for an act of Parliament or charter for the purpose of changing the constitution of the company, has occasioned much discussion and no little difference of opinion. The right of every person to apply to Parliament or to the crown on any subject he pleases is founded upon principles of constitutional law, which are paramount to all others; and although there is an instance in which a minority of a chartered society obtained an injunction, restraining the majority from surrendering the existing charter with a view to procure a new one materially differing from it (*i*), the authority of this case is questionable. The Court will, however, even at the instance of one dissentient shareholder, grant an injunction restraining the application of the funds of an incorporated company in defraying the expenses of obtaining an act of Parliament altering the constitution of that company (*k*); but upon constitutional principles the Court declines to go further, and will not restrain shareholders in a company from applying at their own expense for an act which, if passed, will affect the whole

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Amalgamation.

Right of majority to apply for power to alter nature of company.

Ward v. Society of Attornies.

Such applications may be made, but not at the expense of the company.

& H. 400, and 1 H. & M. 672. See *ante*, pp. 250, 258, and, further, as to amalgamating, *Ex parte Bagshaw*, 4 Eq. 341; *Stace and Worth's case*, 4 Ch. 682; *Gilbert v. Cooper*, 10 Jur. 580, V.-C. E., and *Shrewsbury and Birmingham Rail. Co. v. Stour Valley Rail. Co.*, 2 De G. M. & G. 866; *European Society Arbitration Acts*, 8 Ch. D. 679.

(*e*) By § 27 of the Stannaries act, 1887 (50 & 51 Viet. c. 43), cost-book mining companies governed by that

act have power to amalgamate with companies working adjoining mines.

(*f*) See last note but one.

(*g*) See notes (*c*) and (*d*).

(*h*) *Clay v. Rufford*, 5 De G. & Sm. 768.

(*i*) *Ward v. Society of Attornies*, 1 Coll. 370.

(*k*) *Munt v. The Shrewsbury and Chester Rail. Co.*, 13 Beav. 1; *Simpson v. Denison*, 10 Ha. 51; *Vance v. East Lanc. Rail. Co.*, 3 K. & J. 50; and the cases there cited.

Bk. III. Chap. 1. company and change its constitution ; those shareholders who
 Sect. 4. ————— object to the application must oppose it in Parliament (*l*).

Recapitulation. Recapitulating the results now arrived at, it appears—

1. That within the limits set by the original constitution of a company, the voice of a majority must prevail.

2. That it is not competent for any number of shareholders, less than all, to pass beyond those limits.

3. That it is competent for all to do so, unless they are bound together not only by agreement amongst themselves, but by some charter, letters patent, or act of Parliament, which is inconsistent with what they all desire to do.

SECTION IV.—OF THE CONSTITUTION AND MANAGEMENT OF PARTICULAR COMPANIES.

Statutory enact-
 ments affecting
 the constitution
 of companies.

Having made these general observations on directors and shareholders, it is proposed to examine the various statutory provisions now in force relating to their powers and duties in particular companies.

There are no statutory provisions which affect the constitution of the managing bodies, or the powers of the shareholders of companies governed by the Banking act of 7 Geo. 4, c. 46 ; or by the Letters Patent act of 7 Wm. 4 & 1 Vict. c. 73. But the enactments affecting the management of the affairs of cost-book mining companies, of companies governed by the Companies' clauses consolidation act, 8 & 9 Vict. c. 16, and of companies governed by the Companies act, 1862, are numerous and important, and require special notice.

(*l*) See the last cited cases, and *Ware v. The Grand Junction Water-works Co.*, 2 R. & M. 470 ; and as to injunctions restraining applications to Parliament, *Steele v. The North Metropolitan Rail. Co.*, 2 Ch. 237 ; *Telford v. Metropolitan Board of Works*, 13 Eq. 574 ; *The Lancashire and Carlisle Rail. Co. v. The North-*

Western Rail. Co., 2 K. & J. 293 ; *Heathcote v. The North Staffordshire Rail. Co.*, 2 Mac. & G. 100. See, also, *Bill v. Sierra Nevada, &c., Co.*, 1 De G. F. & J. 177, in which an injunction to restrain an application to a foreign government was also refused.

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1. *Cost-book mining companies governed by the Stannaries acts, 1869 and 1887 (m).*

The affairs of a cost-book mining company are conducted by an agent called a purser, and by the acts above mentioned the following duties are imposed upon him :—

1. To enter proper accounts in the cost-book of the company every four months (*n*).

2. To call a meeting of the shareholders every sixteen weeks for the transaction of ordinary business, and to submit to the meeting his accounts (*o*).

3. To make out and send to the registration office at Truro the periodical returns required to be sent by him (*p*).

A copy of the company's rules and regulations is to be filed at the office of the registrar of the vice-warden's court, and to be open to the inspection of all applicants at reasonable times (*q*). These rules and regulations may within certain limits be altered or added to by the company by special resolutions passed in accordance with the terms of the act. The company has no power to make rules or regulations inconsistent with the act, nor to abrogate any special rules or regulations for the management of the company existing at the time when the act was passed (24 June, 1869); nor to make any special rule enabling a company then existing to borrow money (*r*).

(*m*) The act of 1869, 32 & 33 Vict. c. 19, does not extend to companies registered under the Companies acts unless such companies are expressly mentioned or necessarily implied, § 3, while the act of 1887, 50 & 51 Vict. c. 43, does apply to such companies (§ 2, interpretation of the word "company"). Moreover, while the act of 1869 applies to all mines in the Stannaries, § 3, the act of 1887 applies only to metalliferous mines and tin streaming works in that district, § 3.

(*n*) 32 & 33 Vict. c. 19, § 9, and 50 & 51 Vict. c. 43, § 23. Compare

the two sections, and notice that by the latter act a penalty is imposed for any omission or false entry, §§ 23 & 24. See, as to mine club funds, § 13.

(*o*) 50 & 51 Vict. c. 43, § 25. A penalty is imposed for any breach of duty. The accounts are to be printed and a copy sent to each shareholder, *ib.*, § 26.

(*p*) *Ib.* § 32.

(*q*) 32 & 33 Vict. c. 19, § 9, and 18 & 19 Vict. c. 32, § 22. *West Devon Great Consols Mine*, 27 Ch. D. 106.

(*r*) 32 & 33 Vict. c. 19, § 7.

Bk. III. Chap. 1. Sect. 4. Meetings and votes. There must be an ordinary meeting of the company once every sixteen weeks (*s*). Resolutions at a meeting are passed by the votes of a majority in value of the shareholders present in person or represented by proxy (*t*). A meeting with special notice has power to make calls and audit the accounts (*u*).

Shares. Forfeiture of shares. The company has power by a resolution passed at a meeting with special notice (*x*), to forfeit (*y*) shares for the non-payment of calls, after notice requiring payment has been given by the company (*z*). Shares when forfeited become the property of the company and may be disposed of as it thinks fit.

Relinquishment of shares. Shareholders may relinquish their shares by notice in writing delivered to the purser, and the shares thereupon become the property of the company (*a*). But by the Stannaries act, 1887 (*b*), the relinquishment to be valid must be made at least six weeks before a resolution is passed, or an order made, for winding up the company.

Forfeited and relinquished shares may be sold by the company, and may be bought by the shareholders (*c*). A statutory declaration by the purser, that the requirements of the act, necessary to constitute a valid forfeiture or relinquishment, have been complied with, and his receipt for the purchase money, confer a good title on the purchaser (*d*).

Transfer of shares. The company need not recognize the transfer of a share until all calls are paid (*e*). Nor need it recognize a fraudulent transfer (*f*), nor the transfer (*g*) nor relinquishment (*h*) of a fractional part of a share.

Sale and amalgamation. The company has also power to sell its machinery with or

(*s*) 50 & 51 Vict. c. 43, § 25.

(*t*) 32 & 33 Vict. c. 19, § 4; for meaning of special resolution, see *ib.* § 6.

(*u*) *ib.* § 10.

(*x*) For what constitutes such a meeting, see *ib.* § 5.

(*y*) *ib.* §§ 16 & 17, and see *Rule v. Jewell*, 18 Ch. D. 660.

(*z*) For the service of notices by the company, see *ib.* § 8.

(*a*) *ib.* §§ 21 & 22.

(*b*) 50 & 51 Vict. c. 43, § 22. For

the basis on which relinquished shares are now to be valued, see *ib.*, § 21, and see also *Prosper United Mining Co.*, 7 Ch. 236, and *Frank Mills Mining Co.*, 23 Ch. D. 52.

(*c*) 32 & 33 Vict. c. 19, §§ 18 & 21.

(*d*) *ib.* §§ 19 & 23.

(*e*) *ib.* § 14.

(*f*) *ib.* § 35, and see *Chynoweth's case*, 15 Ch. D. 13.

(*g*) *ib.* § 15.

(*h*) *ib.* § 22.

without its interest in the leases of its mines (*i*), and to amalgamate with a company working an adjoining mine (*k*). Bk. III. Chap. 1.
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2. *Companies governed by 8 & 9 Vict. c. 16.*

First, as to the managing body.

The Companies' clauses consolidation act contains several important provisions relating to the appointment, rotation, powers, and proceedings of directors of the companies to which the act applies (*l*). The special act of such a company is supposed to fix the number of its directors, and this number cannot be varied except within such limits as may be thereby allowed (*m*). A certain number of the directors are required to retire from office in rotation every year, so that all the directors may be changed every three years; the persons to retire are to be determined by the directors by ballot if they do not otherwise agree; but the persons to take their place are to be elected by the shareholders (*n*). The directors may be removed by the shareholders at a general meeting (*o*). Occasional vacancies are to be supplied by the directors themselves (*p*). In order that a person may be eligible as a director he must be a shareholder, and hold as many shares as may be required by the company's special act (*q*). Moreover, it is expressly declared that no person holding an office or place of trust or profit under the company, or interested in any contract with the company, is capable of being a director (*r*); and that if any director accepts or holds any other office or place of trust or profit under the company, or is directly or indirectly concerned in any contract with the company, or

(*i*) *Ib.* § 24.

(*k*) 50 & 51 Vict. c. 43, § 27. Notice that the majority necessary to pass the special resolution in these two cases is different.

(*l*) See 8 & 9 Vict. c. 16, §§ 81 to 100.

(*m*) *Ib.* §§ 81 & 82. See on the construction of such acts, *Portal v. Emmens*, 1 C. P. D. 201 and 664,

and cases there cited.

(*n*) 8 & 9 Vict. c. 16, §§ 88, 83, 84.

(*o*) § 91. *Isle of Wight Rail. Co. v. Tuhourdin*, 25 Ch. D. 320.

(*p*) *Ib.* § 89.

(*q*) *Ib.* § 85. See *Portal v. Emmens*, 1 C. P. D. 221 and 664; *Kincaid's case*, 11 Eq. 192; *Forbes's case*, 19 Eq. 353.

(*r*) *Ib.* § 85.

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participates in the profits of any work to be done for it, or ceases to be the holder of the prescribed number of shares, then his office shall become vacant, and he shall cease from voting or acting as a director (*s*). But an exception is made as regards a director whose only interest in a contract with the company arises from his having shares in another company with which such contract is made (*t*).

Contracts between directors and company.

These provisions do not, like the similar clauses of the repealed act of 7 & 8 Vict. c. 110 (*u*), render void a contract made between a director and the company, unless such contract is confirmed by the shareholders; and it was held in *Foster v. The Oxford Railway Company* (*v*), that under the act 8 & 9 Vict. c. 16, such a contract was not void. But it must not be forgotten that, although the act does not expressly invalidate contracts of this description, there is a well-established equitable principle which precludes any person whose duty it is to take care of others, from binding them by any bargain entered into on their behalf with himself, unless all the circumstances relating to such bargain are fully and clearly explained to them (*y*).

Nature of disqualifying contract.

With respect to the nature of the contracts which disqualify a person interested in them from being a director, it has been held, that they must be contracts made with the company in the prosecution of its undertaking; and that there is nothing to prevent a banker of a company from being one of its directors (*z*).

(*s*) 8 & 9 Vict. c. 16, § 86.

(*t*) *Ib.* § 87.

(*u*) See 7 & 8 Vict. c. 110, § 29.

The following decisions upon that section may be usefully referred to. *Ernest v. Nicholls*, 6 H. L. C. 401; *Curtis v. Anchor Insur. Co.*, 2 H. & N. 537; *Poole v. National, &c., Assur. Society*, *ib.* 687; *Ex parte Stears*, Johns. 480; *Stears v. South Essex Gas Co.*, 9 C. B. N. S. 180. See as to the purchase of shares by directors, *Hodgkinson v. Not. Live Stock Insur. Co.*, 26 Beav. 473, and 4 De G. & J. 422; *Lane's case*, 1 De G. J. & S. 504; and as to loans,

Tewerham v. Cameron's, &c., Rail. Co., 3 De G. & S. 296; *Murray's Executors' case*, 5 De G. M. & G. 746; *Baker's case*, 1 Dr. & Sm. 55; *Bluck v. Mollathue*, 27 Beav. 398; *British Prov. Ass. Society v. Norton*, 3 N. R. 147; *Paul and Beresford's case*, 33 Beav. 204.

(*v*) 13 C. B. 200. But query this case, see *Aberdeen Rail. Co. v. Blaikie*, 1 McQu. 461; *Flanagan v. G. W. Rail. Co.*, 7 Eq. 116, in which such contracts were held invalid.

(*y*) See *infra*, Ch. 2, § 2, duties of directors.

(*z*) *Sheffield and Manchester Rail.*

To return to the act. The directors have the management of the affairs of the company, with the exception of such as are required to be transacted by a general meeting (*a*). They are subject to the control of a general meeting specially convened for the purpose, but no resolution of any such meeting renders invalid what may have been done before the resolution passed (*b*). The directors are required to hold meetings at such times as they shall appoint, and they are empowered to adjourn such meetings as they may think proper (*c*). Any two directors may require a meeting of directors to be called (*c*). One-third of the whole number of directors constitutes a quorum, unless some other quorum is prescribed by the company's special act (*c*). All questions at any meeting are determined by a majority of votes of the directors present, and, in case of an equality of votes, the chairman has a casting vote (*c*). A chairman is required to be elected, and the elected chairman continues in office for a year (*d*). A deputy-chairman may be elected, if the directors think fit, and vacancies in the office of chairman and deputy-chairman are to be filled up (*e*). In case of the absence at any meeting of the chairman and deputy-chairman, the directors present are to choose one of their number to be a chairman for that meeting (*f*).

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Power of
directors.

The directors are authorised to delegate their powers to one or more committees (*g*). Members of committees must act in concert and not delegate their powers to one of their number (*h*).

Delegation of
powers.

The mode in which contracts are to be made on behalf of the company has been already explained (*i*).

Contracts by
directors.

The directors are required to cause to be entered in proper books, notes or minutes of all appointments and contracts made by them, and of the orders and proceedings of all meetings of

Duty to keep
books, &c.

Co. v. Woodcock, 7 M. & W. 574.
The cases referred to above, in note (*a*), may be usefully consulted on this head. See also *Lewis v. Carr*, 1 Ex. D. 484.

(*a*) 8 & 9 Vict. c. 16, § 90. See, as to this, § 91, and *infra*, p. 322.

(*b*) *Ib.* § 90.

(*c*) *Ib.* § 92. See *infra*, note (*g*).

(*d*) *Ib.* § 93.

(*e*) *Ibid.*

(*f*) *Ib.* § 94.

(*g*) *Ib.* §§ 95 & 96. See *D'Arcy v. Tamar Rail. Co.*, L. R. 2 Ex. 158, where a bond was sealed without authority.

(*h*) *Cook v. Ward*, 2 C. P. D. 255.

(*i*) *Ib.* § 97; see *ante*, p. 226.

- Bk. III. Chap. 1. the company, and of the directors and their committees (*j*).
 Sect. 4. All entries are to be signed by the chairman of the meeting at which they are made, and entries so signed are receivable in evidence without any preliminary proof (*k*).
- Acts of *de facto* directors valid. The proceedings of *de facto* directors are not invalid, although it may afterwards be discovered that there was some defect in their appointment, or that they were disqualified (*l*).
- Indemnity of directors. The directors are not personally liable for what they may lawfully do on behalf of the company, and they are entitled to be indemnified by the company against all costs, charges, and expenses properly incurred by them in the exercise of the powers entrusted to them (*m*).
- Duty to take security from subordinate officers. The directors are required to take security from every person entrusted with the custody or control of the monies of the company (*n*); and they are empowered to demand from every officer employed by the company an account of all monies received by him on behalf of the company and the delivery up of all receipts and vouchers, and payment of the balance which may appear to be owing from him on such account (*o*). A summary remedy is provided in case such a demand is not complied with (*p*), and also against any officer believed to be about to abscond without accounting (*q*).

Secondly, as to the shareholders.

2. Shareholders in companies governed by 8 & 9 Vict. c. 16. Ordinary general meetings of the shareholders are to be held twice a year, viz., in February and August, unless the company's act otherwise directs (*r*). Extraordinary general meetings may at any time be convened by the directors (*s*); but provision is also made for convening such meetings at the instance of the

(*j*) 8 & 9 Vict. c. 16, § 98.

(*k*) *Ib.* See as to this, *Miles v. Bough*, 3 Q. B. 845, and other cases noticed *ante*, p. 312.

(*l*) *Ib.* § 99. For a discussion as to the effect of such a clause, see *Newhaven Local Board v. Newhaven School Board*, 30 Ch. D. 350.

(*m*) *Ib.* § 100.

(*n*) *Ib.* § 109. See *Evans v.*

Coventry, 8 De G. M. & G. 835. Decree on appeal, clause 6, as to the effect of not observing such clauses.

(*o*) *Ib.* § 110.

(*p*) *Ib.* §§ 111 & 112.

(*q*) *Ib.* § 113.

(*r*) *Ib.* § 66.

(*s*) *Ib.* § 68.

shareholders (*t*). In order to constitute a meeting, there must be present, either personally or by proxy, the quorum prescribed by the special act; and where no quorum is prescribed, then shareholders, holding in the aggregate not less than one-twentieth of the capital of the company, and being in number not less than one for every 500*l.* of such required proportion of capital, unless such number would be more than twenty, in which case twenty shareholders, holding not less than one-twentieth of the capital of the company, shall be the quorum (*u*). Every meeting is to be presided over by a chairman, viz., by the chairman of directors, or in his absence, by the deputy-chairman, or in the absence of both, by a director chosen by the meeting, or in the absence of all the directors, by a shareholder similarly chosen (*v*).

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Fourteen days' public notice, at least, of all meetings are to be given by advertisement (*y*); and every notice of an extraordinary meeting is to specify the purpose for which the meeting is called (*z*); and if any matters, except such as are authorised by the legislature to be done at an ordinary meeting, are to be transacted at such a meeting, the notice convening that meeting must state what those matters are (*a*). The shareholders present at any meeting are to proceed with the business to transact which the meeting shall have been convened, and with no other business; and no business is to be transacted at an adjourned meeting except that left unfinished at the first meeting (*b*).

Notices of meetings.

No shareholder is entitled to vote, unless all the calls upon his shares have been paid (*c*); but with this qualification, and except where the company's special act otherwise provides, every shareholder is entitled to one vote for every share he holds up to ten, and to one additional vote for every additional five shares up to one hundred, and to an additional vote for every ten shares beyond the first hundred (*d*). Voting by

Votes of shareholders.

(*t*) 8 & 9 Vict. c. 16, § 70.

(*z*) Ibid.

(*u*) Ib. § 72. For some purposes a less quorum is sufficient, see the § 72.

(*a*) Ib. §§ 67, 71, 138.

(*b*) Ib. § 74, and see §§ 67 & 69.

(*c*) Ib. § 75.

(*d*) Ibid.

(*x*) Ib. § 73.

(*y*) Ib. § 71, and see § 138.

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Sect. 4. proxy is allowed, subject to certain regulations, easily complied with (*e*); and every proposition is determined by a majority of votes, the chairman having the casting vote in case of an equality (*f*). Where a share is registered in the names of more persons than one, he whose name stands first on the register is to be treated as the shareholder for all purposes of voting (*g*). Lunatic shareholders are entitled to vote by their committees, and infant shareholders by their guardians (*h*). In case of a dispute as to whether any resolution has been passed by the required majority, a poll may be demanded; but if no poll is demanded the decision of the chairman is final (*i*).

Election of officers.

The shareholders elect the directors (*k*); but occasional vacancies occurring among them may be filled up by the continuing directors (*l*). The shareholders also appoint the auditors, and determine the remuneration of the directors, auditors, treasurer, and secretary, the amount of money to be borrowed on mortgage, and the extent to which the company's capital may be augmented (*m*). Dividends, moreover, can only be declared at a general meeting of the shareholders (*n*). The shareholders can also, at a meeting specially convened for the purpose, make regulations for the conduct of the directors (*o*); or remove them (*p*). The power of making bye-laws may be exercised by the directors, subject to the control of the shareholders (*q*).

Other powers of shareholders.

Sealing register. The company's register of shareholders is to be authenticated

(*e*) 8 & 9 Vict. c. 16, §§ 76 & 77, and 51 & 52 Vict. c. 48. See *ante*, p. 309.

(*f*) 8 & 9 Vict. c. 16, § 76.

(*g*) *Ib.* § 78.

(*h*) *Ib.* § 79.

(*i*) *Ib.* § 80.

(*k*) *Ib.* §§ 83 & 91. As to removal, see *ante*, p. 327.

(*l*) *Ib.* § 89.

(*m*) *Ib.* § 91. See, too, as to auditors, §§ 101 & 104, and as to borrowing money, § 38, *et seq.* A company must pay its secretary for

his services, although his remuneration may not have been fixed at a general meeting, *Bill v. Darent*, *dc.*, *Rail. Co.*, 1 H. & N. 305.

(*n*) 8 & 9 Vict. c. 16, § 91.

(*o*) *Ib.* § 90.

(*p*) § 91. *Isle of Wight Rail. Co. v. Tinkourdin*, 25 Ch. D. 320.

(*q*) *Ib.* §§ 90 & 124. The bye-laws must be under seal. A justice of the peace who is a shareholder cannot convict for a breach of a bye-law, *R. v. Hammond*, 3 N. R. 140.

by the seal of the company at the ordinary general meetings of shareholders (*r*). Bk. III. Chap. 1.
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Shares cannot be forfeited for non-payment of calls without the sanction of a general meeting of shareholders (*s*). Forfeiture of
shares.

The shareholders have a right to inspect and take copies of (*t*)— Right to inspect
books, &c.

1. The shareholders' address-book (*u*).
2. The register of mortgages and bonds (*r*).
3. The register of consolidated stock (*y*).
4. The register of debenture stock (*z*).
5. The company's books of account (*a*).
6. The company's special act (*b*).

They have also a right to have copies of, or of any part of the shareholders' address-book, and the company's books of account, and special act (*c*).

Copies of the company's special act may always be seen by any person interested (*d*).

3. *Companies governed by the Companies act, 1862.*

The constitution of a company formed under the act of 1862 is determined by its memorandum of association and its articles, to copies of which the members are entitled (*e*). Both the memorandum and the articles bind the members as if they had signed and sealed them, and had covenanted to observe their conditions, subject to the provisions of the act (*f*). The memorandum of association defines the nature and objects of the company, and cannot be altered in these respects, although

Constitution of
company formed
under act.

(*r*) 8 & 9 Vict. c. 16, § 9.

(*s*) *Ib.* §§ 31 & 32. See *infra*, book iii. c. 6, as to forfeiture of shares.

(*t*) See as to this, *Mutter v. Eastern Midlands Rail. Co.*, 38 Ch. D. 92, noticed *ante*, p. 314.

(*u*) *Ib.* § 10.

(*x*) *Ib.* § 45.

(*y*) *Ib.* § 63. *Holland v. Dickson*, 37 Ch. D. 669.

(*z*) 26 & 27 Vict. c. 118, § 28.

Mutter v. Eastern Midlands Rail. Co., 38 Ch. D. 92.

(*a*) 8 & 9 Vict. c. 16, §§ 117 & 119.

(*b*) *Ib.* § 161.

(*c*) *Ib.* §§ 10, 119, 161.

(*d*) *Ib.* § 161. Printed copies can be bought of the Queen's printers.

(*e*) 25 & 26 Vict. c. 89, § 19.

(*f*) *Ib.* §§ 11 & 16.

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it may in some others (*g*). The articles contain regulations for the management of the company's affairs, and may be altered from time to time by a special resolution of the members (*h*), notwithstanding any article to the contrary (*i*). But neither the articles themselves nor the power of altering them authorises any alteration of the constitution of the company, as defined by the memorandum of association (*k*); *e.g.*, the issue of preference shares (*l*), the payment of dividends out of capital (*m*); the purchase of its own shares (*n*); the issue of shares at a discount (*o*); or the reduction of capital otherwise than as allowed by the Companies acts, 1867, 1877, and 1880, which will be referred to hereafter (*p*).

Constitution of
existing com-
panies registered
under the act.

The constitution of an existing company, registered but not formed under the act of 1862, is determined by the act of Parliament, letters patent, deed of settlement, or other instrument creating or regulating the company. This constitution, so far as it is fixed by act of Parliament or letters patent, is only alterable by the legislature or the Crown, as the case may be (*q*);

(*g*) *Ib.* § 12. See, also, as to the liability of the directors, 30 & 31 Vict. c. 131, § 8; as to reducing capital, *ib.* § 9, *et seq.*, amended by 40 & 41 Vict. c. 26; as to subdividing shares, *ib.* § 21; as to declaring that a portion of the capital shall not be called up except in the event of a winding-up, 42 & 43 Vict. c. 76, § 5; as to returning profits in reduction of paid-up capital, 43 Vict. c. 19, §§ 3-6. See, also, 28 & 29 Vict. c. 78, § 3, amended by 33 & 34 Vict. c. 20, which enables certain companies to restrict their objects in order to avail themselves of the privileges of issuing transferable mortgage debentures under that act.

(*h*) § 50. *Sheffield Nickel Co. v. Unwin*, 2 Q. B. D. 214.

(*i*) *Walker v. London Tramways Co.*, 12 Ch. D. 705.

(*k*) *Ashbury Rail. Carriage Co. v. Riche*, L. R. 7 H. L. 653; *Ashbury v. Watson*, 30 Ch. D. 376, 28 Ch. D.

56, and *ante*, p. 164.

(*l*) *Hutton v. Scarborough Hotel Co.*, 2 Dr. & Sm. 521; *Ashbury v. Watson*, 30 Ch. D. 376; and distinguish *Harrison v. Mexican Rail. Co.*, 19 Eq. 358; *South Durham Brewery Co.*, 31 Ch. D. 261, *ante*, p. 322, note (*b*). See *infra*, c. 3, § 1.

(*m*) *Guinness v. Land Corporation of Ireland*, 23 Ch. D. 349.

(*n*) *Trevor v. Whitworth*, 12 App. Ca. 409, disapproving of the reasoning of the Court of Appeal in *Dronfield Silkstone Coal Co.*, 17 Ch. D. 76; *Taylor v. Pilsen, &c., Light Co.*, 27 Ch. D. 270, must be considered as overruled on this point.

(*o*) *Almada v. Tirito Co.*, 38 Ch. D. 415; *New Chile Gold Mining Co.*, *ib.* 475; *Addlestone Linoleum Co.*, 37 Ch. D. 191. *Plaskynaston Tube Co.*, 23 Ch. D. 543, and *Ince Hall Rolling Mills Co.*, *ib.* 545 note, are overruled.

(*p*) *Hope v. International Financial Soc.*, 4 Ch. D. 327.

(*q*) 25 & 26 Vict. c. 89, § 196, cl.

nor can the members change the constitution of the company in any of those matters which, had it been formed under the act of 1862, would have been unalterable by its members (*r*). But those regulations which are not contained in any act of Parliament or letters patent, and which, if the company had been formed under the act of 1862, might have been altered by its members, may be altered by a special resolution of the members of an existing company, after its registration under the act (*s*).

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A company registered under the act as an unlimited company can now be converted into a limited company under the provisions of the Companies act, 1879 (*t*).

Power to change from unlimited to limited.

Very little is to be found in the act relating to the powers of directors, or to the internal management of a company's affairs. These matters are for the most part left to be provided for by each company as it may deem proper, and are accordingly dealt with in Table A.

Management of company's affairs.

The act of 1862, however, requires that a general meeting of members shall be held once a year at least (*u*), and the amendment act requires that every company formed under the act of 1862, after the 1st of September, 1867, shall hold a general meeting within four months after its memorandum of association is registered (*r*). Moreover, the act of 1862 enables the members, by a special resolution, the meaning of which is defined (*x*), 1. to alter the constitution and regulations of the company to the extent already pointed out; 2. to appoint inspectors to examine into the affairs of the company (*y*); and 3. to have the company wound up (*z*). The act, further, renders the keeping of proper minutes compulsory, and enacts that, until the contrary is proved, meetings and proceedings, of which minutes shall be properly made, shall be considered

Provisions of act.

3 & 4. See, also, 30 & 31 Vict. c. 131, § 47. *Gibson v. Barton*, L. R. 10 Q. B. 329.

(*r*) § 196, cl. 6.

(*v*) 30 & 31 Vict. c. 131, § 39.

(*s*) § 196, and see § 176, as to companies governed by Table B. of the act of 1856.

(*x*) 25 & 26 Vict. c. 89, § 51.

(*y*) § 60.

(*t*) 42 & 43 Vict. c. 76, §§ 4 & 5.

(*z*) §§ 79 & 129. The members of unregistered companies have not this power, see § 199.

(*u*) 25 & 26 Vict. c. 89, § 49.

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as duly convened and transacted, and that all appointments of directors, managers or liquidators, shall be deemed valid, and that all their acts shall be valid, notwithstanding any defect that may afterwards be discovered in their appointments or qualifications (*a*).

Examination of
company's affairs
by inspectors.

For the greater protection of the members of companies the act contains some very important provisions, enabling not only the members (*b*), but also, on their application, the Board of Trade to appoint inspectors to examine into and report upon the affairs of all companies registered under the act (*c*). A copy of the report of the inspectors, sealed with the seal of the company, is also made admissible in any legal proceeding as evidence of their opinion on any matter contained in their report (*d*).

Provisions of
Table A.

Passing now to the regulations in Table A., the following rules will be found respecting the managing bodies and the members of companies to which that Table applies.

First, as regards the managing body.

Directors.
Table A.

The business of the company is to be managed by the directors, and, in case of any vacancy in their body, by those who continue in office (Table A., Nos. 55 and 56). The powers of the directors are, however, subject not only to the provisions of the act, but also to the company's regulations (*ib.*), which, as before observed, may be altered by special resolution. What is done by *de facto* directors is valid, notwithstanding the subsequent discovery of a defect in their appointment or of their disqualification (No. 71, and § 67 of the act) (*e*).

The directors are the proper persons to make calls (No. 4), forfeit shares (Nos. 17 and 22), and appoint the first auditors

(*a*) 25 & 26 Vict. c. 89, § 67. See *ante*, p. 312.

(*b*) § 60.

(*c*) §§ 56–59.

(*d*) § 61.

(*e*) See *ante*, p. 300. *Newhaven Local Board v. Newhaven School Board*, 30 Ch. D. 350; and *Howbeach*

Coal Co. v. Teague, 5 H. & N. 151, where the defect in the appointment of directors was held not to be cured by a clause of this nature. Compare *Murray v. Bush*, L. R. 6 H. L. 37, which turned on a similar clause in 7 & 8 Vict. c. 110, § 30.

(No. 84). But the directors cannot, without the sanction of the members, convert shares into stock (No. 23), increase the capital by issuing new shares (No. 26), or declare dividends (No. 72).

Until directors are appointed the subscribers of the memorandum of association are the directors (Table A., No. 53), and are the persons to determine the number and names of the first directors (No. 52). This number may afterwards be varied by the members (No. 63). At the first ordinary meeting of the members, after the registration of the company, the whole, and in every subsequent year one-third, of the directors, must retire (No. 58). In case of any dispute as to who shall retire in the first two years after the first, the persons to retire must be determined by ballot (No. 59); but afterwards those who have been longest in office must retire (No. 59). A retiring director may be re-elected (No. 60). Vacancies occurring by retirement under these provisions must be filled up by the members at the meeting at which the directors retire (No. 61); otherwise the meeting stands adjourned for a week (No. 62); and if the vacancies are not filled up at such adjourned meeting, those directors whose places are not filled up continue in office for another year (No. 62). Casual vacancies may be filled up by the other directors (No. 64) (*f*).

A director vacates his office—1. if he holds any other office or place of profit under the company (*g*); 2. if he becomes bankrupt or insolvent; 3. if he (otherwise than as a member of some other company) is concerned in or participates in the profits of any contract with the company (No. 57) (*h*).

Irrespective of these provisions, any director may be removed by a special resolution of the members (No. 65).

The members fix the remuneration of the directors (No. 54).

The directors may regulate their own meetings as they see fit.

(*f*) *York Tramways Co. v. Willows*, 8 Q. B. D. 685; *Munster v. Cammell*, 21 Ch. D. 183.

(*g*) The directors may appoint one of themselves to be a manager at a salary, but the person so appointed ceases by the appointment to be a

director, *Eales v. Cumberland Black Lead Co.*, 6 H. & N. 481. Compare *Iron Ship Coating Co. v. Blunt*, L. R. 3 C. P. 484.

(*h*) See as to this, *ante*, pp. 327 and 328.

Bk. III. Chap. 1. think fit (No. 66), but they are bound to keep minutes of their
 Sect. 4. proceedings (see § 67 of the act). The directors may determine what number is to be a quorum (Table A., No. 66), and may elect a chairman and determine the period for which he shall hold office (No. 67). If no chairman is present when a meeting assembles, the directors present must choose one of themselves to be chairman *pro tem.* (No. 67).

Questions arising at any meeting of directors are to be determined by a majority of votes, the chairman having a second or casting vote in case of equality (No. 66).

Any director may at any time summon a meeting of directors (No. 66).

Delegation of
powers.

The directors may delegate any of their powers to committees of themselves (Nos. 68—70) (i).

The directors may at any time convene an extraordinary general meeting of the members (No. 32).

Duties of
directors.

The directors are bound to keep accounts of the company's stock in trade, receipts and expenditure, assets and liabilities; and the members are entitled to inspect these accounts, subject to such restrictions as the members may themselves impose (No. 78). The directors are further bound, once a year at least, to lay before the members a statement of the company's income and expenditure for the past year (Nos. 79 and 80), and also a balance sheet containing a summary of the assets and liabilities of the company in the form given at the end of Table A. (No. 81). A printed copy of this balance sheet is moreover to be sent to each member seven days before the meeting (No. 82).

In addition to these provisions the directors are bound by the act itself, and mostly under penalties, to do various things which it may be useful here to recapitulate, viz. :—

1. To keep a proper register of members (*k*), and to allow it to be inspected (*l*).

2. To make out and send to the registrar of joint-stock companies the annual lists required to be sent to him (*m*).

(i) See *Totterdell v. Fareham Brick Co.*, L. R. 1 C. P. 674, and *ante.* p. 156.

(*k*) 25 & 26 Vict. c. 89, § 25.

(*l*) § 32.

(*m*) §§ 26, 27, 45, 46.

3. To notify to the registrar all increases or re-distributions of capital and conversions of capital into stock (*n*), and all increases of members where there is no share capital (*o*). Bk. III. Chap. 1.
Sect. 4.

4. To keep, if there be no share capital, a register of directors, and send a copy of it to the registrar, and notify to him all changes amongst the directors (*p*).

5. To take care, in the case of limited companies, that the word "limited" appears, and is used as prescribed by the statute (*q*).

6. To keep, in the case of a limited company, a register of all mortgages or charges affecting its property, and allow such register to be inspected (*r*).

7. To keep, in the office of a limited banking company, an insurance company and deposit provident or benefit society, the statement required by the act, and to permit such statement to be inspected (*s*).

8. To take care that the company does not carry on business with less than seven members (*t*).

9. To send copies of all special resolutions to the registrar, and to the members if required (*u*).

10. To submit to examination by the inspectors appointed by the Board of Trade (*x*), or by a special resolution of the members (*y*).

The powers of directors, as regards calls, dividends, and the forfeiture of shares, and their duties and liabilities on the winding up of a company, will be pointed out hereafter.

Secondly, as regards the members.

The question who are members has been already examined (*z*). The original number of members may be increased (*a*). Members.

- | | |
|--|---|
| (<i>n</i>) §§ 28-34. | 21, 23, 27, 31-33, and 33 & 34 Vict. |
| (<i>o</i>) § 34. | c. 20, §§ 3, <i>et seq.</i> |
| (<i>p</i>) §§ 45 & 46. | (<i>s</i>) § 44. |
| (<i>q</i>) §§ 41 & 42. See <i>ante</i> , p. 240, | (<i>t</i>) § 48. |
| note (<i>k</i>). | (<i>u</i>) §§ 53 & 54. |
| (<i>r</i>) § 43. See, also, as to the re- | (<i>x</i>) § 58. |
| gistration, &c., of debentures issued | (<i>y</i>) § 60. |
| under the Mortgage debenture act, | (<i>z</i>) <i>Ante</i> , p. 119, <i>et seq.</i> |
| 1865, 28 & 29 Vict. c. 78, §§ 6-11. | (<i>a</i>) §§ 12 & 34. |

Bk. III. Chap. 1. The act requires a general meeting of the members to be
 Sect. 4. held once a year at least (*b*); and all companies formed after
 Meetings of members. 1st September, 1867, must hold a meeting within four months
 after its memorandum of association is registered (*c*).

Table A. By the regulations contained in Table A., the first ordinary
 general meeting is to be held at such time within six months
 after registration of the company, and at such place as the
 directors may determine (Nos. 29 and 31). Subsequent ordi-
 nary general meetings are to be held, at such time and place
 as the members may determine; and if they do not fix a time
 and place, a general meeting shall be held on the first Monday
 in February in every year, at such place as the directors may
 determine (Nos. 30 and 31).

Extraordinary meetings. An extraordinary general meeting may be convened by the
 directors whenever they think proper (Nos. 31 and 32); and
 the directors are bound to call such a meeting whenever re-
 quired so to do in writing by one-fifth of the members (Nos.
 32—34). If the directors fail to comply with such requisition,
 the requisitioners, or any other members, being one-fifth of
 the whole, may themselves convene an extraordinary general
 meeting (No. 34) (*d*).

Notice convening meetings. Seven days' notice at least, specifying the day, place, and
 hour of meeting is to be given to the members, by post or
 personal service (Nos. 95—97, and § 52 of the act), or in such
 other way as the members in general meeting may direct
 (No. 35), but the non-receipt of such notice by any member
 does not invalidate the proceedings of the meeting (No. 35).
 Whenever an extraordinary meeting is called, or whenever it is
 intended at an ordinary meeting to do more than sanction a
 dividend, or consider the accounts, balance-sheets, and ordinary
 reports of the directors, the notice convening the meeting must
 state the general nature of the business to be transacted
 (Nos. 35 and 36) (*e*).

Resolutions. No business, except the declaration of a dividend, can be

(*b*) § 49. *Gibson v. Barton*, L. R. 10 Q. B. 329. members may summon meetings,
 see § 52 of the act.

(*c*) 30 & 31 Vict. c. 131, § 39. (*e*) See *ante*, p. 307, and the cases

(*d*) Where there are no regula- there cited in note (*d*).
 tions upon this subject, any five

transacted at any general meeting, unless a quorum of members is present when the meeting proceeds to business (No. 37). The quorum is ascertained as follows:—If the members of the company do not exceed 10, the quorum is 5; if they exceed 10, one must be added for every 5 additional members up to 50; and one for every 10 additional members after 50, until the quorum amounts to 20, which is in all cases a sufficient number (Table A., No. 37) (*f*).

If within an hour from the time appointed for the meeting, a quorum is not present, the meeting, if convened upon the requisition of the members, shall be dissolved; in any other case it shall stand adjourned to the same day in the next week, at the same time and place; and if at such adjourned meeting a quorum is not present, it shall be adjourned *siue die* (Table A., No. 38).

The chairman (if any) of the board of directors, shall preside as chairman at every general meeting of the members (No. 39) (*g*). If there be no such chairman, or if at any meeting he is not present within a quarter of an hour after the time appointed for holding the meeting, the members present shall choose one of their number to be chairman (No. 40) (*h*).

The chairman may, with the consent of the meeting, adjourn it from time to time, and from place to place, but no business can be transacted at any adjourned meeting, except the business left unfinished at the meeting from which the adjournment took place (No. 41) (*i*).

At any general meeting a poll may be demanded by five or more members; but if no poll is so demanded, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of the proceedings of the company is sufficient evidence of the fact, without proof of the number or proportion of votes recorded for or against the resolution (Nos. 42 and 43).

(*f*) See, as to the quorums, *ante*, p. 155.

(*g*) For the power and duties of a chairman, see *Indian Zoedone Co.*, 26 Ch. D. 70.

(*h*) Where there are no regula-

tions to the contrary, the members may always elect their own chairman, see § 52 of the act.

(*i*) As to adjourned meetings, see *ante*, p. 307.

Bk. III. Chap. 1.
Sect. 4. — Where the regulations do not otherwise prescribe, each member is entitled to one vote (*k*), but by the regulations in Table A., every member is entitled to one vote for every share up to ten, and to one additional vote for every 5 additional shares up to 100, and to an additional vote for every 10 shares beyond the first 100 (No. 44). A lunatic may vote by his committee (No. 45). If several persons are jointly entitled to a share or shares, the person whose name stands first on the register in respect of those shares, and no other person, is entitled to vote in respect of them (Table A., No. 46).

Table A. — No member can vote unless he has paid all his calls (No. 47); and except for the first three months after the registration of the company, no member can vote in respect of any share acquired by transfer, unless he has held it for three months (No. 47).

Proxies. — Votes may be given personally or by proxy (No. 48) (*l*). The proxy must be a member of the company, appointed in writing, signed, and attested by one witness at least (No. 49). An instrument appointing a proxy is only good for a year (No. 50), and it must be left at the company's office not less than 72 hours before it can be acted upon (No. 50). A form of proxy is given in Table A. (No. 51); it must be duly stamped (*m*).

Minutes. — Minutes of all resolutions and proceedings of general meetings are required to be kept by the act, which moreover makes the minutes of any meeting admissible in evidence, if purporting to be signed by the chairman of that or of the next succeeding meeting (*n*).

Powers of members. — The members have, as has been already mentioned, power to elect (No. 52) and to increase or reduce the number of the directors (No. 63), and to fix their remuneration (No. 54), and by special resolution to remove them (No. 65).

The members are also entitled to see the accounts of the company (No. 78), and to appoint all auditors, except the first (No. 84).

(*k*) 25 & 26 Vict. c. 89, § 52. See (*m*) *Ante*, p. 310.
as to voting, *ante*, p. 309. (*n*) 25 & 26 Vict. c. 89, § 67.
(*l*) See *ante*, p. 309.

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Sect. 4.

The members, moreover, are entitled by the act,

1. To have copies of the company's memorandum of association and articles (*o*).

2. To inspect and have copies of the register of members (*p*).

3. To inspect the register of mortgages required to be kept by limited companies (*q*).

4. To have copies of all special resolutions (*r*).

5. To apply to the Board of Trade to appoint inspectors to examine the affairs of the company (*s*), and by special resolution to appoint such inspectors themselves (*t*).

6. To insist on the company being wound up (*u*).

7. In addition to these powers, the members are empowered by a special resolution, *i.e.*, a resolution passed by three-fourths, and afterwards confirmed by a majority of members, present in person or by proxy, and entitled to vote (*x*),—to alter the regulations of the company (*y*). But, except by increasing (*z*) or reducing (*a*) the original capital, or by subdividing the shares (*b*), or in certain cases by limiting the objects of the company so as to avail itself of the Mortgage debenture act, 1865 (*c*), or by changing the name of the company (*d*), no departure can be made from the memorandum of association (*e*), nor can the regulations of the company be so altered as to change the respective *status* of the members, and to give one class a preference over others (*f*), except as authorised by § 24 of the Companies act, 1867.

(*o*) § 19.

(*p*) § 32.

(*q*) § 43; *Credit Co.*, 11 Ch. D. 256.

(*r*) §§ 54 & 19.

(*s*) § 56.

(*t*) § 60.

(*u*) §§ 79 & 129. See, also, 30 & 31 Vict. c. 131, § 40.

(*c*) 25 & 26 Vict. c. 89, § 51. The resolution must be registered, § 53.

(*y*) § 50.

(*z*) § 12. As to an unlimited company increasing the nominal amount of its capital when registering itself as limited under the Companies act, 1879, see 42 & 43

Vict. c. 76, § 5. The same section gives a company the power of declaring that a portion of its capital shall not be called up except in the event of a winding up.

(*a*) 30 & 31 Vict. c. 131, § 9, *et seq.*, and 40 & 41 Vict. c. 26, § 3, *et seq.*

(*b*) 30 & 31 Vict. c. 131, § 21, which only applies to limited companies.

(*c*) 28 & 29 Vict. c. 78, § 3, amended by 33 & 34 Vict. c. 20.

(*d*) 25 & 26 Vict. c. 89, § 13.

(*e*) § 12, *ante*, p. 334.

(*f*) See *Hutton v. Scarbro' Hotel Co.*, 2 Dr. & Sm. 521. See *ib.* 514,

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Sect. 4.

Alteration of
articles and
acting on them
as altered.

Questions sometimes arise respecting the power at one and the same meeting both to alter the articles and to pass resolutions which are only valid after the articles have been altered. Unless care be taken this cannot be done. The articles must be altered first, and then a resolution must be passed to do that which they authorise as altered (*g*). But if proper notices are given, there is no reason why a special resolution should not be passed altering the articles, and another resolution (not special) be passed immediately afterwards at the same meeting (*h*). But two special resolutions cannot be passed in this way, if the second depends for its validity on the passing of the first (*i*).

and the judgment of Lord Westbury in 11 Jur. N. S. 551. *Ashbury v. Watson*, 30 Ch. D. 376, and distinguish *Harrison v. Mexican Rail. Co.*, 19 Eq. 358; *South Durham Brewery Co.*, 31 Ch. D. 261, where an increase of capital by the issue of preference shares was authorised by contemporaneous articles.

(*g*) *Patent Invert Sugar Co.*, 31

Ch. D. 166; *Imperial Hydropathic Hotel Co. v. Hampson*, 23 Ch. D. 1; *West India Steam Ship Co.*, 9 Ch. 11 note.

(*h*) *Campbell's case*, 9 Ch. 1; *Taylor v. Pilsen Light Co.*, 27 Ch. D. 268.

(*i*) Compare the cases in the two last notes.

CHAPTER II.

OF THE FIDUCIARY RELATION OF PROMOTERS AND DIRECTORS TO
THEIR RESPECTIVE COMPANIES.

SOME of the rights and duties of promoters and directors have been already examined, viz., their duties and liabilities with respect to contracts to take shares (*a*), with respect to prospectuses (*b*), and their rights and powers to bind their respective companies by contracts and other acts (*c*). The powers of directors as regards general management have also been alluded to (*d*); and their powers with reference to raising capital (*e*), making calls (*f*), transfers of shares (*g*), and the forfeiture of shares (*h*) will be noticed in succeeding chapters. But in addition to these matters it is necessary to investigate the extent to which promoters and directors are regarded as trustees for their respective companies and the consequences of being so regarded. The present chapter is devoted to this difficult subject.

Bk. III. Chap. 2.
Sect. 1.

SECTION I.—OF PROMOTERS.

The duties of partners to observe good faith to each other, not to overreach each other, and not to make separate profits or obtain secret advantages at the expense of their firm has been long recognised and enforced by the Courts of this country (*i*); and this duty commences as soon as the nego-

Duty to observe
good faith.

- (*a*) Book i. c. 1.
- (*b*) Ib. cc. 1 & 3.
- (*c*) Book ii. c. 1.
- (*d*) Book iii. c. 1.
- (*e*) Book iii. c. 3.

- (*f*) Ib.
- (*g*) Book iii. c. 4, § 5.
- (*h*) Ib. c. 6.
- (*i*) Partn. book iii. c. 2.

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Sect. 1.

tations for a partnership commence (*k*). The general principles applicable to partners and to persons about to become partners are applicable to promoters of companies in their dealings with the companies which they practically create, and with the persons whom they induce to join such companies.

Projectors of
company making
a profit out of it.

Nothing is more common than for persons to acquire property in order to re-sell it, to form a company on purpose to buy it, to make arrangements by which the company do buy it, and to conceal their own true position from the company they so form, and induce to buy. Such a transaction can never stand. There is nothing to prevent a person from buying property for himself at one price, and afterwards selling the same property to a company or any one else at a higher price; nor in a case of this simple description is the vendor bound to disclose the fact that he is selling at a profit (*l*). Moreover, there may be a valid sale to a company by a person engaged in getting it up (*m*), and there often is great difficulty in determining the true nature of any given transaction (*n*); but once let it be shown that the alleged vendor was engaged in obtaining property for a company which he was engaged in forming, or that he formed a company to buy property of his own, and it immediately follows that he cannot, without full disclosure on his part, hold the company to its bargain, or in the first case at all events (*o*) charge the company more than he actually gave.

Meaning of the
term promoter.

There has been considerable discussion with reference to the meaning of the word promoter, and also with reference to his relation to the company he is endeavouring to form. The word itself has never been defined; but it is used in common parlance and also in § 38 of the Companies act, 1867, to denote those persons who bring the company into existence, by taking an active part in forming it and in procuring persons

(*k*) See *Hichens v. Congreve*, 4 Russ. 562, and 1 R. & M. 150; *Farectt v. Whitehouse*, 1 R. & M. 132.

(*l*) See *Gover's case*, 1 Ch. D. 182, and *per James, L. J.*, in 5 Ch. D. 118.

(*m*) As in *Paul and Beresford's case*, 33 Beav. 204. See, too, the

observations of V.-C. Wigram, in *Foss v. Harbottle*, 2 Ha. 489.

(*n*) As in *Beck v. Kantorowicz*, 3 K. & J. 323, noticed *infra*, p. 352.

(*o*) See, as to this, the *Cape Breton Mining Co.*, 29 Ch. D. 795, noticed *infra*.

to join it as soon as it is technically formed (*p*). This description is sufficiently accurate for practical purposes, although as a definition it is too wide, for it includes persons, *e.g.* mere printers and advertising agents, who are employed by the promoters, but who have nothing to do with the company or its formation in such a sense as to create any relation between it and them. Bk. III. Chap. 2.
Sect. 1.

The relation of a promoter to a company which he has taken part in forming, has been compared to that which subsists between an agent and his principal, and to that which subsists between a trustee and his *cestui que trust*. Of these analogies the last is the closest, although neither is perfect. The relation of principal and agent cannot exist between a company not yet created and those engaged in forming it (*q*); and what is done by them before the company is formed cannot be ratified by the company after its formation, unless the word ratified is used in a loose and inaccurate sense (*r*). On the other hand trusts for unborn persons are familiar in English law, and such trusts can be enforced by their objects when they come into existence. Relation to the
company.

The real relation of promoters to companies is difficult to define; the relation is in truth *sui generis*, and is the result of dealings and transactions of a kind not known until recent times. The term by which accurately to define such relation has not yet been discovered. Familiarity with trusts and the language employed in connection with them has led to the description of the relation as a fiduciary relation (*s*); and although this is not a very happy expression, it is not easy to suggest a better. What is meant is that although there is no actual relation of trustee and *cestui que trust* between a promoter and an unformed company, yet that when he has succeeded in forming it, he is liable to it in respect of frauds practised by A fiduciary
relation.

(*p*) *Ante*, book i. c. 3, § 2; *Emma Silver Mining Co. v. Lewis*, 4 C. P. D. 396; *Whaley Bridge Co. v. Green*, 5 Q. B. D. 109; *Gover's case*, 1 Ch. D. 182.

(*q*) *Ante*, book ii. c. 1, § 2.

(*r*) *Ante*, book ii. c. 2, § 3.

(*s*) *Erlanger v. New Sombrero*

Phosphate Co., 3 App. Ca. 1218; *Bagnall v. Carlton*, 6 Ch. D. 371; *Emma Silver Mining Co. v. Lewis*, 4 C. P. D. 396; *Lydney, &c., Co. v. Bird*, 33 Ch. D. 85; *Whaley Bridge Printing Co. v. Green*, 5 Q. B. D. 109.

Bk. III. Chap. 2. him upon it, planned by means of agreements entered into
 Sect. 1. — before its formation, and the real nature of which is carefully
 concealed from every one except those who profit by them.
 The frauds thus perpetrated are obvious when discovered ;
 and the doctrine of fiduciary relation has been invented or
 extended in order to defeat them.

The following extract from the judgment of Lord Cairns in
Erlanger v. New Sombrero Phosphate Co. (t) explains the posi-
 tion of a promoter very clearly :—

Lord Cairns in
Erlanger v.
New Sombrero
Company.

“It is now necessary that I should state to your Lordships in what position I understand the promoters to be placed with reference to the company which they proposed to form. They stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company ; they have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence, and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchaser of the property of themselves, the promoters, it is, in my opinion, incumbent upon the promoters to take care that in forming the company they provide it with an executive, that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint stock company, and then sell his property to it, but I do say that if he does he is bound to take care that he sells it to the company through the medium of a board of directors who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other person.”

Commencement
 of the fiduciary
 relation.

One of the greatest difficulties in connection with this subject is to determine when a promoter of a projected company begins to be in such a position as to be unable to make a secret profit by a sale to it, or to persons acting on its behalf. On the one hand, it is quite plain that the so called fiduciary relation between a promoter and a company may exist long before the actual formation of a company by registration or otherwise (u). On the other hand, it is obvious that something must be done beyond a purchase and resale to constitute such

(t) 3 App. Ca. 1236.

(u) See the cases in the last note

but one, and *Bank of London v. Tyrell*, 10 H. L. Ca. 26.

a relation : something must be done by the promoter to impose upon him the duty of protecting the interests of those who ultimately compose the company. He assumes this duty if he assumes to act for them, or if he induces them to trust him, or to trust persons who are under his control, and who are practically himself in disguise ; he also assumes such duty if he calls the company into existence in order that it may buy what he has to sell ; but he does not assume such duty by negotiating with persons who have themselves assumed that duty and who are in no way under his influence (*x*). A fraud by him on them will of course vitiate any agreement based on the fraud, whether there is any fiduciary relation between him and them or not ; but the principles now being investigated presuppose the existence of that relation, and a breach of the obligations incidental to it, and no fraud other than that involved in their breach.

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Sect. 1. — —

In dealing with any particular case care must be taken not to be misled by words. Owing to the ambiguity in the meaning of the word promoter, and the difficulty of defining his exact relation to the company he procures to be formed, it is unsafe to say that any particular person was a promoter of a particular company, and to infer from thence, that he is liable to account to it as if he had been its trustee. The question in each case must be, what has the so-called promoter done to make himself liable to the demand made against him ? What fraud or breach of trust has he committed or been party or privy to (*y*) ? If none, he is under no liability : if any, he is liable accordingly by whatever name he may be called or by whatever terms his relation to the company may be expressed. His liability, moreover, in such cases, is incurred by “ fraud or breach of trust ” within the meaning of the Bankruptcy act, and is not therefore terminated by his bankruptcy and subsequent discharge (*z*).

The position of a promoter to the company he promotes

(*x*) Compare *Albion Steel Wire Co. v. Martin*, 1 Ch. D. 580, with

the other cases noticed in the text.

(*y*) See *Lydney, &c., Co. v. Bird*, 33 Ch. D. p. 93 ; *Whaley Bridge Co. v.*

Green, 5 Q. B. D. 109.

(*z*) *Emma Silver Mining Co. v. Grant*, 17 Ch. D. 122 ; *Ramskill v. Edwards*, 31 ib. 100.

Bk. III. Chap. 2. will be best understood if the following propositions are borne
 Sect. 1. — in mind :—

1. A seller of property is under no obligation to inform the buyer how or when, or from whom, or at what price, or under what circumstances he, the seller himself, acquired it.

2. An agent to buy cannot charge his principal a greater price than the agent pays, and if he does so his principal can either repudiate the purchase and compel the agent to repay him the price he, the principal, has paid ; or the principal can keep the property and recover from the agent the profit he has made by the transaction.

3. An agent to buy cannot sell his own property to his principal without informing him of the fact, and if he does so, the principal can repudiate the transaction. Whether, in this case, the principal can keep the property and recover from the agent the profit he has made by the transaction cannot be regarded as settled (*a*).

4. An agent cannot in any other way obtain secret benefits for himself at the expense of his principal in any transaction within the scope of the agency.

5. A person engaged in forming a company is treated as under the same disabilities in these respects as if he were its agent.

The cases illustrating these propositions, and their application to promoters of companies, are numerous and important ; but their details are complicated and infinitely various. They group themselves into four classes, viz. :—

1. Cases in which promoters have been acquiring property and forming a company to take it at an enhanced price.

2. Cases in which persons have sold their own property to a company formed by them to buy it.

3. Cases in which the promoters of a company have in other ways obtained secret benefits at its expense.

4. Cases in which the position of promoter has not been proved to exist, and in which, therefore, the doctrines applicable to promoters have not come into operation.

(*a*) See *Cape Breton Co.*, 29 Ch. D. 795, noticed *infra*.

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1. *Cases in which promoters have been acquiring property and forming a company to take it at an enhanced price.*

In this class of cases a company is formed in order to buy property for a given price. The price really consists of two portions; one is what the property is fairly worth; the other is what is called promotion money, and is enough to cover the legitimate expenses of forming the company, and to put large sums of money into the pockets of the promoters. The owner of the property may or may not be himself a promoter; but he gets no money until the company is formed and money is raised by the issue of shares or debentures. The fact that the company is being made to pay far more than an equivalent for what it gets is of course concealed, and the first directors are promoters or persons procured by them, and the shares they take are in fact paid for out of the promotion money. The contrivances to which recourse is had in order to rob companies in this way without being found out, are innumerable. The following are the leading cases of this class, and they are important enough to be noticed separately.

In *Hichens v. Congreve* (b), a company was formed to work a mine, and was principally got up by three of the defendants; it was proposed that a lease of the mine should be purchased by the company, and a lease to the company was executed by the owner of the property for 25,000*l.* This sum was accordingly charged to the company, but it afterwards turned out that 10,000*l.* only had been in fact paid to the owner for the lease, and that the remaining 15,000*l.* had been distributed amongst the directors. The three principal promoters of the company alleged that the property had been sold to them, on their private account, before the company had come into existence, that 25,000*l.* was a fair price for the company to pay for the lease, and that the 15,000*l.* was only a fair profit on a re-sale, the original purchase being entirely at the personal risk of the three. They said that the lease was taken directly to the company, and that the amount of the considera-

Company entitled to sums reserved by directors.
Hichens v. Congreve.

(b) 4 Russ. 562, and 1 R. & M. 130. See, also, *Forrest v. Whitehouse*, 1 R. & M. 132, a somewhat similar case.

13k. III. Chap. 2. tion money was stated to be 25,000*l.*, with the knowledge of
 Sect. 1. the lessor, and merely for the purpose of simplifying the title.

But it was admitted that only 10,000*l.* reached the lessor's hands, and that the 15,000*l.* had been divided amongst the defendants. A motion was made that the three principal defendants might be ordered to pay into Court such sums, part of the 15,000*l.*, as appeared by their answers to be then in their hands, and an order to that effect was made.

Alleged open
 sale by pro-
 jectors to
 company.
Beck v. Kan-
torowicz.

Another and very instructive case is *Beck v. Kantorowicz* (*c*), in which one projector sought to obtain a benefit at the expense of the others, and they all sought to make a profit out of the company. In this case five persons proposed to purchase a mine, and to get up a company to work it. One of them, Kantorowicz, negotiated on behalf of himself and co-adventurers with the owners of the mine, and agreed with the owners for a purchase from them, at a sum of 85,000*l.*, and he represented to his co-adventurers that this sum was the least which the owners would take for the mine. In point of fact, however, there was an agreement between Kantorowicz and the owners, that if the mine was purchased at that price he was to have 20,000*l.* for his trouble; but this was unknown to the other adventurers and to the company which was afterwards formed. Upon the supposition that 85,000*l.* was the price of the mine, a contract for the sale of it at that price was entered into between the owners of the one part, and Kantorowicz and his four co-adventurers of the other. Part of the purchase money was to be paid in shares in the company proposed to be formed. Shortly afterwards a prospectus was issued, with a view to the formation of the company; and in the prospectus it was stated that a contract had been entered into for the purchase by the company of the entire property for 125,000*l.*, including all preliminary expenses, and a premium to the parties who had incurred the risk and the responsibility of the original purchase. The company was formed. The agreement between Kantorowicz and the owners was afterwards discovered, and a bill was filed by three of the committee of management of the company, on

behalf of themselves and other shareholders, for the purpose of compelling Kantorowicz to account to the company for the 20,000*l.* premium which he had received in shares from the vendors of the mine. On the part of Kantorowicz it was insisted, first, that he had an interest in the mine, and was a selling party, and that, therefore, he practised no fraud on the four original adventurers: and secondly, that even if the transaction could not be upheld as between him and them, the company could not complain, as he and the other promoters avowedly sold the property to the company for 125,000*l.*, and the company had got all they ever expected, or had contracted to have. But it was held upon the evidence, that Kantorowicz had no interest in the mine, and that, as between him and the other promoters, the transaction could not for one moment stand. With respect to the more difficult question which arose between Kantorowicz on the one side, and the company on the other, it appeared in the first place, that two of the original promoters were members of the committee of management. In this latter capacity they became, as it were, agents for the company, and were, as such, bound to buy for the company at as reasonable a price as possible, although in their character of grantees they were entitled to sell at any price they liked. It also appeared that the 125,000*l.* at which the company was to buy was fixed by the committee of management, upon the assumption that 85,000*l.* was, in fact, to be paid to the vendors of the mine, and that the difference between 85,000*l.* and 125,000*l.* would cover the preliminary expenses, and what was considered to be a fair premium for the promoters. This premium was alluded to in the prospectus, and was a premium of 30,000*l.*, to be paid out of the difference between the 85,000*l.* and the 125,000*l.* Another premium, payable out of the 85,000*l.* to one of the promoters alone, was never contemplated in drawing up the prospectus. Upon these grounds it was held not to be competent to Kantorowicz to get a bonus of 20,000*l.*, in addition to his share of the 30,000*l.*, and that having kept back the transaction as to the 20,000*l.*, he ought to be considered as having joined the other four promoters in stipulating for payment by the company of a premium of 30,000*l.*, and no more. He in fact allowed them, in the exer-

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Beck v. Kantorowicz.

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New Sombbrero,
&c., Co. v.
Erlanger.

cise of their judgment as to what was a right premium to demand of the company, to contract with the company for the 30,000*l.*, and that was the contract which the Court held ought to be performed as between the company and the promoters (*d*).

Again, in *The New Sombbrero Phosphate Co. v. Erlanger (c)*, a lease of some property was sold to an agent for a syndicate, *i.e.*, a group of speculators. One of these speculators, on behalf of himself and the others, got up a company to buy the property from them. An agent of theirs entered into a provisional contract with a nominee of their own for the sale of the property to him, as trustee for the intended company, at the advanced price, to be paid for in cash and shares. The company's memorandum and articles of association were prepared under the direction of the chief promoter. There were five directors. Of these two were abroad, and the others were all in fact nominees, and more or less under the control of the chief promoter; one of them was the person who originally purchased as agent for him and the other speculators. The agreement between this agent and the trustee for the company was alluded to in the articles of association, and also in a prospectus published by the directors. This prospectus was in fact prepared under the instructions of the chief promoter. The solicitor of the company was the solicitor of the promoters. The prospectus stated that the provisional contract with the trustee for the company had been approved by the directors, and in fact the directors in this country had adopted it; but they had in truth no discretion in the matter; they had no independent advice, and one of them was the trustee for the promoters. Their approval was therefore a mere sham. Upon the true facts becoming known, the company repudiated the contract, and filed a bill to set it aside. The V.-C. Malins dismissed the bill, being of opinion that the promoters of the

(*d*) The result, it is apprehended, would not have been different if the four promoters had insisted on keeping the company to the bargain for 125,000*l.*, and had claimed to have the 20,000*l.* stipulated for by Kantorowicz divided between him

and themselves. As it was, they abandoned any interest they might have in the 20,000*l.* to the company.

(*c*) 5 Ch. D. 73, and 3 App. Ca. 1218. See the extract from Lord Cairns' judgment in this case, *ante* p. 348.

company were not in such a fiduciary position towards it as to render it obligatory upon them to disclose that they were themselves selling their own property to the company. But on appeal, this decision was reversed upon the ground that the promoters stood in a fiduciary relation to the company, which was their creature; and were bound to disclose the fact that they were selling their own property to the company.

In *The Phosphate Sewage Co. v. Hartmont* (*f*), the promoters had no title to the property they sold. The trustees of the company to whom they sold it were their own financial agents, and were paid a large commission by them out of the purchase money obtained from the company. The solicitors to the company were the solicitors to the promoters, and neglected their duty. The contract was set aside; the so-called trustees had to repay the commission they received; and all the defendants, including the solicitors, were ordered to pay the costs of the suit.

Baynall v. Carlton (*g*), a company was formed to buy some property at a given price, which was much larger than the price paid to the owner. The difference went into the pockets of persons employed by him to get up the company, which was formed for the purpose of buying the property. This difference, however, less just allowances for expenses properly incurred in forming the company, was recovered by the company in an action brought against those who had divided the plunder (*h*). In this case the company brought an action to rescind the contract of purchase, which having regard to the fraud perpetrated on the company, would clearly have been set aside if that action had not been compromised. Such compromise, however, did not affect the company's right to recover from the promoters the secret profit which they had made at the expense of the company. One of the promoters was dead, but his estate was held liable for what he had received.

Emma Silver Mining Co. v. Grant (*i*), was another case in

(*f*) 5 Ch. D. 395.

(*g*) 6 Ch. D. 371.

(*h*) The 1,500*l.* paid to the solicitors, and sought to be recovered from them, was not paid out of the

promotion money, see 6 Ch. D. 410.

(*i*) 11 Ch. D. 918. See further as to the effect of bankruptcy, S. C. 17 Ch. D. 122, *ante*, p. 349, note (c).

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Phosphate
Sewage Co. v.
Hartmont.

Baynall v.
Carlton.

Emma Silver
Mining Company
v. Grant.

Bk. III. Chap. 2. which part of the purchase money paid by the company for a mine was divided amongst the persons who took part in its formation, but who concealed from the company the fact that they were to have part of the purchase money. In substance they created the company and blinded it, and took advantage of its blindness to enrich themselves at its expense. In this case, as in others of the same sort, the promoters urged in vain that they were sellers; they were also creating the buyers, and came under obligations to them which had been disregarded. The promoters were compelled to repay to the company the sums they had obtained by their secret arrangements, but they were allowed all expenses fairly and properly incurred in forming the company. In this case the company did not seek any rescission of contract.

Lydney, &c.,
Company v.
Bird.

Lydney & Wypool Iron Ore Co. v. Bird (*k*), is another case of the same class. The company was formed to buy a business. One of the defendants took an active part in forming the company, and was one of its first directors. The purchase money was fixed by him, and it included a large sum which he was to retain for his own benefit. This fact was concealed from the company, but was afterwards discovered. He was compelled to refund it, but was allowed all expenses fairly incurred by him in forming the company. No rescission of the contract of purchase was sought by the company. The other defendant was a partner of the first, but took no part in the formation of the company, except that he guaranteed the taking of a certain number of shares, and was paid for this guarantee. He was paid in fact out of money got from the company, but he did not know this, and he was held not liable to refund the payment.

The *Whaley Bridge Printing Co. v. Green* (*l*), noticed *infra* (class 3), is based on the same principles as the foregoing, and belongs to the same class of cases.

Allowances made
in these cases.

The allowances made to promoters in cases of this description do not cover all the expenses they have in fact incurred: the allowances are confined to legitimate expenses; and do not

(*k*) 33 Ch. D. 85, reversing S. C., 31 Ch. D. 328.

(*l*) 5 Q. B. D. 109.

extend to bribes or commissions paid to people who procure shares to be taken (*m*). Nothing can be allowed which would involve a misapplication of the company's funds (*n*). Bk. III, Chap. 2.
Sect. 1.

Such being the principles which the Court enforces, it need hardly be added, that contracts of the kind alluded to in the foregoing pages will not be decreed to be performed by the company, even although the company's articles of association provide that they shall (*o*). Any concealed agreement, moreover, between a vendor to a company and its directors, to the effect that they shall profit by the purchase by the company will entitle the company to repudiate its agreement with the vendor (*p*). No specific performance of contracts tainted with want of good faith.

The right of the company in these cases is to rescind the contract, or at its option to hold the property it has purchased, and to pay no more for it than its agent or trustee himself paid (*q*). But the right to rescission cannot be exercised if the property bought cannot be restored; nor can the property be retained unless the company is prepared to pay, or has paid what the promoters paid the owner for it (*r*).

2. Cases in which persons have sold their own property to a company formed by them to buy it.

This class of cases is very similar to the last, but is distinguished from it by the fact that the promoters of the company buy and pay for the property which they afterwards form a company to buy, and which they ultimately sell to it.

The fact that the company is buying from its promoters is not disclosed to the company or to such of its directors as do

(*m*) *Lydney Co. v. Bird*, 33 Ch. D. 85, see p. 95. The commission allowed in *Baynall v. Carlton*, 6 Ch. D. 371, would not have been allowed if the company had not offered to allow it.

(*n*) *Ib.*

(*o*) *Macnair v. Port Tennant, &c.*, Co., 24 Beav. 495. See, too, *Ellis v. Colman*, 25 Beav. 662; *Flanagan*

v. Gt. Western Rail. Co., 7 Eq. 116, a case of an agreement with a director.

(*p*) *Ex parte Williams*, 2 Eq. 216.

(*q*) See *Tyrell v. Bank of London*, 10 H. L. C. 26.

(*r*) See *Great Luxembourg Rail. Co. v. Magnay*, 25 Beav. 586, and the cases in the next class.

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not profit by the transaction, and on this ground the company can rescind the contract of purchase; but if the decisions about to be referred to are correct, the company has no other remedy. Consequently, if it cannot rescind, it is without redress. The leading cases on this subject are the following:—

*Ladywell Mining
Company v.
Brookes.*

Ladywell Mining Co. v. Brookes (s). In this case the defendants bought a leasehold mine in order to resell it at a profit to a company which was to be formed in order to buy the mine. At the time of the purchase nothing had been done to form a company. After the defendants had bought the mine and paid for it, they agreed to sell it at a profit to a trustee for the intended company, and a company was formed to buy the property at the enhanced price, and four of the original buyers became directors. The company bought the mine and paid the enhanced price out of capital raised by shares placed by the original buyers, who in fact found the money paid in respect of the shares. The company was ejected from the mine by the lessor, and it then sought to recover the profit made by those who had bought the mine and resold it to the company. The Court, however, decided that the company were not entitled to this relief, because those who sold to the company were under no fiduciary relation to the company when they themselves bought it. The Court held that the only relief which the company could have been entitled to would have been to rescind the contract for purchase, and that as this was impossible, the company could obtain no redress. The company was not in a position to say, “when you bought this mine you were acting for us; this purchase, although made by you, is one which must be considered as having been made by you for the company, which was afterwards formed at your invitation” (*t*).

This case was decided in conformity with a previous decision of the Court of Appeal in the case of the *Cape Breton Co.*

*Cape Breton
Company.*

Cape Breton Co. (u). In this case certain persons bought a coal mine. A company was afterwards formed to purchase it from them at an enhanced price. One of the original purchasers was a director of the company. The company was

(s) 35 Ch. D. 400.

(t) 35 Ch. D. 413.

(u) 26 Ch. D. 221; 29 ib. 795,

affirmed on appeal under the name
of *Cavendish Bentinck v. Fenn*, 12
App. Ca. 652.

wound up ; the facts became known ; and at a meeting of shareholders specially convened in order to determine what should be done, they resolved not to repudiate the purchase, but to keep the mine and to resell it, which they did at a heavy loss. After this, a contributory of the company endeavoured to make the director who was one of the original purchasers liable for the loss sustained by the company, and it was decided that he was under no such liability. The House of Lords decided the case upon the ground that there was no proof that the director's interest in the property was not disclosed, and no proof that it had been sold to the company for more than it was worth. But Pearson, J., and the Court of Appeal (*x*), decided the case upon the ground that although the company might have rescinded the contract, yet, that having adopted it, the director could not be made liable for any loss sustained by the company ; because when the mine was originally bought, the purchasers bought for themselves and not for any company then in course of formation, and because it was impossible to ascertain the sum for which the director could be properly held responsible. The Court distinguished the case from *Bagnall v. Carlton* and others of that class, on the ground that in each of them the property sold to the company had been acquired by persons acting for a company then in process of formation, so that the company ultimately formed could say that the property was in truth bought on its behalf. The distinction here drawn between a company contemplated by the buyers but not yet in process of formation, and a company, the formation of which has just commenced, is very fine (*y*), the more so, as it was conceded that the company ultimately formed may have been very different from that which the promoters were endeavouring to form when they became purchasers themselves. It is much to be regretted that the House of Lords did not express an opinion on the broad point on which the members of the Court

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(*x*) *i.e.* Lords Justices Cotton and Fry ; Bowen, L. J., dissented. The majority thought the value of the property could not be ascertained, and *qu.* if the decision would have been the same if they had thought

otherwise ; apparently not, see the judgment of Cotton, L. J., in *Ex parte Taylor* and *Ex parte Moss*, 14 Ch. D. 398.

(*y*) See, however, 3 App. Ca. 1235, *per* Cairns, L. C.

Bk. III. Chap. 2. of Appeal differed. The decision as it stands is difficult to
 Sect. 1. — reconcile with others in the books (*z*), and seriously limits the
 redress that can be obtained against fraudulent promoters.

Observations on these cases. Notwithstanding the present state of the authorities, the writer ventures to submit that it is the breach of duty on the part of the seller to the company, and the resulting application of the company's money which gives rise to the right to relief in these cases; and he submits that when a promoter (*a*) sells his own property to a company at a profit, without disclosing the fact that what he is selling is his property, the company can at its option either rescind the sale or keep the property, paying only its fair value, and such further allowances, if any, as may be just, and recovering back from the promoter the difference between such value and allowances, if any, and the sum he has managed to extract from the company. But of course the company must pay him the fair value of his property, and all just allowances; and if it is impossible to ascertain this value, the transaction can only be rescinded *in toto*, and if it is also impossible to rescind then the company will be without redress (*b*). In this view there is no difference in the result between this class of cases and the last.

3. *Cases in which the promoters of a company have in other ways obtained secret benefits at its expense.*

Promoters of companies are exceedingly ingenious in the devices to which they have recourse in order to obtain money without being found out, from the companies they call into existence. The principles, however, before expounded, are generally sufficient to defeat them.

(*z*) *Kimber v. Barber*, 8 Ch. 56; *Bentley v. Craven*, 18 Beav. 75; *Great Luxembourg Rail. Co. v. Magnay*, 25 Beav. 586, see pp. 595, 6. See the next class of cases.

(*a*) The principle contended for is submitted to apply to all cases in which an agent sells his own property to his principal without dis-

closing the fact.

(*b*) *Ex parte Taylor*, 14 Ch. D. 390. See *Great Luxembourg Rail. Co. v. Magnay*, 25 Beav. 586, and observe that the bill was framed upon the assumption that the whole thing was to be set aside, see p. 594.

In *Emma Silver Mining Co. v. Lewis* (c), a promoter who procured himself to be appointed metal broker to the company on certain terms which were disclosed, also managed to obtain a large sum in addition out of the promotion money, which (as is usual), was added to and hidden in the price paid by the company for the property it bought. But he was compelled to refund what he so surreptitiously obtained.

Whaley Bridge Printing Co. v. Green (d) goes a step further. In that case the company agreed to buy property for 20,000*l.*, of which (by an agreement concealed from the company) 3,000*l.* was to be paid by the vendor to its promoter. The company had paid the 20,000*l.*, but the vendor had not paid over the 3,000*l.* The company recovered it from the vendor upon the ground that the company was entitled to the benefit of the agreement made by the promoter. There was no rescission of contract here, nor was it considered necessary.

The principles illustrated by the foregoing decisions apply, if possible, more strongly to the solicitors of projected companies than to other persons. The relation of solicitor and client in cases of this sort is considered as commencing from the time when the solicitor first acts in any matter relating to the company; and if he afterwards acquires property for himself and sells it at a profit to the company, without the fullest disclosure, the company can retain the property and compel him to refund the profit (e). Moreover, if the solicitor to the company is, as he frequently is, the solicitor to the promoters, and he neglects his duty to the company when he knows that the promoters are acting improperly towards it, he runs the serious risk of being held liable to the costs of proceedings against them (f): but he ought not to be made a party if

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Sect. 1.

Emma Silver
Mining Co. v.
Lewis.

Whaley Bridge
Printing Com-
pany v. Green.

Solicitors to
projected com-
panies.

(c) 4 C. P. D. 396, an action for damages.

(d) 5 Q. B. D. 109.

(e) *Tyrell v. Bank of London*, 10 H. L. C. 26, affirming mainly, but in some respects varying the decree below, in 27 Beav. 273. The company bought only part of what its solicitor had purchased, and the

House of Lords held that the company had nothing to do with the profit made by reselling the rest of the property. Compare *Bagnall v. Carlton*, 6 Ch. D. 371.

(f) *Phosphate Sewage Co. v. Hartmont*, 5 Ch. D. 394. See generally, *re Blundell*, 40 Ch. D. 370.

Bk. III. Chap. 2. the only relief sought against him is the payment of costs (g).
 Sect. 1.

4. *Cases in which the position of promoter has not been proved to exist.*

The most instructive case of this kind is the *Albion Steel and Wire Co. v. Martin*; and its value consists in the contrast it affords with those already noticed.

*Albion Steel
and Wire Co.
v. Martin.*

In the *Albion Steel and Wire Co. v. Martin* (h), two persons carried on a business which was afterwards sold to a company formed in order to buy it. The defendant had long supplied the vendors with goods for their business, and at their request he agreed to become a director of the company. After he had so agreed, and before the company was formed, he contracted to supply goods to the vendors, and these contracts were not completed when the company took over the business. The business was taken over with all contracts pending at the time of its transfer, and the defendant completed the contracts into which he had entered, and was paid by the company of which he had become a director. An attempt was made by the company to compel him to account for the profit made by him, at the expense of the company, from these contracts. But it was held that he was not bound to do so. There was no fraud whatever in the transaction; the defendant had dealt with the vendors; they had dealt with the company; the company had trusted them, and he was not concerned directly or indirectly in the purchase by the company of their business, and was not directly or indirectly in the double position of buyer and seller; and in his own contracts with the vendors they were the guardians of the interests of the company. In this same case, however, the defendant had, after he had become a director, entered into similar contracts with the company itself, but he did not attempt to retain the profits on them, and it is plain that he could not have done so.

The liability of promoters and others who issue prospectuses

(g) *Bagnall v. Carlton*, *ubi supra*; *v. Beyfus*, 26 Ch. D. 35.
Barnes v. Addy, 9 Ch. 244; *Burstall* (h) 1 Ch. D. 580.

and fail to comply with the provisions of § 38 of the Companies Bk. III, Chap. 2.
act, 1867, has been already noticed; see Bk. I., c. 3, § 3. Sect. 2.

Before leaving this subject it will be useful to refer to the Payment for
rights of promoters to payment for their services. What will services.
be allowed them on setting aside transactions with them has
been seen already (*i*). But in addition to this it is to be ob-
served that promoters of companies are not entitled to charge
each other for their services, unless there is some agreement to
that effect (*k*); nor have they any claim for their services
against the company they have formed in the absence of some
clause to that effect contained in the company's special act or
charter (*l*), or (in other cases) in the absence of some agree-
ment entered into by the company and binding the company to
pay them (*m*). Moreover, even an express agreement for their
remuneration may be *ultra vires*, and not binding on the com-
pany on that ground (*n*).

SECTION II.—OF DIRECTORS AND THEIR POSITION AS TRUSTEES.

As soon as a company is formed, the difficulties peculiar to
promoters disappear.

The same obligation to good faith which exists on the part of every member of an ordinary firm (*o*), exists also on the part of every member of a company; but, in this latter case, the obligation of each member towards the others is qualified by the comparatively small right of personal intervention in the affairs of the company which each member enjoys (*p*). It is part of the contract into which the members of a company enter, that the management of its concern shall be confided to

(*i*) *Ante*, p. 356 *et seq.*

(*k*) *Holmes v. Higgins*, 1 B. & C. 74; *Goddard v. Hodges*, 1 Cr. & M. 33; *Wilson v. Curzon*, 15 M. & W. 532; *Parkin v. Fry*, 2 C. & P. 311.

(*l*) As in *Carden v. The Gen. Cemetery Co.*, 5 Bing. N. C. 253.

(*m*) *Ante*, Bk. ii. c. 1, § 2.

(*n*) See as to this, Bk. ii. c. 2, § 2.

(*o*) As to which, see Partn. bk. iii., c. 2, pp. 303 *et seq.*

(*p*) As to voting on questions on which interests are conflicting, see *ante*, p. 309.

Good faith
amongst share-
holders.

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Directors
trustees.

a few chosen individuals. But whilst this contract limits the right of each member of the company to interfere in the conduct of its affairs, and limits his obligation to exert himself for the benefit of the company, it, if possible, increases the obligation of the directors to observe good faith towards the great body of shareholders, to attend diligently to their interests, and to act within the limits of the authority conferred by them. Directors are not only agents, but to a certain extent trustees(*pp*). Their position, however, is very different from that of ordinary trustees, whose primary duty it is to preserve the trust property, and not to risk it. Directors have to carry on business, and this necessarily involves risk(*q*). The duty of directors to shareholders is so to conduct the business of the company, as to obtain for the benefit of the shareholders the greatest advantages that can be obtained consistently with the trust reposed in them by the shareholders and with honesty to other people. Directors should remember that they are not the masters but the servants of the shareholders; and although it is true that the directors have more power, both for good and for evil, than is possessed by the shareholders individually, still that power is limited, and accompanied by a trust, and is to be exercised *bonâ fide* for the purposes for which it was given, and in the manner contemplated by those who gave it. The property of the company may not be legally vested in the directors, but it is practically under their control; and they are bound to employ it for the purposes for which it is entrusted to them. So the powers which the directors have, *e.g.*, of calling meetings, electing members of their own board, allotting, transferring and forfeiting shares, making calls, &c., &c., are reposed in them in order that such powers may be *bonâ fide* exercised for the benefit of the company as a whole; and any exercise of such powers for other purposes is a breach of trust, and will be treated accordingly (*r*).

(*pp*) See per Kay, J., in *Faure Electric Accumulator Co.*, 40 Ch. D. p. 151.

(*q*) See per Bacon, V.-C., in *London Financial Assoc. v. Kelk*, 26 Ch. D. 143.

(*r*) See generally as to the duties of

directors, *Faure Electric Accumulator Co.*, 40 Ch. D. 141, *York and North Midland Rail. Co. v. Hudson*, 16 Beav. 485; *Great Luxembourg Rail. Co. v. Magnay*, 25 Beav. 586. As to how far they can be treated as trustees

It follows as a necessary consequence that directors of a company are bound to account to the company for all profits made by themselves, by the employment of the assets of the company, and for all profits made by them at the expense of the company, unless they can show that the company, with a full knowledge of all the facts, have agreed to allow them to retain such profits for their own benefit.

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Directors must account for profit made by employment of the company's assets.

The duties of directors begin from the moment they become directors ; but persons who are directors may have come under obligations to the company long before they became directors of it. Whether they have done so or not depends upon the principles investigated in the last section (s). In the ensuing pages it is proposed to examine the duties of directors after they have become such. All the authorities referred to in the last section are relevant to the present inquiry, and may be referred to in support of their liability to account for profits secretly made by them. In addition to those authorities the following may be also usefully alluded to.

Commencement of duties of directors.

In the celebrated case of *The York and North Midland Railway Company v. Hudson* (t), a quantity of shares in a railway company were placed at the disposal of its directors, amongst whom the defendant was the most influential. The defendant disposed of these shares by issuing some 5000 of them to nominees of his own, causing them to be sold for his benefit and putting the proceeds of the sale into his own pocket, accounting, however, to the company for the money due on them in respect of deposits and calls. The defendant contended that the shares in question were in fact a present to himself, in consideration of his great services to the company ; but the Court thought otherwise, and having come to the conclusion that the shares were to be at the disposal of the directors as trustees for the company, compelled the defendant

Profits made by employment of assets of company.

Directors selling shares for their own benefit.

York and North Midland Rail. Co. v. Hudson.

for persons dealing with the company, see *Wilson v. Lord Bury*, 5 Q. B. D. 518 ; *Poole, Jackson, and Whyte's case*, 9 Ch. D., at p. 328. As to the rule against not interfering in matters of internal management, see *infra*, book iii. c. 9, § 2.

Hichens v. Congreve, 1 R. & M. 150 ; *Fawcett v. Whitthouse*, ib. 132 ; but not in *Albion Steel Wire Co. v. Martin*, 1 Ch. D. 580.

(t) 16 Beav. 485. The judgment in this case is particularly valuable with reference to the position of directors.

(s) They had, for example, in

Bk. III. Chap. 2. to account for the monies derived by him from their sale.
 . Sect. 2.

The Court also held, that the defendant was not entitled to be allowed any part of such monies by way of remuneration for his services, or on account of money disbursed by him for the company in a manner which he either could not or would not explain (*u*).

Profits made on
 issuing shares.
Parker v.
McKenna.

In *Parker v. McKenna* (*x*), a banking company resolved to issue 20,000 new shares, and those not taken up by the old shareholders were to be disposed of by the directors at a certain price. The old shareholders only took up about one half of the shares; and the directors made an arrangement with one *Stock* that he should take all the rest at the price fixed, and pay for them as he found purchasers for them. He was unable to pay for them all, and he applied to the directors to take a large part of them off his hands. Some of them agreed to do so; and each of the defendants took a certain number, sold what he took at a price considerably higher than that at which the directors had been authorised to sell them, but only accounted to the company for that price. When, however, the shareholders discovered what had been done, they claimed to be entitled to share all the profits thus made by the defendants, and their claim was upheld by the Court. It was conceded in this case, that if the directors had actually sold the shares to *Stock*, and he had *bonâ fide* paid for them and completed his title to them, the directors (or any one else) might have bought them from him and resold them at a profit; but the arrangement with him was such that the shares had never become his; the duty of the directors to the shareholders with respect to the disposal of the shares had not been performed when they were taken off his hands, and the shares were in effect under the control of the directors as unissued shares when the defendants themselves sold them at a profit.

(*u*) In *Dunston v. Imperial Gas Co.*, 3 B. & Ad. 125, it was held that directors are not impliedly entitled to any pay for their services; and see, as to making presents to directors, *Rossmore v. Mowatt*, 15 Jur. 238, V.-C. K. B.; *Hutton v.*

West Cork Rail. Co., 23 Ch. D. 654, in which case the company had ceased to carry on business. As to their unpaid fees, see *Ex parte Cannon*, 30 Ch. D. 629.

(*x*) 10 Ch. 96.

Again, the directors of a company are not entitled to retain for their own benefit any advantages they may receive by way of bonus, commission, or otherwise on the sale of the company's business, or on the amalgamation of the company with some other (*y*), unless there is an agreement to the contrary between the company and the directors (*z*). In *Gaskell v. Chambers* (*a*), the directors of a company, which amalgamated with another company, received from the latter a considerable sum, the particulars of which they kept secret. In a suit instituted on behalf of the shareholders in the first company, this money was held *prima facie* to belong to them, and it was ordered to be paid into Court (*a*).

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Bonuses, &c.,
on sales, &c.

Gaskell v.
Chambers.

So, if on the formation of a company, its directors receive bonuses or other advantages from the promoters on a sale to the company, or on the adoption or ratification of a contract by the company, they can be compelled to account for what they so receive (*b*).

Again, directors are not entitled to retain any shares or other benefit which may have been given them by the promoters of a company in order to induce them to become directors or to qualify them for that office. In *Nant-y-Glo v. Grave* (*c*), Grave consented to become a director of the plaintiff company, on receiving from one of the promoters five hundred fully paid up shares, and subsequently acted in that capacity. Some years after he had ceased to be a director, an action was instituted against him by the company to recover these shares or their value. The shares being at that time very much diminished in value, Grave was ordered to pay to the company a sum equivalent

Persons receiving
shares, &c., from
promoters as
consideration
for becoming
directors.
Nant-y-Glo v.
Grave.

(*y*) *Boston Deep Sea Fishing Co. v. Ansell*, 39 Ch. D. 339; *General Exchange Bank v. Horner*, 9 Eq. 480.

(*z*) *Southall v. British Mutual Society*, 6 Ch. 614, where it was agreed that a part of the purchase money should be paid to the directors by way of bonus. See, also, *Imperial Mercantile Credit Association v. Coleman*, L. R. 6 H. L. 189, noticed *infra*.

(*a*) 26 Beav. 360.

(*b*) See *Mulrid Bank v. Pelly*, 7

Eq. 442, and the next two notes, and the cases *ante*.

(*c*) 12 Ch. D. 738. See, also, *MacKay's case*, 2 Ch. D. 1; *De Ravigne's case*, 5 Ch. D. 306; *Pearson's case*, *ib.* p. 336; *Englefield Colliery Co.*, 8 Ch. D. 388; *Weston's case*, 10 Ch. D. 579; *Mitcalfe's case*, 13 Ch. D. 169; *Carriage Co-operative Supply Association*, 27 Ch. D. 322, cases of a similar nature under § 165 of the Companies act, 1862.

Bk. III. Chap. 2. to the highest value they had reached since they had been trans-
Sect. 2. —ferred to him together with interest from that time at four per cent.

Directors qualified out of assets of a company.

Another illustration of the same general principle is afforded by those cases in which a director has had shares allotted to him as a qualification, and has had them paid up out of money belonging to the company, and been compelled to refund the money so paid (*d*).

Contracts between directors and their companies.

Indeed, it is not going too far to say that every director of a company is bound, when his personal interest conflicts with his duty to the shareholders, to perform his duty towards them at the sacrifice of his own interest; and a transaction in which a director, on behalf of the company, has, in fact, been dealing with himself as an individual, cannot stand. This was solemnly decided in the House of Lords, where it was unanimously held, that a contract entered into between a firm of ironfounders for the supply of railway chairs to a company, one of the directors of which was a member of the firm, clearly could not be enforced against the company (*e*). This decision did not turn upon any act of Parliament, but was based upon the general principles applied by courts of equity to trustees and agents in their dealings with those whose interests are committed to their charge. The same principles unfortunately were not formerly recognised at law to the same extent as in equity; and it was therefore to be regretted that the Companies act, 1862, contained no provisions similar to those in the repealed act 7 & 8 Vict. c. 110, making void contracts between companies and their own directors unless sanctioned by the shareholders (*f*). But since the Judicature act this has probably ceased to be of any consequence.

Profits made by transacting business.

Whether, however, this be so or not it is clearly settled that the directors of a company cannot, without its consent, make a profit at its expense in the course of business transactions with it or for it. This is shown by *Albion Steam and Iron Works Co.*

(*d*) *Hay's case*, 10 Ch. 593. See, also, *Carling's case*, 1 Ch. D. 115. These cases will be noticed hereafter under the head Contributories.

(*e*) *Aberdeen Rail. Co. v. Blaikie*, MacQ. 461. See, also, *Flanagan v.*

Great Western Rail. Co., 7 Eq. 116; *Murphy v. O'Shea*, 2 Jo. & Lat. 422. See *Foster v. The Oxford Rail. Co.*, 13 C. B. 200, *ante*, p. 328.

(*f*) See *ante*, p. 328.

v. *Martin* (g), already alluded to, and by *Imperial Mercantile Credit Association v. Coleman* (h). In that case a director of a financial company was authorised to do some business for it at a certain commission to be paid to the company. He in fact got a larger commission, and it was held that the company was entitled to it, although he had told the other directors that he had an interest in the transaction. He never, however, told them what his interest was; and it was held that in order to entitle himself to the commission he was bound to make a full disclosure of his interest (i).

But directors may issue debentures of a company at a discount if they cannot issue them at par; and it has been held that if a director takes some of them himself at the same price as they are issued to other people, he cannot be compelled to pay their full value (k). The same rule will apply to taking shares at a discount in those cases in which an issue of shares at a discount is allowed by law (l).

The position of promoters and others selling their own property without disclosing the fact has been already investigated (m). The company can always repudiate such a transaction unless it is too late so to do; but it is doubtful if the company can retain the property sold and compel the vendors to account for the profit they have made by the transaction (n). If rescission is not sought and no profit is shown to have been made there will be nothing to account for (o). An instructive illustration of this principle is furnished by *In re Ambrose Lake Tin Copper Mining Co., Ex parte Taylor and Ex parte Moss* (p). There a cost book mining company was converted into a registered company. The mine was bought by the new company from the old company for more than it was worth, but was paid for in shares of the new company all of which were allotted to the members of the old company. In effect what was paid by

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Imperial Mercantile Credit Association v. Coleman.

Taking shares and debentures at a discount.

Sales by directors to the company.

Ambrose Lake, &c., Company.

(g) 1 Ch. D. 580, *ante*, p. 362.

(h) L. R. 6 H. L. 189, reversing S. C. 6 Ch. 558.

(i) See, also, *Dunne v. English*, 18 Eq. 524.

(k) *Campbell's case*, 4 Ch. D. 470.

(l) As to which, see *infra*, c. 3,

§ 1.

(m) *Ante*, p. 357 *et seq.*

(n) *Ib.*

(o) *Cavendish Bentinck v. Fenn*, 12 App. Ca. 652, *ante*, p. 358, was decided on this principle.

(p) 14 Ch. D. 390.

Bk. III. Chap. 2. the new company was what it got from the old company, but
 Sect. 2. divided in a different manner amongst its members. The directors of the new company were members of the old company, and two of them sold their shares in the new company and made a profit by the transaction. The new company was wound up and the liquidator endeavoured to recover for the company the profit made by those two directors; but the money obtained by selling the shares was in no sense the money of the company, and the Court held that the company was not entitled to the profit made by their sale (*q*). If shares in the new company had been allotted to persons who were not vendors, *i.e.*, if strangers had come in and the mine had been bought with their money, the case would have assumed a different aspect. But as it was the only remedy was for each purchaser of shares in the new company to sue his vendor for any misrepresentation he might have made (*r*).

Case where all the members agree to divide shares between them to the detriment of the company.

Society of Practical Knowledge v. Abbott.

This case may be usefully contrasted with another in which all the persons interested in a company committed that which was a fraud on those only who subsequently joined it. In *The Society of Practical Knowledge v. Abbott* (*s*), a corporation was created by charter with a capital of 20,000*l.* in four hundred 50*l.* shares which ought to have been paid for in cash. At the time of the granting of the charter, four persons only held shares, and they appropriated the whole of the shares equally amongst themselves, and debited themselves in the books of the company with the 20,000*l.* This sum they did not pay, but after spending, as they alleged, 16,000*l.* in taking and fitting up the Adelaide Gallery, they paid 4,000*l.* into a bank to the credit of the company. They then sold shares; each for his own benefit, and for what he could get. It was afterwards alleged that 8,000*l.* only, and not 16,000*l.*, had been expended for the purposes mentioned, and that in point of fact, the four

(*q*) *British Seamless Paper Box Co.*, 17 Ch. D. 467, was a similar case, only new shareholders afterwards came in.

(*r*) See 14 Ch. D. 399, *per* Cotton, L. J. The object of the whole transaction was to obtain shares in

the new company, and then sell them for more than they were worth.

(*s*) 2 Beav. 559. See, also, the observations of Jessel, M. R., in 5 Ch. D. 113, as to duties to future shareholders.

original members of the society had benefited themselves at the expense of the society to the extent of 8,000*l.* A bill was filed by the company against them for an account, in order to compel them to pay this amount; and a demurrer to the bill was overruled, although it was strongly urged on behalf of the defendants, that they were the company at the time when the acts complained of were done, and that they therefore had a right to do as they liked with the shares (*t*). Bk. III. Chap. 2.
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The duties of directors as trustees are by no means confined to an obligation to account to the company in respect of gains made by themselves at its expense.

Directors are responsible for the loss of the company's assets if that loss is attributable to the employment of the assets in a manner and for purposes not warranted by the constitution of the company (*u*). Thus, in the *Land Credit Co. of Ireland v. Lord Fermoy* (*x*), the directors of a company who had improperly employed its funds in buying up its own shares were held liable to replace the funds so spent. So in *Grimes v. Harrison* (*y*) the directors of a building society were held liable to make good money of the society improperly expended in the purchase of land. So if directors are parties to a fraudulent transaction by which their company suffers loss, they can be compelled to indemnify it against such loss (*z*). So if the directors improperly pay dividends out of capital (*a*). So directors will be held liable to repay money paid by them Liability for
assets lost.

Land Credit Co.
v. Lord Fermoy.

Grimes v.
Harrison.

(*t*) See also *Flitcroft's case*, 21 Ch. D. 519.

(*u*) But see *Pickering v. Stephenson*, 14 E.L. 342, and *Studdert v. Grosvenor*, 33 Ch. D. 528, as to their non-liability where they act *bonâ fide* and with the sanction of a majority of shareholders.

(*x*) 8 E.L. 7, and 5 Ch. 763. See, also, *Joint Stock Discount Co. v. Brown*, 8 E.L. 381. Compare *Turquand v. Marshall*, 4 Ch. 376.

(*y*) 26 Beav. 435.

(*z*) See *Parker v. Lewis*, 8 Ch. 1035, where the court held there was no loss caused by the fraudulent transaction.

(*a*) *National Funds Assurance Co.*, 10 Ch. D. 118; *Flitcroft's case*, 21 Ch. D. 519; *Denham & Co.*, 25 Ch. D. 752; *Oxford Benefit Building Soc.*, 35 Ch. D. 502; *Leeds Estate, &c., Co. v. Shepherd*, 36 Ch. D. 787; *Rance's case*, 6 Ch. 104.

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Actions to
recover property
of a company.

Culpable negli-
gence and wilful
default.

Negligence in
taking security.
Evans v.
Coventry.

as a bonus to a promoter (*b*), or for commission improperly paid for placing the company's shares (*bb*).

The property of a company is so far regarded as in the nature of trust property that it can be recovered by the company from any person who has obtained it from the directors with notice that they were acting beyond their powers (*c*).

Although, generally speaking, directors have a wide discretion, and in the absence of proof of *mala fides*, it may be difficult to establish a case of culpable negligence or wilful default, yet if such a case be proved, and loss by the company attributable thereto be also proved, the directors will be liable to make good such loss (*d*). Thus, in *Evans v. Coventry*, it was sought to make the directors of a company responsible for monies of the company embezzled by its secretary, on the ground that the directors had neglected to obtain security for his good conduct, as they were required to do by the company's deed of settlement. The deed only required the directors to take such security as they thought proper, and no collusion or dishonesty was imputed to them, and under these circumstances the V.-C. Kindersley held that they were not liable to make good the monies in question (*e*). But on appeal, an inquiry on the subject was directed, with a view to make the directors responsible, if the result of the inquiry should prove

(*b*) *Ex parte Pelly*, 21 Ch. D. 492.
See, also, *Englefield Colliery Co.*, 8 Ch. D. 388.

(*bb*) *Faure Electric Accumulator Co.*, 40 Ch. D. 141; compare *infra*, note (*o*).

(*c*) *Ex parte Pelly*, 21 Ch. D. 492; *Bryson v. Warwick and Birmingham Rail. Co.*, 4 De G. M. & G. 711, and *Ernest v. Croysdill*, 2 De G. F. & J. 175, which require to be studied together. See the cases as to Building Societies repaying money borrowed, *ante*, p. 189. See, also, *Hardy v. Metropolitan Land, &c. Co.*, 7 Ch. 427, reversing 12 Eq. 386. *Gray v. Lewis*, 8 Eq. 526, was decided on this principle, and, although reversed, 8 Ch. 1035 may be usefully referred to as illustrating the prin-

ciple. The money there sought to be recovered never, in fact, belonged to the company. Its title was based on a sham and fraudulent transaction. In *Grimes v. Harrison*, 26 Beav. 435, the purchaser of the company's property was held to have had no notice of the directors' want of authority to sell it. As to ordering defendants in such cases not to part with the property pending litigation, see *Bank of Turkey v. Ottoman Co.*, 2 Eq. 366; *Hagell v. Currie*, 2 Ch. 449.

(*d*) See *Charitable Corp. v. Sutton*, 2 Atk. 400, and *Overend, Gurney, & Co. v. Gibb*, L. R. 5 H. L. 480.

(*e*) *Evans v. Coventry*, 2 Jur. N. S. 557.

adverse to them (*f*). Although the directors had a discretion as to what security they should require, they were culpably negligent in taking none at all. bk. III. Chap. 2.
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Again, in *Western Bank of Scotland v. Bairds* (*g*), directors were held liable for losses sustained by reason of their neglect, in not causing the business of the company to be stopped, pursuant to a provision to that effect in its articles; and, although in a subsequent English case of a similar nature the decision was different, that case was decided on the ground that the shareholders had sanctioned the continuance of the business (*h*). Not stopping
company.
Western Bank of
Scotland v.
Bairds.

It is clearly established that directors who keep within the limits of their authority, and act *bonâ fide* to the best of their judgment (*i*), are not liable to make good to the company the losses which may result from their acts. Honest mistakes and errors of judgment made by directors when acting within their powers do not render them liable for losses thereby occasioned to the company. This was the real *ratio decidendi* in the great case of *London Financial Association v. Kelk* (*k*), in which all the previous authorities on this subject will be found collected. No liability for
errors of
judgment.

London Financial
Association v.
Kelk. In that case a company sought to make its directors responsible for large sums of money spent and lost in building the Alexandra Palace, and in obtaining shares in companies formed for carrying it on and for building on land about it. Such transactions were within the scope of the plaintiff company's memorandum of association; they were known to and approved by its shareholders; and the directors had acted honestly in the exercise of their powers; and although the consequences were disastrous they were held not responsible to make good the losses occasioned by them.

So it has been held, that directors acting *bonâ fide* and within their powers, are not liable for a loss arising from a loan

(*f*) S. C., 8 De G. M. & G. 835. See clause 6 of the decree on appeal. Compare *Overend, Gurney, & Co. v. Gurney*, 4 Ch. 701, and *Overend, Gurney, & Co. v. Gibb*, L. R. 5 H. L. 480, where there was no obligation to take any security.

(*g*) Cited in 4 Ch. 381.

(*h*) *Turquand v. Marshall*, 4 Ch. 376, reversing 6 Eq. 112. See, also,

Lethbridge v. Adams, 13 Eq. 547.

(*i*) See as to what amounts to acting *bonâ fide*, *Nat. Funds Ass. Co.*, 10 Ch. D. 118; *Oxford Benefit Build. Soc.*, 35 Ch. D. 562; *Faure Electric Accumulator Co.*, 40 Ch. D. 141.

(*k*) 26 Ch. D. 107, see p. 144, noticed *ante*, p. 200.

Bk. III. Chap. 2. to a co-director who had died insolvent (*l*); nor for losses
 Sect. 2. occasioned by purchasing a business which they knew to be insolvent at the time of purchase (*m*); nor for omitting to take mortgage securities to cover the amount of insolvency (*n*). Nor are directors acting *bonâ fide* and within their powers liable to refund to the company sums paid by way of commission and promotion money, to persons other than themselves, although such payments may have been made for very inadequate considerations (*o*).

In compromising claims. Moreover, if judgment has been obtained against a company for a large sum of money, and the directors, instead of appealing, *bonâ fide* compromise the matter by paying less than the sum recovered, they cannot be compelled to refund to the company what they so pay, although the judgment against the company may have been erroneous (*p*).

Trusting to others. At the same time directors must attend to their duties and not place undue reliance on the other servants of the company.

Leeds Estate Co. v. Shepherd. Thus in *Leeds Estate Co. v. Shepherd* (*q*), directors who had paid dividends out of capital, relying on the balance-sheets prepared by the manager and certified by the auditor, were held liable to make good the money so paid away.

Liability as for breach of trust. The liability of a director for the misapplication by him of the money of the company closely resembles the liability of a trustee for a breach of trust, and is indeed often designated as such. The liability is not barred by the statute of limitations (*r*); it is not terminated by death (*s*); nor by bankruptcy (*t*).

(*l*) *Turquand v. Marshall*, 4 Ch. 376, see p. 386.

(*m*) *Oreend, Gurney, & Co. v. Gibb*, L. R. 5 H. L. 480, affirming *Oreend, Gurney, & Co. v. Gurney*, 4 Ch. 701.

(*n*) *Ib.* Compare *Evans v. Coventry*, 8 De G. M. & G. 835, cl. 6 of the decree on appeal.

(*o*) *General Exchange Bank v. Horner*, 9 Eq. 480. Compare *ante*, notes (*b*), (*bb*).

(*p*) See *Parker v. Lewis*, 8 Ch. 1035, and the remarks of Jessel, M. R. in *Forest of Dean Coal Mining Co.*, 10 Ch. D. 450; and *Bath's case*, 8 Ch. D. 334.

(*q*) 36 Ch. D. 787. It should be noticed that the balance-sheet in this case was not prepared in accordance with the articles of association. The case is also valuable as showing the duties of an auditor. Compare *Denham & Co.*, 25 Ch. D. 752.

(*r*) *Oxford Benefit Building Soc.*, 35 Ch. D. 502; *Filtcroft's case*, 21 ib. 519, see p. 537; *Metropolitan Bank v. Heiron*, 5 Ex. D. 319. See now 51 & 52 Vict. c. 59, § 8.

(*s*) *Ramskill v. Edwards*, 31 Ch. D. 100.

(*t*) *Ib.*, and see *Emma Silver Mining Co. v. Grant*, 17 Ch. D. 122.

In *Evans v. Coventry* (u), directors were charged with interest at 4l. percent. on the money of the company improperly applied by them in paying themselves salaries, in paying dividends out of capital, and in buying up shares: and in other cases when they have been charged with assets of the company which they have misapplied, or with profits made by themselves, to which the company is entitled, they have usually been charged with interest at 4 per cent. (v).

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Interest charged
against directors.
Evans v.
Coventry.

Liabilities of co-directors.

A difficult question which arises with reference to the liability of directors is the extent to which each is liable for the acts of the other. The following appear to be the principles applicable to this subject:—

Liability of
directors for
acts of each
other.

1. All those directors who are actually implicated in misapplying the company's money (even although they only sign cheques prepared by others), are jointly and severally liable for the losses arising therefrom (y): *e.g.*, where they have improperly paid money to promoters (z), preliminary expenses (a), dividends out of capital (b). So where they have paid up shares of their own out of the monies of the company (c); and where they have allotted to each other, as fully paid up, shares which are not paid up (d).

2. Directors who really know of and sanction such misapplication are implicated in it within the meaning of this rule, although they do not actively take part in it (e).

(u) 8 De G. M. & G. 835.

(x) See *Joint Stock Discount Co. v. Brown*, 8 Eq. 407; *Parker v. McKenna*, 10 Ch. 123; *National Funds Assurance Co.*, 10 Ch. D. 118; *Flitcroft's case*, 21 Ch. D. 519; *Oxford Benefit Build. Soc.*, 35 Ch. D. 502; *Leeds Estate, &c. Co. v. Shepherd*, 36 Ch. D. 787; *Faure, &c., Co.*, 40 Ch. D. 141. Even 5 p. c. has been allowed, *Alexandra Palace Co.*, 21 Ch. D. 149; *Denham & Co.*, 25 Ch. D. 752; *Oxford Benefit Build. Soc.*, *ubi supra*.

(y) *Joint Stock Discount Co. v.*

Brown, 8 Eq. 381; *Land Credit Co. v. Lord Fermoy*, 8 Eq. 7, 5 Ch. 763.

(z) *Ex parte Pelly*, 21 Ch. D. 492. And see *Faure, &c. Co.*, 40 Ch. D. 141.

(a) *Englefield Colliery Co.*, 8 Ch. D. 388.

(b) *Leeds, &c. Co. v. Shepherd*, 36 Ch. D. 787; *Oxford Ben. Build. Soc.*, 35 ib. 502; *Flitcroft's case*, 21 ib. 519; *Nat. Funds Ass. Co.*, 10 ib. 118.

(c) *Joint Stock Discount Co. v. Brown*, 8 Eq. 381.

(d) *Carriage Co-operative Supply Assoc.*, 27 Ch. D. 322.

(e) *Land Credit Co. v. Lord Fer-*

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3. So are directors who know of the misapplication, but take no steps to prevent it beyond writing a letter of disapproval (*f*).

4. Where their liability is to account for moneys of the company improperly received by them, they are only severally liable for their own receipts, and are not jointly and severally liable for each other's receipts (*g*). But even in this case their liability is joint and several if there has been a joint receipt by them all, and then a division amongst themselves of what they have all received; or if they have all been implicated in some joint breach of trust resulting in profit to them all (*h*).

5. It has been decided that a director who is not cognisant of a breach of trust committed by his co-directors, and who takes no part in it, is not liable for it (*i*). This point, however, involves the question, whether a director is not bound to make himself acquainted with what his co-directors are doing, and to take such steps as may be in his power to prevent them from doing wrong. On this question opinions differ, and it can scarcely be considered as settled (*k*). Mere constructive notice, however, is not enough to impose liability (*l*). Moreover, if (as often happens) the constitution of the company is such as to justify a director in leaving certain matters to his co-directors, or some of them, he is justified in trusting them with such matters, and is not responsible for breaches of trust committed by them and concealed from him (*m*). But in other cases his irresponsibility is by no means so clear (*n*).

6. Nor is a director liable for breaches of trust committed

moy, 8 Eq. 7, and 5 Ch. 763, where the sub-committee were the persons more immediately to blame.

(*f*) *Joint Stock Discount Co. v. Brown*, 8 Eq. 381, and see *Ramskill v. Edwards*, 31 Ch. D. 100.

(*g*) *Parker v. McKenna*, 10 Ch. 96; *General Exchange Bank v. Horner*, 9 Eq. 480.

(*h*) *Oxford Benefit Build. Soc.*, 35 Ch. D. 502; *Carriage Co-operative Supply Assoc.*, 27 Ch. D. 322.

(*i*) *Joint Stock Discount Co. v. Brown*, 8 Eq. 381; *Ashurst v.*

Mason, 20 Eq. 225.

(*k*) Compare the judgment of the M. R. in the *Land Credit Co. v. Lord Fermoy*, 8 Eq. 7, with the last cases, and see *Turquand v. Marshall*, 4 Ch. 385.

(*l*) *Hallmark's case*, 9 Ch. D. 329, and see the next note.

(*m*) *Denham & Co.*, 25 Ch. D. 752; *Land Credit Co. v. Lord Fermoy*, 5 Ch. 763, reversing on this point, S. C. 8 Eq. 7.

(*n*) See *Leeds Estate, &c. Co. v. Shepherd*, 36 Ch. D. 787.

by his co-directors before he became a director (*o*). In this case the new director's liability, if any, can only be for the loss sustained by the company by reason of his omission to make known what he has discovered, and to compel the real delinquents to make good their breach of trust; and it has been decided that an incoming director is not liable for such omissions (*o*).

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That powers reposed in directors are regarded as being in the nature of trusts, is clearly shown by *Gilbert's case* (*p*), in which it was held that a director could not exercise his power of making calls for his own benefit and without regard to the interests of the company: in that case a call was postponed in order to enable a director to transfer his shares, and a transfer by him in the interval was held invalid. There are other cases which show that directors have no right to favour one set of shareholders more than another (*q*); and that powers of accepting surrenders of shares and of forfeiting shares (*r*), as also powers of approving transfers of shares (*s*), and of paying preliminary expenses (*t*), must be exercised *bonâ fide* for the purposes for which they are conferred.

Powers of directors treated as trusts.
Gilbert's case.

Before leaving the subject of the liability of directors to make good assets of the company improperly lost or parted with, or to account for profits made by them at the expense of the company, it is material to consider whether the shareholders have acquiesced in what has been done or not (*u*). Cases indeed may occur where their acquiescence is imma-

Effect of acquiescence.

(*o*) *Forest of Dean Coal Mining Co.*, 10 Ch. D. 450. See *Ashurst v. Mason*, 20 Eq. 225; *Turquand v. Marshall*, 4 Ch. 385; *Evans v. Coventry*, 8 De G. M. & G. 835, decree cl. 2; but observe the Scotch cases *contra* there cited. And see *Jackson v. Munster Bank*, 15 Ir. L. R. 356.

(*p*) 5 Ch. 559. See, also, *Sykes' case*, 13 Eq. 255, as to paying calls in advance, and then taking them back for fees. And compare *Poole Jackson and Whyte's case*, 9 Ch. D. 322.

(*q*) *Richardson v. Larpent*, 2 Y. &

C. C. C. 507; *Harris v. The North Devon Rail. Co.*, 20 Beav. 384.

(*r*) *Infra*, cc. 5 & 6.

(*s*) *Bennett's case*, 5 D. M. & G. 284, p. 297; *Gresham Life Assurance Society*, 8 Ch. 446; *Maffatt v. Farquhar*, 7 Ch. D. 591; *Faure, &c., Co.*, 40 Ch. D. 141.

(*t*) *Englefield Colliery Co.*, 8 Ch. D. 388.

(*u*) See *De Bussche v. Alt*, 8 Ch. D. 286, at p. 312 *et seq.*, as to what amounts to acquiescence as between principal and agent.

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Sect. 2.

terial, but this is only where the company is incorporated and its funds have been applied in a manner which is *ultra vires* (*x*). In other cases the acquiescence of the shareholders affords a complete defence to the directors as against the shareholders or the company: *e.g.*, where it is attempted to make them refund dividends improperly paid to the shareholders (*y*); or to make good losses sustained by the company after its business ought by the articles to have been stopped, but which the shareholders, knowing the facts, allowed to be continued (*z*).

Sanction by
other directors.

Again, where a director has made a profit at the expense of the company, and this circumstance is known to the other directors, and they, acting *bonâ fide*, sanction it, having power so to do, the shareholders and the company will be bound by their sanction (*a*). But as will be seen hereafter, when treating of winding up, a liquidator may impeach transactions on behalf of creditors which neither the company nor the shareholders can impeach themselves (*b*).

Indemnity.

The right of directors as trustees to be indemnified by the company against expenses and liabilities incurred by them in the exercise of their powers, will be alluded to in the next section. But it may be properly observed here that directors may be entitled to contribution and indemnity amongst themselves in respect of a demand against them on the part of the company. Thus, where shares in a company were purchased and transferred into the name of a director as trustee for the company, pursuant to a resolution of the board which was not binding on the company, it was held that he was entitled to be indemnified by the other members of the board who had concurred in the transaction against the claims made on him by the company (*c*). Again, in *Ramskill v. Edwards* (*d*), a

Contribution
inter se.

Ramskill v.
Edwards.

(*x*) See *ante*, p. 175 *et seq.*

(*y*) *Turquand v. Marshall*, 4 Ch. 376.

(*z*) *Ibid.* See, also, *ante*, p. 373.

(*a*) *Imperial Mercantile Credit Assoc. v. Coleman*, 6 Ch. 558, reversed, L. R. 6 H. L. 189, but only on the ground that the other directors were not sufficiently informed of the facts.

(*b*) *National Funds Ass. Co.*, 10 Ch. D. 118.

(*c*) See *Ashurst v. Mason*, 20 Eq. 225, and *Ashurst v. Fowler*, *ib.* A director who was only present when the transfer was formally approved was held not liable. And compare the next case.

(*d*) 31 Ch. D. 100.

director who had been compelled to make good money of a company which had been advanced on an improper security sued his co-directors for contribution ; he was held entitled to relief against those directors who had joined in the mis-application and against the estates of such of them as were dead ; but not as against one of them who had merely confirmed what had previously been done (*e*). The maxim that there is no contribution amongst wrongdoers is seldom applicable to this class of case ; but if all parties have been guilty of actual fraud or of a wilful breach of the law, no relief will be obtainable by some against the others in respect of their fraudulent or illegal transactions (*f*).

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SECTION III.—OF THE RIGHT OF DIRECTORS AND OTHERS TO INDEMNITY.

The right of partners to contribution in respect of their liabilities and losses will be found investigated in the volume on Partnership (*g*). Wherever there is community of profit and loss there must be a right to contribution in respect of those transactions the profits or losses of which have to be shared. Consequently, if a member of a company is compelled to pay more than his share of a debt of the company, he is entitled to contribution from the other members. In some cases this right is expressly conferred by statute ; in others it rests on express agreement ; but the right exists independently of express enactment or agreement, although it of course may be modified or even be excluded in particular cases by special enactment or agreement.

The right of a public officer of a banking company to be indemnified by the members of the company against judgments obtained against himself is recognised by statute (*h*) ; and the right of each individual shareholder, against whom execution may have issued for a debt of the company, to indemnity from the company, or to contribution from his co-shareholders, is

Right of shareholders to be indemnified against judgments.

(*e*) See the last note but one.

(*f*) See Partn., 377 *et seq.*

(*g*) Partn., 367 *et seq.*

(*h*) 7 Geo. 4, c. 46, § 14.

Bk. III. Chap. 2. also placed beyond a doubt by legislative enactment (*i*), except
 Sect. 3. in the case of companies governed by the Letters Patent act, 7 Wm. 4 & 1 Vict. c. 73, which is silent upon this point. This act provides for limited liability, but does not enact that if one member of a company governed by it pays more than his share of a debt of the company, he is to be reimbursed by the company or the other shareholders; but his right to such indemnity or contribution is nowhere taken away, and may therefore be assumed to exist by virtue of general principles not touched by the statute.

In registered companies this particular question cannot arise, as execution cannot issue against individual shareholders on judgments obtained against such companies.

The rights of members of companies to contribution seldom arise until the companies are being wound up: and for further information on this head the reader is referred to Book IV. The rights of directors, however, require special notice, and may be conveniently examined in the present chapter.

Right of directors to contribution and indemnity.

Directors of a company are both members and also agents and trustees. As members, they are entitled to contribution in respect of such debts and liabilities of the company as they may be compellable or have been compelled to pay in that character; and as agents and trustees they are entitled to be indemnified by the company against all losses and expenses *bonâ fide* sustained and incurred by them in the exercise of the trust reposed in them. But if directors exceed their authority, and thereby incur loss, such loss must be borne by them and not by the company, unless the company ratifies what they have done. But even in this case one director may be entitled to contribution from his co-directors as has been already seen (*k*).

Directors acting *bonâ fide*, but beyond their authority.

The cases illustrating these general statements will be examined presently, but before proceeding to notice them it is requisite to allude to certain decisions which tend to show that where directors of a company acting *bonâ fide* and to the best of their judgment, advance money in order to carry on the business of the company, and spend the money for that pur-

(*i*) 7 Geo. 4, c. 46, § 14; 8 & 9 and 7 & 8 Vict. c. 113, § 14.
 Vict. c. 16, § 37. See, also, the repealed acts, 7 & 8 Vict. c. 110, § 67,
 (*k*) See *ante*, pp. 378, 379.

pose, they are entitled to be reimbursed by the company; although they had no authority to borrow money, and could not have rendered the company liable to third persons for money lent on the credit of the company.

Upon this subject the case of the *German Mining Company* (l) is the leading authority. It was there decided that directors who had no power to borrow money on the credit of the company, but who nevertheless did borrow money, and themselves advance money, and *bonâ fide* apply the whole for the benefit of the company, were entitled, having themselves repaid the money borrowed, to be reimbursed by the shareholders the whole amount borrowed and advanced. The circumstances of this case were somewhat peculiar. The partnership was a mining partnership; it was absolutely necessary to work the mines in order to preserve them from rapid deterioration and destruction; the directors had ostensible power not only to carry on the mines, but also to carry them on on credit; the money borrowed and advanced was wholly applied in paying miners' wages, and other expenses necessarily incurred in carrying on the works, and so preserving the mines; and the shareholders were kept informed of what was being done. The money borrowed and advanced was in fact applied in discharging debts for which the company was or would have been legally responsible; and although it by no means necessarily followed that those debts were not incurred improperly as between the directors and the shareholders, yet the full information which the shareholders had of what was being done, precluded them from saying that the debts were improperly incurred. Although, therefore, the company was not liable at law to repay the money borrowed, the mode in which that money was applied, coupled with the acquiescence of the shareholders in the course pursued by the directors, entitled them to be reimbursed the money they had advanced.

This case paved the way for others which have gone far beyond it.

In *The Norwich Yarn Company's case* (m), the company's deed of settlement was prepared with an anxious view to limit

(l) *Ex parte Chippendale*, 4 De G. M. & G. 19.

(m) 22 Beav. 143, *Ex parte Bignold*.

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German Mining
Company's case.

Ex parte Bignold.

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the liability of the shareholders, as between themselves, to the amount of their shares in the capital of the company; and there were certain provisions for increasing that capital, and for borrowing money on mortgage of the company's landed property. The capital being all expended, the directors, instead of raising money by increasing the capital, or by mortgage, from time to time borrowed money of a bank, and applied the money in carrying on the business of the company. It was held that they were entitled to charge this money against the company, although the consequence was to render each shareholder liable to a considerable extent beyond the amount of his share (*n*).

Baker's case.

In *Baker's case* (*o*), the V.-C. Kindersley held that a director of a company governed by 7 & 8 Vict. c. 110, was not entitled to stand as a creditor against the company by virtue of a debenture issued to him by the company, for the loan had not been confirmed as required by that statute (*p*). But His Honour said:—

“But although, for want of confirmation, the contract is not binding upon the company as a contract, still *Mr. Baker* may be entitled to recover the money, if he can show that it was duly applied in carrying on the business of the company. For, if a director, finding that it is necessary for the carrying on of the business of the company that goods should be purchased, or that workmen should be employed and wages paid, or that other disbursements should be made, and that there are no available funds of the company at their bankers, should, out of his own pocket, advance the money necessary to carry on the business, and it was applied accordingly, he would have a right to recover that money; and, in my opinion, such a transaction would not be a contract within the meaning of the 29th section.

“Upon the whole, I am of opinion that the claim of *Mr. Baker*, by virtue

(*n*) Is is very difficult to reconcile the company's deed in *The Norwich Yarn Company's case* with the notion that the directors had, as between themselves and the shareholders, power to borrow in any other way than that pointed out in the deed; and yet if this were not so, the decision ought to have been against the directors, as in the case of *The Worcester Corn Exchange*, 3 De

G. M. & G. 180, and *Selwyn v. Harrison*, 2 J. & H. 334, noticed *infra*, pp. 384, 387.

(*o*) 1 Dr. & Sm. 55. See, also, *British Proc. Society v. Norton*, 3 N. R. 147, and 9 Jur. N. S. 1308.

(*p*) The 29th section of 7 & 8 Vict. c. 110, rendered contracts with directors invalid, unless confirmed by the company. There were some exceptions.

of the contract, must be disallowed ; but he must be at liberty to establish 11k. III. Chap. 2. Sect. 3. a claim for so much of the sum in question as he can show to have been properly applied for the purposes of the company."

This case was followed by *Troup's case* (q), and *Hoare's* Troup's case. *case* (r), in both of which the shareholders of a company were Hoare's case. held liable to reimburse the directors a sum of money borrowed by them without authority, but applied in the construction of the works of the company.

In *Lowndes v. The Garnett and Moseley Mining Company* (s), Lowndes v. Garnett and Moseley Company. advances were made by a director, and were applied in paying debts of the company ; the shareholders were held liable to repay the advances, although they had not been sanctioned in the manner required by the regulations of the company respecting the borrowing of money.

These decisions are apparently based upon the ground that Observations on the foregoing cases. directors do not exceed the limits of their trust by borrowing and advancing money *bonâ fide* for the purposes of the company, although the borrowing may have been an excess of authority. But it is difficult to see how that which, as between the directors and the shareholders, is a clear excess of authority, can as between the same persons be deemed warranted by any trust. Nor is it easy to assent to the doctrine that where shareholders have anxiously limited the powers of directors with respect to raising capital and borrowing money, there is no breach of trust on the part of directors who persist in carrying on the business of the company on credit, when the capital of the company has been expended, and its borrowing powers have been exhausted.

It may be urged, that as, if gain had resulted from the outlays made by the directors, the shareholders would have had the benefit of it, so it is only fair that if loss has unfortunately ensued they should sustain that loss. But in answer to this, the shareholders are entitled to say, "As you chose to act without authority, it rests with us to adopt or repudiate what you have done ; and we are not to be deprived of our right of repudiation, on the ground that if we elect not to repudiate your acts, we shall be bound to indemnify you." Neither has

(q) 29 Beav. 353.

(r) 30 Beav. 225.

(s) 3 N. R. 601.

Bk. III. Chap. 2. the maxim, *qui sentit commodum sentire debet et onus*, any
 Sect. 3. application; unless the shareholders had some opportunity, either of objecting to the outlays before they were made, or of rejecting the benefit and the burden at some subsequent period. If the shareholders, having had an opportunity of objecting to the proposed outlay, did not object; or if, having had an opportunity of rejecting the benefit derived from the outlay, they have declined to do so, then, indeed, the maxim may apply; but in the absence of any such opportunity it is impossible to hold them liable to indemnify the directors on the ground of having had the benefit of the expenditure. No liability can be established on this ground, unless it is to be held that a benefit is to be paid for, because it cannot be got rid of.

Observation on
 judgment in
 Baker's case.

With reference to the extract from the judgment in *Baker's case*, given above, the writer ventures to observe, that although the doctrine there laid down is apparently warranted by what fell from the Court in the case of *The German Mining Company*, yet, as already pointed out, the actual decision in that case by no means involves the necessity of holding that as between directors and shareholders the liability of the latter is to be determined by the benefits they have received rather than by the powers which they have conferred. When directors who have no power to borrow money find that the business of the company cannot go on without borrowing, they ought to disclose the truth to the shareholders. It cannot be successfully maintained that directors may, if they honestly believe it to be for the benefit of the company, advance and borrow money to an unlimited extent, and expend it in attempting to keep the company on foot, and then, having failed, make the shareholders, at least in unlimited companies, pay for the experiment.

Comparison of
 the foregoing
 cases with
 others.

Re the Worcester
 Corn Exchange
 Company.

The decisions noticed above must be contrasted with other cases.

In the *Worcester Corn Exchange Company's case* (t), a company was formed for the purpose of building a corn exchange. The deed of settlement of the company limited the amount of each shareholder's subscription, and authorised the directors to

(t) 3 De G. M. & G. 180.

create new shares and to raise money by borrowing, under certain restrictions. The capital of the company being expended, and more money being required, the directors advanced money themselves, and expended it in payment of debts of the company. They also, but in excess of their powers, borrowed money of a bank which had notice of the company's deed, and that money was similarly expended. It was held that the directors were not entitled to charge the shareholders, either in respect of the advances or in respect of the bank debt, beyond the amount of the capital which each shareholder had agreed to subscribe.

Again, in *Ex parte Cropper* (u), a committee of directors charged with the winding-up of a company, was held not entitled to be repaid by the company, expenses incurred in endeavouring to obtain the passing of a public bill pending in Parliament, for facilitating the winding-up of the affairs of insolvent companies generally; for to support bills in Parliament was not within the scope of the committee's authority.

These decisions are strictly in conformity with the sensible rule that agents are not entitled to any indemnity from their principals in respect of unauthorised expenditure; and in the first edition of this work the writer ventured to express a hope, that this rule, so essential to the protection of shareholders against directors, would not be frittered away; and that the principle of *The German Mining Company's case* would not be extended. That hope has been partially realised, for all attempts to extend that principle have failed, and its practical application is now confined to cases where the money has been applied in discharging debts for which the company was liable, or for carrying on the legitimate business of the company (x). Even when thus restricted, however, it must be borne in mind that debts for which a company is liable may as between the directors and the shareholders have been improperly contracted by the directors; and in such a case the directors ought to

(u) 1 De G. M. & G. 147.

(x) See the cases in the next note, and *Ex parte Williamson*, 5 Ch. 309; *Cork and Youghal Rail. Co.*, 4

Ch. 748; *Hill's case*, 9 Eq. 605; *Davis' case*, 12 Eq. 516; *The Catholic Publishing Co.*, 10 Jur. N. S. 193; and *ante*, p. 235 *et seq.*

Bk. III. Chap. 2. indemnify the shareholders, and not the shareholders the
Sect. 3. directors.

Limits of the principle above discussed.

1. Where money is raised for an unauthorised purpose.

Kent Benefit Building Society.

Notwithstanding the length to which the courts have gone in the cases observed upon above, directors who borrow money without authority, and apply it to purposes not falling within the scope of the company's business, are not entitled to be reimbursed by the shareholders. This is well shown by the case of *The Kent Benefit Building Society (y)*. There the managing committee of a benefit building society exceeded their powers by purchasing land, and by borrowing the money to pay for it. The repayment of the money was secured by a mortgage of the land purchased. The society was ordered to be wound up. The mortgage securities were realised for less than the amount due upon them, and the members of the committee had to make good the difference. They sought to prove the amount paid by them as a debt against the society; but it was held that the society was not liable. The fact of the borrowing appears to have been brought to the notice of the society at a general meeting; but there was nothing to show that the acts of the committee had been sanctioned by all the members of the society; and to buy land was not within the scope of the objects of the society, and was altogether *ultra vires*.

2. Where the right to indemnity is expressly restricted.

Gillan v. Morrison.

Again, the right of directors to indemnity, if expressly confined and limited, cannot be extended beyond the limit thus expressly set. The two following cases illustrate this.

In *Gillan v. Morrison (z)*, a company was formed for purchasing land in Segovia, and establishing a colony there. It was agreed at a meeting of the directors and proposed shareholders, that an expedition should proceed to Segovia, to examine and report upon the land which it was proposed the company should purchase; that the expense of the expedition should not exceed 1200*l.*; that the expense to that

(y) 1 Dr. & Sm. 417. See also *Cundliffe, Brooks & Co. v. Blackburn Building Soc.*, 9 App. Ca. 857, affirming 22 Ch. D. 61; *Blackburn Building Soc. v. Cundliffe, Brooks & Co.*, 29 Ch. D. 902; *Baroness Wenlock v.*

River Dee Co., 19 Q. B. D. 155; 36 Ch. D. 674; affirmed 10 App. Ca. 354; all noticed *ante*, pp. 186 *et seq.*, and 235 *et seq.*

(z) 1 De G. & S. 421.

amount should be defrayed out of the shareholders' deposits, and that if the expense should exceed 1200*l.*, the difference should be raised by a new issue of shares. Certain persons were appointed trustees to direct the fitting out of the expedition, to nominate the persons who were to conduct it, and to manage the fund supplied for defraying the expenses. The persons composing the expedition proceeded to Segovia, and arrived at the place where the lands in question were situate; and were then arrested and imprisoned. The object of the expedition was thus frustrated; the expenses incurred by its members greatly exceeded the fixed sum of 1200*l.*; and an attempt was made on behalf of the trustees to compel the shareholders to make good the excess. But it was held that, as between the trustees and the shareholders, the liability of the latter was limited to 1200*l.*, and that they were not bound to contribute more.

Again, in the case of *Selwyn v. Harrison* (a), the creditors of a firm executed a deed by which the business of the firm was placed in the hands of inspectors, and the creditors severally covenanted to indemnify the inspectors to a limited extent against the liabilities which they might incur in carrying on the business. It was held that the creditors were not bound, otherwise than by their covenants, to contribute to the payment of debts contracted by the inspectors in carrying on the business. The express covenant to indemnify the trustees to a definite amount, excluded any more extensive obligation to indemnify them which might otherwise have arisen.

The reader, however, will not fail to observe that both in *The German Mining Company's case* and in *The Norwich Yarn Company's case*, the shareholders had taken care to stipulate that their liability should not be unlimited.

It is scarcely necessary to remark that the shareholders in a limited liability company cannot be compelled to contribute more than the amount of their shares, either for the purpose of indemnifying directors or for any other purpose.

With respect to advances by directors, it has been held that if a loan is *bonâ fide* made by them to the company and the

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Selwyn v. Harrison.

Loans by
directors.

(a) 2 J. & H. 334.

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money advanced has been *bonâ fide* applied to the legitimate purposes of the company, the company must repay it (*b*). But the attention of the shareholders should be specially called to the fact of a loan being made by the directors. The duties of directors and the interest of creditors may very possibly conflict with each other; and it is always suspicious when a director claims to be a creditor of the company entrusted to his care, in respect of a matter of which the shareholders know nothing (*c*).

Allowances to
directors.

Directors of companies are generally allowed compensation for their trouble by express agreement (*d*); but where there is no such agreement they cannot, without the sanction of the shareholders, charge the company anything for their services (*e*), nor are they entitled to extra remuneration for extra work. In *The York and North Midland Railway Company v. Hudson* (*f*), the defendant contended that he was entitled to certain shares of the company by way of remuneration for the great advantages he had conferred upon it, and for which, as he alleged, the shares in question would be a meagre and inadequate return. But the Court held this contention to be wholly inadmissible, observing that,

York and North
Midland Railway
Company *v.*
Hudson.

“When Mr. Hudson accepted the office of chairman, he knew that the salary was not more than 1*l.* per week, and yet he was content to give his services on that footing. He might possibly have considered that the

(*b*) See *ante*, p. 380. See, also, *Murray's Executors' case*, 5 De G. M. & G. 750; *Ex parte Sedgwick*, 2 Jur. N.S. 949.

(*c*) As to loans by directors of companies governed by 7 & 8 Vict. c. 110, see *Baker's case*, 1 Dr. & Sm. 55; *Murray's Executors' case*, 5 De G. M. & G. 750; *Teversham v. The Cameron's Coalbrook, &c. Co.*, 3 De G. & S. 296, and *Bluck v. Mullaluc*, 27 Beav. 398, in which last case there was an express authority to borrow from the directors.

(*d*) Where there is such an agreement they are entitled to their fees, although the company proves a

failure, *Ex parte Johnson*, 27 L. J. Ch. 803. See *infra*, notes (*h*) and (*i*).

(*e*) *Dunston v. Imperial Gas Co.*, 3 B. & Ad. 125, where there was a resolution to pay them.

(*f*) 16 Beav. 485. See, too, *Evans v. Coventry*, 8 De G. M. & G. 835, *Oxford Benefit Build. Soc.*, 35 Ch. D. 502, and *Leeds Estate Co. v. Shepherd*, 36 Ch. D. 787, where directors were made to refund, with interest, the difference between what they were entitled to by the company's deed, and what they had voted themselves, and retained for their remuneration.

station and influence acquired in the position of chairman of the York and North Midland Railway was a remuneration for the time and labour bestowed by him, even if his services were not paid by any salary at all; but whether this were so or not, it is the duty of every man who accepts any situation, to perform the duties of it thoroughly and entirely. If they require his whole time and attention, it is his duty to give that whole time and attention to the due discharge of them. This Court can never countenance a person who is placed in a fiduciary situation in retaining for his own benefit sums of money which have come to his hands, or have been acquired by him in that character, although the acquisition of those sums is due to his own exertions, on the suggestion that his services were worth more than what was paid for them, and that he was himself entitled to ascertain and determine the just measure of their value. If this principle were allowed, I know not what there would be to prevent any clerk from retaining the property of his master, on the plea that his master had not adequately rewarded his great and meritorious services" (g).

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When a company is being wound up, it cannot make presents to its directors for past services at the expense of its creditors or otherwise than at the expense of those who make the presents (h). Moreover if a company is being wound up, fees due to its directors cannot be paid until the debts of the company have been satisfied (i).

If losses not properly chargeable to the company or the shareholders, without their consent, are charged to them in the accounts and reports in such an open and fair way as to enable them to see and understand what is done, and these accounts and reports are not objected to, but are, on the contrary, approved and adopted by the shareholders, it will be too late for them afterwards to dispute the propriety of what they may thus have sanctioned (k). Moreover, those shareholders who do not choose to attend meetings of which they have notice, cannot complain of their ignorance of what they might have known had they attended (l).

Ratification by
shareholders.

Where directors have misapplied moneys of a company by

Refunding by
shareholders.

(g) See, also, *Imperial Merc. Credit Assoc. v. Coleman*, L. R. 6 H. L. 189.

(h) See *Hutton v. West Cork Rail. Co.*, 23 Ch. D. 654.

(i) *Ex parte Cannon*, 30 Ch. D. 629.

(k) *Ex parte Chippendale*, 4 De

G. M. & G. 19, might perhaps have been properly decided on this ground alone.

(l) See *ante*, p. 311, and *Turquand v. Marshall*, 4 Ch. 376; *Lane's case*, 1 De G. J. & Sm. 504. See, also, *Ex parte Bignold*, 22 Beav. p. 165.

Bk. III. Chap. 2. improperly distributing them among the shareholders, and have
 Sect. 3. — been afterwards compelled to repay such moneys, the question arises whether the directors can compel the shareholders to refund the amounts they have respectively received. The circumstance that the directors made a mistake in point of law, would not entitle them to relief, but perhaps a mistake of fact might. This question has not yet been settled by judicial decision (*m*).

(*m*) See *National Funds Assurance Co.*, 10 Ch. D. 118, where the directors' rights, if any, against the shareholders were reserved; *Wye Valley Rail Co. v. Hawes*, 16 Ch. D. 489, where the Court refused to add the shareholders as third parties to an action against the directors.

CHAPTER III.

OF THE CAPITAL OF COMPANIES; OF CALLS; OF DIVIDENDS; AND
OF ACCOUNTS.SECTION I.—GENERAL OBSERVATIONS ON THE CAPITAL OF
COMPANIES.

THE word capital is used in many senses: we speak of Bk. III. Chap. 3. borrowed or loan capital; of share capital; of nominal capital; Sect. 1. — of paid-up capital; of unpaid-up capital; of issued and un-Capital. issued capital; of fixed capital; of floating capital. Again, capital is used by way of distinction from income, interest, dividends, and profits; and accounts are divided into capital accounts and income accounts. The idea underlying the various meanings of the word capital in connection with a company is that of money obtained or to be obtained for the purpose of commencing or extending a company's business as distinguished from money earned in carrying on its business. Money earned in carrying on the business may be treated as capital, or, in other words, may be capitalised, *i.e.*, it may be applied in paying off capital previously borrowed, or in replacing capital which has been lost or exhausted, or in some extension of business instead of being applied in defraying current expenses, or in being divided as profit.

In speaking of capital, it is of the first importance not to confound borrowed capital with share capital.

1. *Of borrowed or loan capital.*

A company's so-called borrowed capital or loan capital is Borrowed capital. neither more nor less than a debt; it is money borrowed by a

Bk. III. Chap. 3. company on certain terms, and is repayable by the company
 Sect. 1. according to the terms on which the money has been lent. The loan may be secured or unsecured—*i.e.*, the persons to whom the money is due may be entitled to a mortgage or charge on the company's property, or some definite part of it, or they may simply be entitled to be paid by the company out of its assets, without having any specific mortgage or charge upon them or any part of them (*a*).

The power of companies to borrow money has already been alluded to (Bk. II., c. 3) (*b*), and the observations there made are equally applicable to money borrowed as capital and to money borrowed for other purposes. The powers of companies to issue debentures, and the rights of debenture-holders have also been already noticed (*c*).

2. *Of share capital.*

Capital of
companies.

The capital of a company—*i.e.*, the money intended to be raised for carrying out its objects—is one of the matters determined upon as soon as its formation is seriously undertaken. The sum fixed upon ought to be so large as to be sufficient to enable the company to carry on its business with success; but it ought not to be larger than is necessary for this purpose; for the greater the capital sunk in any undertaking, the less will be each subscriber's share of profit, unless, indeed, the profits increase with the capital sunk, a result not so often obtained as anticipated. The probable success of any company depends very much upon the capital intended to be embarked in its projected business; if that capital is inadequate, it will probably be wholly lost; whilst if it is more than is required, the profits per share will be unnecessarily diminished. Hence the amount of a company's capital is one of those things which, when fixed, cannot be varied without the consent of *all* who join the company, unless there is some special provision to the contrary in the statute by which a company is governed, or in its charter or deed of settlement (*d*). This is well illustrated

Varying the
amount of
capital.

(*a*) See Debentures, *ante*, p. 196.

(*b*) *Ante*, p. 186 *et seq.*

(*c*) *Ante*, p. 196.

(*d*) See the observations of Lord

by *Smith v. Goldsworthy* (e), where it was held that notwithstanding the very large powers which by a company's deed were conferred upon a general meeting of shareholders, such a meeting was not authorised in so far altering the constitution of the company as to convert its capital from 2,000,000*l.* divided into 20,000 shares of 100*l.* each, into a capital of 1,000,000*l.* divided into 20,000 shares of 50*l.* each. Upon the same principle a person who agrees to take shares in a company with a given capital, is *primâ facie* not bound to take shares in a company with a different capital (f); but persons not unfrequently agree to take shares in companies the capital of which is not defined; and in such cases they are bound by their agreement, although the capital ultimately fixed upon may differ materially from that originally proposed (g).

The capital of a company is usually divided into a definite number of equal parts or shares; and the value and amount of such parts are by no means matters of small importance to the subscribers or shareholders; for not only is a small share more marketable than a large one, but the extent to which a subscriber or shareholder is liable to contribute to the capital or debts of a company depends on the number and amount of his shares. When, therefore, the number and amount of the shares into which the capital of a company is to be considered as divided are once fixed, no change in these respects ought to be valid unless made under some statutory or other special power, or unless assented to by all the shareholders; and there are cases to this effect (h). However, in the *Ambergate, &c., Railway Company v. Mitchell* (i), a company was incorporated by a special act, which enacted that the capital was to be

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Smith v. Goldsworthy.

Division of
capital into
shares.

Varying the
amount of
shares.

*Ambergate Rail-
way Company v. Mitchell.*

Bramwell in *Bouch v. Sproule*, 12 App. Ca. 405, as to leaving money in the business.

(e) 4 Q. B. 430. Compare *Ambergate, &c., Rail. Co. v. Mitchell*, 4 Ex. 540, noticed *infra*.

(f) See *Bourne v. Freeth*, 9 B. & C. 632; *Fox v. Clifton*, 6 Bing. 776; *Pitchford v. Davis*, 5 M. & W. 2.

(g) See, for example, *Norman v. Mitchell*, 5 De G. M. & G. 648;

Nicon v. Brownlow, 2 H & N. 455, and 3 ib. 686.

(h) See acc. *Feiling's case and others In re the Financial Corporation*, 2 Ch. 714; *Scwell's case*, 3 ib. 131; *Smith v. Goldsworthy*, 4 Q. B. 430; and *In re European Society Arbitration Acts*, 8 Ch. D. 679, at p. 705.

(i) 4 Ex. 540.

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divided into shares, and that for the purpose of voting, each sum of 25*l.* of the capital should be considered as representing one share. The shares were at first 25*l.* shares, but the company (*i.e.*, apparently the directors) afterwards reduced them to 20*l.* shares, and it was contended in an action for calls on a 20*l.* share, that the alteration in the number and value of the shares was invalid, and that the call was not recoverable. But it was held that there was nothing in the company's special act which prevented the directors from making shares of less than 25*l.* each; that they were not bound to fix the amount of the shares once for all; and that, as to the voting, the alteration could not deprive any one of his rights, inasmuch as the only effect of it was, to give every holder of a 25*l.* share, one share and a quarter, instead of one share as before.

Unissued
shares.

Unissued shares in a company belong to the company, and although they may be placed at the disposal of the directors, the directors must account to the company for whatever they may receive in respect of such shares (*k*). On the other hand, the shares held by a director are his separate property, and he is in no sense a trustee of them for the company (*l*).

Issuing too
many shares.

Persons who conspire to issue, as good, more shares than the authorised number, may be criminally prosecuted (*m*).

Nominal and
paid-up capital.

It is not usual for the whole of the sum fixed upon as the capital of a company, to be paid up at once by the subscribers or shareholders. The capital, and the number and amount of the shares into which it is to be divided, having been determined upon, and such shares having been subscribed for, an instalment only of the money they represent is paid, and the rest of that money is left to be paid as occasion may require. Hence the distinction between *paid-up* and *nominal* capital. The former is the money which the company actually has or has had; the latter consists of the sum to which it is entitled by virtue of the contract entered into by its subscribers and

(*k*) *York and Midland Rail. Co. v. Hudson*, 16 Beav. 485. So all unpaid calls, see *Webb v. Whiffin*, L. R. 5 H. L. 711; *Morris' case*, 7

Ch. 200; and 8 Ch. 800.

(*l*) *Gilbert's case*, 5 Ch. 559.

(*m*) See *R. v. Mott*, 2 Car. & P. 521.

shareholders, including the nominal value of any unissued shares (*n*). Bk. III. Chap. 3.
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A share, the whole nominal amount of which has been paid to the company is called a *paid-up* share. Whether a share can be effectually paid up otherwise than in money has been much discussed. The result of the decisions seems to be, that unless the contrary can be shown by reference to some statutory enactment, payment in money's worth, *e.g.*, in services rendered or goods supplied to the company, is equivalent to payment in money (*o*): whence it follows that paid-up shares can be issued in consideration of such services, &c. The abuse, however, of this rule led to the insertion in the Companies act, 1867, of a provision to the effect that shares in companies registered under the Companies act, 1862, must be paid up in cash unless some agreement in writing for payment otherwise is entered into and registered at or before the issue of the shares (*p*). The articles of association are not such an agreement (*q*).

The issue of paid-up shares otherwise than for value (*r*) is a breach of trust on the part of the directors; and the company and its creditors are entitled to have such shares treated as not paid up (*s*); unless they are in the hands of *bonâ fide* holders for value without notice of the facts (*t*).

(*n*) See *English Channel Steamship Co. v. Rolt*, 17 Ch. D. 715; and *Re Dronfield Coal Co.*, *ib.* p. 86, *per* Jessel, M.R.

(*o*) See *Currie's case*, 3 De G. J. & Sm. 367; *Pell's case*, 5 Ch. 11; *Schroder's case*, 11 Eq. 131. But see the observations of V.-C. Stuart in *Lecke's case*, 11 Eq. 100.

(*p*) See 30 & 31 Vict. c. 131, § 25. As to compelling the Registrar to register such agreements by *mandamus*, see *R. v. Registrar of Joint-Stock Companies*, 21 Q. B. D. 131. In that case the Registrar had refused to register a certain agreement on the ground that it was insufficiently stamped. In *Dublin and Wicklow Manure Co.*, 13 Ir. L. R.

200, the Court granted an order for registering a contract for 3,000 fully paid-up shares more than six years after the original issue of the shares, on being satisfied that the creditors would not be prejudiced. See further in book iv. c. 1, § 10, A (5).

(*q*) *Pritchard's case*, 8 Ch. 956.

(*r*) As to inquiring into the value, see *Pell's case*, 5 Ch. 11, and the others cited above.

(*s*) See *infra*, book iv. c. 1, § 10, A. (5), Holders of paid-up shares.

(*t*) See *Guest v. Worcester Rail. Co.*, L. R. 4 C. P. 9; *Waterhouse v. Jamieson*, L. R. 2 Sc. App. 29; *British Farmers, &c., Cuke Co.*, 7 Ch. D. 533; *affd. sub nom. Barkinshaw v. Nicolls*, 3 App. Ca. 1004; *Bar-*

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Issue at a
discount.

Where the liability of the members of a company is limited by charter, statute, or registration, it is, to say the least, questionable whether it can lawfully issue paid-up shares at a discount, and exonerate the taker from liability to pay the difference between the price at which he takes them and their nominal value (*u*). Shares in companies governed by the Companies' clauses consolidation act can be issued at a discount, with certain restrictions (*x*); but shares in companies formed and registered under the Companies act, 1862, cannot be so issued (*y*).

Preference
shares.

Unless the contrary is declared by statute, charter, or express contract, all shareholders are entitled to equal rights; and no class is entitled to any preference or priority over any other. Nor can a majority of shareholders deprive a minority of this right of equality (*z*).

Shares conferring on their holders preferential or additional rights not enjoyed by the holders of other shares are called *preference* shares. They can only be created when the authority to create them is given by statute or charter, or by agreement between all parties interested. If, however, authority to issue them is given by a company's memorandum of association, or by its articles of association, as originally framed, preference shares may be issued (*a*).

Kind of pre-
ference.

Preference shareholders are members, not creditors, of the company issuing the shares. The nature of the preferential rights which the holder of a preference share enjoys depends on the terms on which it is issued; for example, he may be

row's case, 14 Ch. D. 432; *A. W. Hall & Co., Limited*, 37 Ch. D. 712. See further in book iv. c. 1, § 10, A (5).

(*u*) See *Hoole v. Gt. Western Rail. Co.*, 3 Ch. 262; *West Cornwall Rail. Co. v. Moratt*, 12 Jur. 407; and as to cost-book companies, 32 & 33 Vict. c. 19, § 12.

(*x*) 26 & 27 Vict. c. 118, § 21; 30 & 31 Vict. c. 127, § 27; 32 & 33 Vict. c. 48, §§ 5—7.

(*y*) 30 & 31 Vict. c. 131, § 25; *Almadu and Tirito Co.*, 38 Ch. D. 415;

Addlestone Linoleum Co., 37 Ch. D. 191, overruling *Ince Hall Rolling Mills Co.*, 23 Ch. D. 545, n., and *Plaskynaston Tube Co.*, 23 Ch. D. 542.

(*z*) *Hutton v. Scarborough Hotel Co.*, 2 Dr. & Sm. 514 and 521; and 9 Jur. N. S. 551; *Ashbury v. Watson*, 30 Ch. D. 376. See also *Guinness v. Land Corp. of Ireland*, 22 ib. 349. Compare the cases in the next note.

(*a*) *Bridgewater Nav. Co.*, 39 Ch. D. 1; *South Durham Brewery Co.*, 31 Ch. D. 261; *Harrison v. Mexican Rail. Co.*, 19 Eq. 358.

entitled to some advantage in voting, or to be paid a dividend in priority to other shareholders, or to be paid his capital in priority to them in the event of a winding-up. It by no means follows that a right to priority to payment of dividend whilst a company carries on business involves a right to priority to payment of capital when business has ceased, and the assets of the company are being distributed amongst the shareholders. This subject will be adverted to hereafter. See as to dividends, *infra*, Companies governed by the Companies' clauses consolidation act, and section 3, and as to distribution of assets, Bk. IV., c. 1, § 13.

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Preference shareholders cannot be deprived of their rights by the other shareholders; but if their rights are created subject to modification or revocation they may be modified or revoked accordingly (*b*).

In the absence of special provision to the contrary, after the capital originally agreed upon has been raised and expended, any shareholder in an unlimited company has a right to say, I will subscribe no more, and if the company cannot now be carried on to a profit, I insist upon its being dissolved (*c*). This right is the only security which a shareholder, whose liability is not limited, has against being made responsible for an unlimited amount of debts. It certainly sometimes happens that calls are made after the original capital has been paid up and expended; but in order that the shareholders may be liable to pay such calls, they must either have agreed to submit to them, or must have allowed their directors to go on and contract debts which at last have to be met by a general contribution.

Effect of exhausting capital.

A company has no power to increase its capital, unless such power is expressly conferred upon it, or unless all the shareholders agree to subscribe or raise more than the sum originally determined upon (*d*); and if the capital of a company is fixed by its charter, letters patent, or special act, and no power is given to increase it, such capital cannot be increased, even by

Increasing capital.

(*b*) *Bannatyne v. Direct Spanish Tel. Co.*, 34 Ch. D. 287; *Direct Spanish Tel. Co.*, *ib.* 307.

Ireland, 22 Beav. 471; *Jennings v. Baddeley*, 3 K. & J. 78.

(*d*) See the cases in the last note, and *Fisher v. Tayler*, 2 Ha. 218.

(*c*) See *Electric Telegraph Co. of*

Bk. III. Chap. 3. the consent of all the members of the company. The dis-
 Sect. 1. — tinction, however, between borrowing money and increasing capital, which was adverted to on a former occasion, must not be overlooked; for it does not follow that because a majority of the shareholders of a company cannot increase the capital of the company, they cannot lawfully, and against the will of the minority, borrow money on the credit of the company (*e*).

Increasing
 capital of cost-
 book mining
 companies.

To the rule that, in the absence of special powers, the capital of a company cannot be increased against the will of a single dissentient shareholder, there is, apparently, an exception in the case of cost-book mining companies. It is stated by Mr. Tapping, in his useful essay on the cost-book, that the capital of a cost-book mining company may be increased in pursuance of a resolution of a special general meeting (*f*). No authority is cited for this statement, but it certainly is the constant practice of cost-book companies, which have spent all their capital, to make further calls on their shareholders, and to proceed against them in the Stannary court in case of non-payment. But it must not be overlooked that the capital of a true cost-book company is seldom if ever fixed beforehand (*g*), and that shareholders in cost-book mining companies have the power of relinquishing their shares if all calls upon them have been paid up; and that if they do not choose to avail themselves of this power, they may with propriety be treated as agreeing to go on, and to furnish more capital, should it be found necessary, for the purposes of the mine.

Statutory enact-
 ments relating
 to capital, &c.

Passing now to the various statutory enactments bearing upon the capital of companies, it may be observed, that there is no statutory provision relating to the capital of banking companies governed by 7 Geo. 4, c. 46, nor to that of companies governed by the Letters Patent act of 7 Wm. 4 & 1 Vict. c. 73.

(*e*) See *Bryon v. Metropolitan Saloon Omnibus Co.*, 3 De G. & J. 123; and *Australian Auxiliary Steam Clipper Co. v. Mounsey*, 4 K. & J. 733,

noticed *ante*, p. 191 *et seq.*

(*f*) Tapping on the Cost-Book, p. 22.

(*g*) See *ante*, p. 93 *et seq.*

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Companies governed by the Companies' clauses consolidation act.

The capital of companies incorporated by special act of Parliament is determined by such act, and is divided into shares of the number and amount thereby prescribed (*h*). ^{Capital of companies governed by 8 & 9 Vict. c. 16.} And by the Companies' clauses consolidation act it is enacted, that the subscribers shall pay the sums subscribed by them respectively, or such portions thereof as shall from time to time be called for by the company (*i*); and the company is empowered to make calls on the shareholders (*k*), and to enforce payment by action (*l*), and to forfeit the shares of defaulters (*m*). Subject to certain restrictions, new shares in these companies may be issued at a discount (*n*). The act in question does not itself confer any power to borrow, but it contains important provisions relating to the borrowing of money by companies empowered to borrow by their special acts (*o*), and enacts that money authorised to be borrowed may, unless it be otherwise provided by the special act, be raised by the creation of new shares (*p*), which, with reference to the payment of calls, are to be on the same footing as original shares (*q*), and are to be offered to the existing shareholders if the old shares are at a premium (*r*). It is also declared, that it shall be lawful for the company to convert or consolidate shares wholly paid up into capital stock, to be divided amongst the shareholders according to their respective interests therein (*s*): and provision is made for registering the owners for the time being of such stock and for the transfer thereof, and for securing to the holders such rights as they would have enjoyed if their shares had not been converted

(*h*) See *Ambergate, &c., Rail. Co. v. Mitchell*, 4 Ex. 540, noticed *ante*, p. 393.

(*i*) 8 & 9 Vict. c. 16, § 21.

(*k*) *Ib.* § 22. See *infra*, § 2.

(*l*) *Ib.* § 25.

(*m*) *Ib.* § 29. See *infra*, c. 6.

(*n*) See 26 & 27 Vict. c. 118, § 21, as amended by 30 & 31 Vict. c. 127, § 27, and by 32 & 33 Vict. c. 48, §§ 5-7.

(*o*) 8 & 9 Vict. c. 16, § 38 *et seq.*

(*p*) *Ib.* § 56.

(*q*) *Ib.* § 57.

(*r*) 8 & 9 Vict. c. 16, § 58. See *Pearson v. London and Croydon Rail. Co.*, 14 Sim. 541; and *Campbell v. London and Brighton Rail. Co.*, 5 Ha. 519, as to the time within which a shareholder must accept the offer.

(*s*) 8 & 9 Vict. c. 16, § 61.

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into capital stock of the company (*t*). The act authorises the directors to receive payment from any shareholder of the whole amount of his shares, and to pay him interest on the difference between such amount and the amount of calls actually made in respect of the same shares (*u*).

The company's monies are to be applied first in payment of the costs and expenses incurred in obtaining the special act, and secondly in carrying out the objects of the company (*x*).

26 & 27 Vict.
c. 118.

The Companies' clauses act, 1863 (*y*), contains some further important provisions relative to additional capital and debenture stock of companies governed by special acts of Parliament. The act in question does not confer any power to increase capital, or to issue preference shares, or to create debentures, but only regulates the mode of exercising such powers where they are conferred by the company's special act. There is one provision, however, relating to the rights of preference shareholders which requires special notice. The provision in question (§ 14) is to the effect that preference shares or stock shall be entitled to the preferential dividend or interest assigned thereto out of the profits of each year in priority to the ordinary shares and stock of the company; but if in any year there are not profits available for the payment of the full amount of preferential dividend or interest for that year, no part of the deficiency shall be made good out of the profits of any subsequent year, or out of any other funds of the company. Prior to the passing of this act, it had been held that preference shareholders were entitled to have any deficiency of profit in one year made good out of the profits of a subsequent year, even although nothing might be left for the ordinary shareholders (*z*). The enactment altering this rule only extends, it is conceived, to preference shares issued under some special act passed after July, 1863.

Preference
shareholders.

(*t*) *Ib.* §§ 62-64. Stock will pass under a bequest of shares. See Vict. c. 121, §§ 3 *et seq.*, ante, book ii., c. 1, § 2.

Morrice v. Aylmer, 10 Ch. 148; (*y*) 26 & 27 Vict. c. 118; amended by 30 & 31 Vict. c. 127, and 32 & 33 Vict. c. 48.
Dillon v. Arkins, 17 L. R. Ir. 636. But not debentures. See last case.

(*u*) *Ib.* § 24.

(*x*) *Ib.* § 65. See, also, 27 & 28 (*z*) See as to preference shares, *Webb v. Earle*, 20 Eq. 556; *Bangor*

Companies governed by the Companies act, 1862.

The capital of a company formed under the act of 1862, and limited by shares, must be specified in the memorandum of association (§ 8), and the capital of other companies formed under the act, and having a capital divided into shares, must be specified in the registered articles (§ 14).

Capital of companies governed by 25 & 26 Vict. c. 89.

By the Customs and Inland Revenue act, 1888 (*a*), the nominal capital of any company to be registered with limited liability is to be liable to an *ad valorem* stamp duty of two shillings per cent., and a statement of the amount of nominal capital and of any increase of capital must be sent to the Registrar of joint stock companies.

The number and amount of the shares into which the capital is divided must also appear in the memorandum or articles, as the case may be (§§ 8 and 14); and the shares must be numbered (§ 22); but the omission to number them will not prevent their holder from being a contributory in respect of them (*b*).

Shares in limited companies formed under this act cannot be issued at a discount (*c*).

Issue at a discount.

The original capital may be increased by the issue of new shares (§§ 12 and 50) (*d*); but notice of the increase must be given to the registrar of the joint-stock companies (§ 34).

Increase of capital.

and *Port Madoc Slate Co.*, *ib.* 59; *Henry v. Great Northern Rail. Co.*, 1 De G. & J. 606, and 4 K. & J. 1; *Sturge v. Eastern Union Rail. Co.*, 7 De G. M. & G. 158; *Crawford v. North-Eastern Rail. Co.*, 3 K. & J. 723; *Sterens v. South Devon Rail. Co.*, 9 Ha. 313; *Matthews v. Great Northern Rail. Co.*, 5 Jur. N. S. 284; *Coates v. Nottingham W. W. Co.*, 30 Beav. 86; *Corry v. Londonderry and Enniskillen Rail. Co.*, 29 Beav. 263; *Smith v. Cork and Bandon Rail. Co.*, Ir. L. R. 3 Eq. 356, and 5 *ib.* 65, where the preference shareholders established their right to many years' arrears.

(*a*) 51 Vict. c. 8, § 11.

(*b*) See *Ind's case*, 7 Ch. 485. See *ante*, p. 50, as to numbering shares.

(*c*) *Almada and Tiritio Co.*, 38 Ch. D. 415; *New Chile Gold Mining Co.*, 38 Ch. D. 475; *Adlestree Linoleum Co.*, 37 Ch. D. 191; overruling *Iace Hall Rolling Mills Co.*, 23 Ch. D. 545 n.; and *Plaskynaston Tube Co.*, 23 Ch. D. 542. And see 30 & 31 Vict. c. 131, § 35. Debentures may be issued at a discount. *Regent's Canal Ironworks Co.*, 3 Ch. D. 43; *Anglo-Danubian Steam, &c. Co.*, 20 Eq. 339; *Campbell's case*, 4 Ch. D. 470.

(*d*) See *Campbell's case*, 9 Ch. 1, as to the necessary meetings.

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Sect. 1.

An unlimited company when registering as a limited company may increase its capital by increasing the nominal amount of its shares (*e*).

Reduction of
capital.

The capital of a company not limited by shares, may apparently be reduced (see §§ 14 and 50) (*e*); but to reduce the capital of a company limited by shares was impossible as the act originally stood (*f*). This, however, may now be done under the provisions of the Companies acts, 1867 and 1877 (*g*), and with the sanction of the Court (*h*); but not otherwise, *e.g.*, by buying up and cancelling shares (*i*). But, as will be seen hereafter, inability to reduce capital does not prevent shares from being forfeited or surrendered in the usual way (*k*).

These acts and the orders of Court relating to the reduction of capital will be found in the appendix to the present treatise. By reference to them and to the decisions referred to below it will be seen that—

1. The reduction of capital must be authorised by the company's regulations as originally framed or as altered by special resolution. Where the articles require alteration they must be first altered by special resolution and then another resolution must be passed reducing the capital (*l*).

2. Where there are several classes of shareholders with different rights, *e.g.* holders of preference shares and holders of ordinary shares, the reduction must be so made as not to infringe the rights of either class (*m*); but it is not necessary

(*e*) See the Companies act, 1879 (42 & 43 Vict. c. 76).

(*f*) See § 12, and the cases of *Feiling and others*, 2 Ch. 714; *Sevell's case*, 3 Ch. 131. Even a company which had power to reduce its capital lost it by being registered as a limited company, *Droitwich Patent Salt Co. v. Curzon*, L. R. 3 Ex. 35.

(*g*) 30 & 31 Vict. c. 131, § 9 *et seq.*; 40 & 41 Vict. c. 26.

(*h*) § 11. For the practice of the Court in these matters, see the cases cited in the following notes, and *The General Mining Co.*, Ir. L. R. 6 Eq. 213.

(*i*) *Hope v. International Financial Soc.*, 4 Ch. D. 327; *Trevor v. Whitworth*, 12 App. Ca. 409; disapproving *Dronfield Silkstone Coal Co.*, 17 Ch. D. 76; *Taylor v. Pilsen, &c., Light Co.*, 27 Ch. D. 268, must also be considered as overruled on this point. See *Re Bulgooley Distillery Co.*, 17 Ir. L. R. 239.

(*k*) *Teasdale's case*, 9 Ch. 54. Compare the cases in the last note.

(*l*) *Patent Invert Sugar Co.*, 31 Ch. D. 166. Compare *Taylor v. Pilsen, &c., Light Co.*, 27 ib. 268. And see *ante*, book iii., c. 1, § 4.

(*m*) *Bannatyne v. Direct Spanish*

that the reduction should be made equally or ratably on all the shares (*mm*). The rights of the different classes of shareholders will depend on pre-existing arrangements. Lk. III. Chap. 3.
Sect. 1.

3. Shares never taken up or agreed to be taken up by any person may be cancelled by a special resolution of the shareholders, and without any application to the Court (*n*).

4. In all other cases an order of the Court having jurisdiction to wind up the company (*i.e.*, in England the Chancery Division of the High Court of Justice) is necessary in order to effect a reduction of capital (*o*).

5. With such sanction and the approval of a special resolution of the shareholders, the capital may be reduced whether fully paid up or not, and whether lost or not (*p*). But the Court will not sanction a reduction to correct an issue of shares at a discount (*q*).

6. Where the reduction of the capital involves either the diminution of a shareholder's liability or the payment to any shareholder of any paid-up capital (*r*), notice of an intended application to the Court must as a rule be given to the creditors (*s*); and security must be given to those creditors who will not assent (*t*).

7. The words "and reduced" must be temporarily added to the name of the company in all cases where the sanction of the Court to a reduction of capital is required, unless the Court dispenses with such addition (*u*); and the Court has only power to dispense with it where the reduction does not involve

Tel. Co., 34 Ch. D. 287, an instructive case, but too special to be usefully abridged.

(*mm*) *Barrow Hematite Steel Co.*, 39 Ch. D. 582; *Quebrada, &c., Copper Co.*, 40 Ch. D. 363.

(*n*) 40 & 41 Vict. c. 26, § 5.

(*o*) 30 & 31 Vict. c. 131, § 11. As to the discretion of the Court, see *per* Cotton, L.J., in *Bannatyne v. Direct Spanish Tel. Co.*, 34 Ch. D. 303.

(*p*) *Ib.* § 9, and 40 & 41 Vict. c. 26, § 3. Prior to this act the law was otherwise. See *Ebbw Vale Steel, &c., Co.*, 4 Ch. D. 827; *Kirkstall Brewery Co.*, 5 *ib.* 535, and compare *Crédit Foncier of England*, 11 Eq. 356.

(*q*) *New Chile Gold Mining Co.*, 38 Ch. D. 475.

(*r*) See 40 & 41 Vict. c. 26, § 4.

(*s*) 30 & 31 Vict. c. 131, §§ 11 and 17. General Order March, 1868, r. 5. The advertisements directed in this rule may be dispensed with by the Judge if he is satisfied that the interests of creditors will not be affected, *Tambracherry Estates Co.*, 29 Ch. D. 683.

(*t*) *Ib.* §§ 11, 13, and 14.

(*u*) *Ib.* § 10. The Court usually directs this addition to be used for three months, *Sharp v. Stewart and Co.*, 5 Eq. 155; but in *Telegraph Construction Co.*, 10 Eq. 384; *Crédit*

Bk. III. Chap. 3. either the diminution of any liability in respect of unpaid capital
 Sect. 1. or the payment to any shareholder of any paid-up capital (x).

8. The special resolution confirmed by the order must be registered (y).

All copies of the memorandum of association issued after the reduction must be in accordance with it (z).

Where the liability to calls is to be diminished or a division of paid-up capital is to be made (a), a time is fixed for creditors to come in and object, and if they do not come in within the time fixed for the purpose, they cannot afterwards effectually dissent (b). But unless a consent on their behalf is produced the Court will order a sum equal in amount to the money owing to the non-consenting creditors to be paid into Court (c). Creditors who receive no notice of the intended reduction are entitled to be paid their debts not only by the company, but, if necessary, by compelling the then members of it to contribute to their payment (d).

Reduction of
 paid-up capital.

By the Companies act, 1880, power is given to a company to reduce its paid-up capital by a return of accumulated profits to the shareholders, or to such of them as are willing to accept such a return. In exercising this power the following matters must be attended to:—

1. The profits in question must be capable of being distributed amongst the shareholders, with their consent, in the shape of a dividend or bonus (e) ;

2. A special resolution for the return of these profits or a part of them must be passed (f) ;

3. A memorandum containing the necessary particulars must be produced to and registered by the Registrar-General before the resolution can take effect (g) ;

Foncier of England, 11 Eq. 356, and
Patent Ventilating Granary Co., 12
 Ch. D. 254, fourteen days were fixed.
 See also cases in note (mm) and
 Buckley, 5th ed., p. 516.

(x) See 40 & 41 Vict. c. 26, § 4.

(y) 30 & 31 Vict. c. 131, §§ 15, 16,
 and see 40 & 41 Vict. c. 26, § 4. As
 to the form of the minute to be regis-
 tered, see W. N. 1888, pp. 54, 103.

(z) 30 & 31 Vict. c. 131, § 18.

(a) 40 & 41 Vict. c. 26, § 4.

(b) *Crédit Foncier of England*, 11
 Eq. 356, foot-note.

(c) *Patent Ventilating Granary Co.*,
 12 Ch. D. 254.

(d) 30 & 31 Vict. c. 131, § 17.
 See the section.

(e) 43 Vict. c. 19, § 3.

(f) *Ib.*

(g) *Ib.* § 4.

4. Since shareholders are at liberty to require the company Bk. III. Chap. 3. Sect. 1. to retain the moneys paid upon their shares (*h*) the company must specify (*i*)

- 1) in the annual lists of members returnable under § 26 of the Companies act, 1862, the amounts so retained by them ;
- 2) in the statements of account laid before any general meeting the amount of undivided profits which have been returned.

Provision is also made by the Companies act, 1867, for sub- Subdivision of shares. dividing a company's shares. This may be done by special resolution, without the sanction of any court (*k*) ; but the proportion between the amount paid and unpaid on the existing shares must be preserved (*l*) ; and all copies of the memorandum of association issued after the subdivision must be in accordance with it (*m*).

Notwithstanding the large powers given by the Companies Preference shares. act, 1862, to shareholders, enabling them to modify their articles of association by special resolution (*n*), it has been held not competent for them to issue preference shares unless the articles as originally framed authorise such issue (*o*). But it is otherwise if they do, although the memorandum of association is silent on the subject (*p*). By the act of 1867, special resolutions may be passed authorising arrangements on the issue of shares for a difference between their holders in the amount of calls to be paid, and the time of payment of such calls (*q*).

The capital of companies governed by the Companies act, Conversion into stock. 1862, may be consolidated and divided into shares of larger amount, and may be converted into stock (§§ 12 and 50) ; but notice of any such change must be given to the registrar (§ 28).

(*h*) *Ib.* § 5.

(*i*) *Ib.* § 6.

(*k*) 30 & 31 Vict. c. 131, § 21.

(*l*) *Ib.*

(*m*) § 22. As to the illegality of subdividing otherwise than under the act, see the cases of *Feiling and others*, 2 Ch. 714.

(*n*) 25 & 26 Vict. c. 89, § 50.

(*o*) *Hutton v. Scarboro' Cliff Hotel*

Co., 2 Dr. & Sm. 514 and 521, and 9 Jur. N. S. 551 ; *Ashbury v. Watson*, 30 Ch. D. 376. See as to the construction of articles on this point, *Melhado v. Hamilton*, 21 W. R. 874.

(*p*) *Harrison v. Mexican Rail. Co.*, 19 Eq. 358 ; *South Durham Brewery Co.*, 31 Ch. D. 261 ; *Bridgewater Nar. Co.*, 39 Ch. D. 1.

(*q*) 30 & 31 Vict. c. 131, § 24.

Bk. III. Chap. 3.
Sect. 1.

Return, showing
capital, &c.

Companies act,
1862.

Table A.

Provisions as to
capital.

The amount of a company's capital or stock, the shares into which the former is divided, and in which the latter is held, the persons to whom the shares or stock belong, the dates of transfers, and the amounts of calls paid and unpaid, must appear with other matters in the returns required to be made annually to the registrar (§§ 26 and 29).

By the regulations in Table A., the directors may, with the sanction of a special resolution of the members, increase the capital of the company by issuing new shares (No. 26). The amount of the increase and the amounts of the shares into which the increased capital is to be divided, rest with the members; but if they give no directions upon the subject, then with the directors (*ib.*). Unless the meeting, authorising the increase, gives directions to the contrary, all new shares are to be offered to the members in proportion to the existing shares held by them (No. 27). Shares not accepted by the members, may be disposed of by the directors as they think most beneficial to the company (*ib.*). Any capital raised by the creation of new shares is to be considered as part of the original capital, and is subject to the same provisions as regards calls and forfeiture of shares (No. 28) (*r*).

By the same regulations, the directors may, with the sanction of the members, convert any paid-up shares into stock (No. 23, §§ 12, 28, and 34 of the act). The transfer of stock is, as far as practicable, subject to the same regulations as the transfer of shares (No. 24), and the rights of stock-holders are assimilated, as nearly as circumstances will permit, to the rights of shareholders (Nos. 24 and 25; and see § 29 of the act).

Capital of exist-
ing companies.

With respect to existing companies registered under the act but not formed under it, the amount of their capital and the number of their shares, and the persons to whom they belong, and the amounts paid on them, must all be stated in the documents sent to the Registrar (§ 183); and if the capital has

(*r*) Clauses similar to these were contained in Table B. to the act of 1856. They were discussed with reference to borrowing money, in *Bryon v. Metropolitan Saloon Omnibus Co.*, 4 Jur. N. S. 680, and 3 De

G. & J. 123; *Australian Auxiliary Steam Clipper Co. v. Mounsey*, 4 K. & J. 733. As to the issue of preference shares, see *Bannatyne v. Direct Spanish Telegraph Co.*, 34 Ch. D. 287, and *ante*, p. 405.

been converted into stock, the amount of such stock, and the persons entitled to it, must be similarly stated (§ 185). Shares in these companies need not be numbered if they were not numbered before registration (§ 196, cl. 2). Subject, however, to the provisions of any special act of Parliament, or letters patent, the foregoing remarks concerning the capital and shares of new companies appear to be applicable to existing companies after their registration (see § 196; and as to companies registered under the acts of 1856—1858, see §§ 176—178).

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Sect. 2.

SECTION II.—OF CALLS.

Capitals of companies are usually raised by instalments or *calls*. Different kinds of calls.

“A call,” is an expression used to denote both a demand for money, and also the sum demanded; and in this last sense it signifies either the whole sum required to be raised at one time from the members of a company by a contribution amongst themselves, or that proportion of this entire sum which is payable in respect of each share.

There are two kinds of calls. First, there are those calls which are nothing more than the unpaid-up portions of the nominal capital of a company (*s*); and, secondly, there are those calls which are contributions required after that capital has been raised and exhausted. Calls of the first kind are payable by virtue of the agreement entered into by the subscribers and shareholders to contribute the sums fixed upon as the capital; but calls of the last kind are payable in consequence of the liability of shareholders to discharge their debts (*t*). If this liability is unlimited, the amount of calls (of the second kind) which a shareholder may be compelled to pay,

(*s*) Payments on allotment are not calls. See *Croskey v. Bank of Wales*, 4 Giff. 314.

(*t*) The difference here alluded to is illustrated by *Hull Flax Co. v.*

Wellesley, 6 H. & N. 38, in which it was held that calls made by liquidators might be recovered, although the notices required for other calls had not been given.

Bk. III. Chap. 3. depends entirely on the amount of the debts to be liquidated,
 Sect. 2. — and upon the number of the solvent co-shareholders. But no shareholder can be required to pay calls of the first kind beyond his unpaid proportion of the capital of the company. In the ensuing pages it is proposed to examine the law respecting calls of the first kind, so far as it relates to the persons empowered to make them, the purposes for, and the manner in which they may be made, the persons liable to pay them, and the law relating to actions for their recovery. The right to forfeit shares for the non-payment of calls will be noticed in a subsequent part of the work (*infra*, ch. 6).

1. *Of the persons by whom calls may be made.*

By whom calls
may be made.

The terms of the instrument which regulates the internal affairs of each company must be ascertained before the persons empowered to make calls on its shareholders can be known. Generally speaking, this power is naturally vested in the directors of the company. There is no statutable provision upon this subject applicable to banking companies governed by 7 Geo. 4, c. 46; nor to companies governed by the Letters Patent act of 7 Wm. 4 & 1 Vict. c. 73. In ordinary cost-book companies calls are made by the shareholders (*u*).

In companies
governed by
7 Geo. 4, c. 46,
7 Wm. 4 & 1
Vict. c. 73.

In companies
governed by
8 & 9 Vict.
c. 16.

By the Companies clauses consolidation act the power to make calls is given to the company where its special act is silent on the subject (*x*); and it has been held, that this power is one which may be exercised by the directors, and that consequently a general meeting of the shareholders need not be held for the purpose of making a call (*y*).

Companies go-
vern'd by the
Companies act,
1862.

By the schedule to the Companies act, 1862, the power of making calls is exerciseable by the directors (*z*); and this rule applies to all companies limited by shares and formed under that act, and having no articles of association of their own. The act itself, however, is silent upon the subject, and leaves the authority to make calls to be settled by the regulations of each company.

(*u*) See 32 & 33 Vict. c. 19, § 10. *Ac.*, *Rail. Co. v. Mitchell*, 4 Ex.

(*x*) 8 & 9 Vict. c. 16, § 22. 540.

(*y*) *Ib.* § 90. See *Ambergate*, (*z*) Table A., No. 4.

Where the power to make calls resides in the directors, a call made by those directors who are so *de jure* is valid, although an attempt may have been made to remove them, and other directors may have been (improperly) elected to take their place (*a*). Bk. III. Chap. 3.
Sect. 2.
Calls made by
directors *de jure*.

It need hardly be observed, that a call made by persons who have not the right to make it, is altogether invalid (*b*). Calls made by
improper per-
sons.

Where the power to make a call is exercisable by a certain number of persons collectively, a valid call cannot be made at a meeting at which less than the requisite number is present. Calls must be
made by the re-
quisite number
of persons.

The authorities on this point are numerous and conclusive (*c*). However, in *The Southampton Dock Company v. Richards* (*d*), power to make calls was given by a special act of Parliament to the directors of a company, and it was held that a call made by a court of directors (*i.e.*, by three of them) was valid, inas-
Southampton
Dock Company
v. Richards.
much as in the act the expressions "the directors" and "a court of directors" were used indiscriminately.

2. *The purposes for which calls may be made.*

First, as to starting the company.

It has been seen already that a person who agrees to take shares in a company formed for a given purpose, and with a given capital, is not bound to accept shares in a company formed for another purpose, or with a different capital; and it follows from this that a variation in the original scheme, if unassented to by a subscriber to it, affords an answer to any application for calls which may be made upon him (*e*). Calls made to
start a company.

Calls on allottees
of scrip, &c.

(*a*) *Swansea Dock Co. v. Leccin*, 497.
20 L. J. Ex. 447.

(*b*) See *Garden Gully Co. v. McLister*, 1 App. Ca. 39; *Howbreach Coal Co. v. Teague*, 5 H. & N. 151, and the remarks on this case in *York Tramways Co. v. Willours*, 8 Q. B. D. 685, and *London & Southern Counties Land Co.*, 31 Ch. D. 223. The general issue raised the question of validity. *South-Eastern Rail. Co. v. Hebblewhite*, 12 A. & E.

(*c*) See *Bottomley's case*, 16 Ch. D. 681; *Kirk v. Bell*, 16 Q. B. 290, and similar cases cited *ante*, p. 155, and p. 299, and compare *Thames Haven Dock Co. v. Rose*, 4 Man. & Gr. 552.

(*d*) 1 Man. & Gr. 448. *Southampton Dock Co. v. Arnett*, *ib.*

(*e*) See *Galvanized Iron Co. v. Westoby*, 8 Ex. 17.

Bk. III. Chap. 3. if no concluded agreement has been entered into, binding an
Sect. 2.

Before the whole
capital has been
subscribed.

allottee of shares to accept them, and to become a shareholder, he cannot be liable to calls (*f*). But if a subscriber to a company binds himself to take shares in a company which may differ, more or less, from that originally proposed to be formed, he cannot set up a variation in the original scheme as an answer to a demand for payment of the capital he has undertaken to contribute (*g*). Again, although the whole of a company's intended capital has not been subscribed, it does not follow that those who have subscribed are not bound to furnish funds to enable it to commence operations. If by a company's special act or charter the subscription of the whole, or a definite part of the proposed capital, is made a condition precedent to the right to require payment of anything from those who have subscribed, effect must be given to such a condition (*h*); but there is nothing in any general act now in force having any such effect (*i*); and consequently, where there is no special act or charter affecting the question, the liability of a subscriber to a company to contribute to its capital before the whole has been subscribed for depends entirely upon the contract into which he may have entered; and there are several instances in which persons have been held bound so to contribute, although the whole capital of the company which they had joined had not been subscribed for (*k*). *Primâ facie*, however, they are not so bound (*l*); and in all the cases in which they were held bound, the defendants had entered into a contract which precluded them from maintaining that the

(*f*) *Duke v. Andrews*, 2 Ex. 290.

(*g*) *Ante*, p. 22 *et seq.*, and p. 106; *Midland, &c., Rail. Co. v. Gordon*, 16 M. & W. 804; *Cork and Youghal Rail. Co. v. Paterson*, 18 C. B. 414; *Norman v. Mitchell*, 5 De G. M. & G. 648, and 19 Beav. 278. See, too, *Kidwelly Canal Co. v. Ruby*, 2 Price, 93.

(*h*) *Norwich and Lowestoft Nav. Co. v. Theobald*, 1 Moo. & M. 151. And see *North Stafford Steel Co. v. Ward*, L. R. 3 Ex. 172; *Peirce v. Jersey Waterworks Co.*, 5 ib. 209.

(*i*) There was a clause to the effect in question in the repealed act relating to banking companies formed after May, 1844. See 7 & 8 Vict. c. 113, § 5.

(*k*) *MacDougall v. Jersey Imperial Hotel Co.*, 2 H. & M. 528; *Lyon's case*, 35 Beav. 646. See *Scottish Petroleum Co.*, 23 Ch. D. p. 422.

(*l*) See *For v. Clifton*, 6 Bing. 776; *Pitchford v. Davis*, 5 M. & W. 2; *North Stafford Steel Co. v. Ward*, L. R. 3 Ex. 172.

subscription of the whole of the originally proposed capital Bk. III. Chap. 3.
Sect. 2. was an express or implied condition to their becoming shareholders (*m*).

With respect to companies formed under the Companies act, 1862, and having no special articles of their own, it is conceived that the directors have power to commence business, and make calls before the whole capital is subscribed for (*n*).

Secondly, as to carrying on the business of the company.

The unpaid-up instalments of a capital, agreed to be subscribed for a given purpose, cannot be lawfully required to be paid up for any purpose other than that to which the capital itself is by agreement properly applicable. In other words, a call cannot be lawfully made upon the shareholders of a company for any purpose not warranted by the constitution of that company (*o*). If it is made by the proper authority, in the proper form, and for a purpose which is not improper, then although some of the shareholders may disapprove of it, the call will be valid, and a court will not take upon itself to decide whether it ought or ought not to be made, but will leave that question to the decision of the shareholders themselves (*p*). But if a call is made for a purpose not warranted by the constitution of the company, such call will be invalid, and a court will interfere, even at the instance of one single

Calls made to
continue the
company's
business.

(*m*) See *Hutt v. Giles*, 12 M. & W. 492; *Waterford, Wexford, &c. Rail. Co. v. Dalbiac*, 6 Ex. 443; *London and Continental Ass. Co. v. Redgrave*, 4 C. B. N. S. 524; *Norman v. Mitchell*, 5 De G. M. & G. 648, and 19 Beav. 278.

(*n*) *Ornamental Pyrographic Co. v. Brown*, 2 H. & C. 63, and *MacDoughall v. Jersey Hotel Co.*, 2 Hem. & M. 528; *Lyon's case*, 35 Beav. 646. *Howbeach Coal Co. v. Teague*, 5 H. & N. 151, however, contains dicta to the contrary; and see *North Stafford Sterl. Co. v. Ward*, L. R. 3 Ex. 172, which, however

turned on the articles.

(*o*) In an action for calls this defence was open on a plea of never indebted. *South-East. Rail. Co. v. Hebblethwaite*, 12 A. & E. 497.

(*p*) *Yets v. Norfolk Rail. Co.*, 3 De G. & S. 293; *Cooper v. Shropshire Union Rail. and Can. Co.*, 6 Rail. Ca. 136, and 13 Jur. 443. See, also, *Orr v. Glasgow Rail. Co.*, 3 McQu. 799, where the money already obtained was applied to a purpose which was improper, unless sanctioned by a majority of shareholders.

Bk. III. Chap. 3. dissentient shareholder, to prevent the making of such a call.
Sect. 2.

The authorities bearing upon this subject will be adverted to hereafter, when the principles which guide the Court in interfering in matters connected with the internal affairs of companies come to be discussed (Bk. III. c. 9, § 2). There appears to be no objection in principle to making calls to meet prospective and estimated expenses; but it seems that in ordinary cost-book companies such calls were formerly considered improper (*q*).

Improper calls.

The power of making a call must be exercised as a trust (*r*), so as not to oppress or favour one shareholder, or set of shareholders, more than another; and if a call, which ought to be made on all the shareholders ratably, is made on some of them exclusively of the others, redress may be had (*s*). So, if a call is made on one shareholder only, with a view to enable him to make default and have his shares forfeited, and thus get out of the company, the call, and all the proceedings founded upon it, will be nugatory as against the other shareholders (*t*).

Mandamus to make a call.

A creditor who has obtained judgment against a company and cannot obtain satisfaction by execution in the ordinary way, has been held not entitled to a mandamus to compel the company to pay him by means of a call (*u*). But as before the Judicature acts a court of equity would, so now it is submitted any Division of the High Court will, if necessary, assist a person entitled to payment out of the funds of a company by making a call on the shareholders, and compelling them to furnish so much of the unpaid-up capital as may be required to liquidate the demand upon them (*v*). Whether they can be

Action to compel the making of a call.

(*q*) Such calls can, however, now be made for the estimated expenses of three months. See 32 & 33 Vict. c. 19, § 11.

(*r*) See *Gilbert's case*, 5 Ch. 559.

(*s*) *Preston v. Grand Coll. Dock Co.*, 11 Sim. 327. Compare *Mangles v. Grand Coll. Dock Co.*, 10 ib. 519; *Bailey v. Birkenhead, &c. Rail. Co.*, 12 Beav. 433; *Yotts v. Norfolk Rail. Co.*, 3 De G. & S. 293. These cases will be considered hereafter.

(*t*) *Richmond's case* and *Painter's case*, 4 K. & J. 305.

(*u*) *R. v. Victoria Park Co.*, 1 Q. B. 288. See, also, *The York Buildings Co.*, 2 Atk. 56.

(*v*) *Laur v. London Indisputable Pol. Co.*, 1 K. & J. 223; *Ex parte Durham*, 4 K. & J. 517; *Talbot's case*, 5 De G. & S. 386. The 7 & 8 Vict. c. 113, § 31, provided for making calls for the indemnity of a shareholder who had been compelled to

compelled to furnish more than their respective unpaid up instalments depends in each case upon the constitution of the company, *i.e.*, upon whether the liability of the shareholders is limited or unlimited. Bk. III. Chap. 3.
Sect. 2.

The amount of each call (meaning thereby an instalment of capital) (*y*), is generally fixed by those to whom the power of making calls is entrusted. Where there is no special provision in a company's act, charter, or regulations, limiting the amount of each call, that amount must be considered discretionary, subject only to the limits which are set, first, by the rule that no call can be made upon the shareholders of any company for any purpose not warranted by the constitution of that company; and secondly, by the rule that the shareholders are not bound to contribute more than the capital which may have been agreed upon. Amount of call
to be made.

Statements are sometimes made in prospectuses that it is not intended to call up more than part of the capital; but such statements afford no defence to a call for more than the amount stated. A statement of a present intention does not preclude a subsequent change. Power, however, is given by the Companies act, 1879, to an unlimited company, when registering under that act as limited, and to a limited company, by special resolution, to declare that any portion of the capital not already called up shall not be capable of being called up except in the event and for the purposes of the company being wound up. It is also provided that, when an unlimited company on registering itself as limited increases the nominal amount of its capital by increasing the nominal amount of each of its shares, no part of such increased capital shall be capable of being called up except for the purposes of the company being wound up (*z*). Intention not to
make a call.

Whether a call can be made on persons who have once paid up their shares in full but to whom part of the paid-up capital has been returned, is a question which turns on the true con- Calls to compel
repayment of
returned capital
or accumulated
profits.

pay a debt of the company. No act now in force contains any such provision; but his right to indemnity in such a case is clear. Whether his remedy would be by action or by

a petition to wind-up would depend on circumstances.

(*y*) *Ante*, p. 407.

(*z*) 42 & 43 Vict. c. 76, § 5.

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Sect. 2.

struction of the act, charter, or other instrument, conferring the power to make calls. But unless there are words showing the contrary, the power to make calls in such a case would be considered as exhausted. It would not, however, follow that the returned capital could not be recovered back (*a*). When the accumulated profits of any company are returned to the shareholders in reduction of its paid-up capital under the Companies act, 1880, the directors' powers of making calls are expressly extended to the amount of unpaid capital as augmented by this reduction (*b*).

Interest on
unpaid calls.

Calls not paid on the day fixed bear interest at rates varying in different companies; in the cases of companies governed by 8 & 9 Vict. c. 16, the rate is 4 per cent., see §§ 23 and 25 (*c*); and in companies governed by 25 & 26 Vict. c. 89, and Table A, the rate is 5 per cent., see Table A, No. 6. Calls made by cost-book companies may be made to bear interest at 5 per cent. (*d*). Interest on calls made in winding-up proceedings will be alluded to hereafter.

3. *Of the manner of making calls.*

Mode of making
calls.

In order that a call may impose any obligation on those on whom it is made, it must be made not only by the proper authority, but in the proper manner (*e*). What is the proper manner varies in different companies, but there are a few rules applicable generally to making calls to which it will be convenient at once to advert.

(*a*) See the Companies' clauses cons. act, 1845, § 121, and as to registered companies, compare *The Cardiff Coal Co.*, 11 W. R. 1007, with *Cardiff Coal Co. v. Norton*, 2 Eq. 558 and 2 Ch. 405; *Stringer's case*, 4 Ch. 475; *Rance's case*, 6 ib. 104.

(*b*) 43 Vict. c. 19, § 3.

(*c*) The act says lawful interest. The interest should not be added to the principal and be claimed with it as part of the call. See *Southampton Dock Co. v. Richards*, 1 Man. & Gr.

448.

(*d*) 32 & 33 Vict. c. 19, § 12. This section also provides that discount not exceeding 5 per cent. may be allowed for punctual payment.

(*e*) In an action for calls, never indebted put in issue the propriety of the manner in which they were made. *South-Eastern Rail. Co. v. Hobblerhite*, 12 A. & E. 497; *Shropshire Union Rail. Co. v. Anderson*, 3 Ex. 401; *Welland Rail. Co. v. Blake*, 6 H. & N. 410.

Except so far as irregularities may have been waived (*f*), it seems that an irregularity in making a call renders it invalid; and an irregularity in giving notice of it precludes the company from enforcing its payment against a person who has not received a proper notice (*g*). But after judgment has been recovered in an action for a call, such judgment will not be set aside on the ground that the call was improperly made; although the defendant may only have become acquainted with its invalidity since the judgment was obtained against him (*h*).

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Irregularities in making them.

The irregularities which are generally relied upon as exonerating a shareholder from the payment of a call may be reduced to two kinds, viz. (1,) those which affect the resolution for the call, and (2,) those which affect the notice requiring payment of a call which has been made. It may be useful to refer to each of these in turn.

1. *As to the resolution making the call.* It has been already seen that the resolution to be valid must be made by those persons with whom the power to make the call lies, and also by a competent number of such persons (*i*). It has also been seen, in an earlier part of the treatise, that what takes place at a meeting improperly convened is not legally valid, and is not binding upon those who have not, by their own acts, precluded themselves from objecting thereto (*k*). If, therefore, a call can only be made at an extraordinary meeting, specially summoned for the purpose, a call made at a meeting not duly summoned for that purpose will be invalid. But if a call can be made at an ordinary meeting not specially convened, it may also be made at an adjourned ordinary meeting, although such meeting may have been convened specially by a notice not stating the purposes for which it was to be held, and although the notice was not sent to everybody entitled to be present (*l*).

Irregular resolution making call.

(*f*) *British Sugar Refining Co.*, 3 K. & J. 408. *same Co. v. Rose*, 4 ib. 552.

(*i*) *Ante*, p. 409.

(*g*) See *Miles v. Bough*, 3 Q. B. 845, where the defendant had actually promised to pay the call. (*k*) *Ante*, p. 305 *et seq.*; and see *Garden Gully Co. v. McLister*, 1 App. Ca. 39.

(*h*) *Thames Haven Dock Co. v. Hall*, 5 Man. & Gr. 274; and *The* (*l*) See *Wills v. Murray*, 4 Ex. 843; see ib. p. 862.

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Resolution need
not state when,
where, or to
whom a call is
to be paid.

Prospective calls.

Intervals be-
tween successive
calls.

Although the persons making a call may also be required to determine when, where, and to whom the call is to be paid, it is not necessary that they should do this by the resolution making the call. It is sufficient if these particulars are stated in the notices issued in pursuance of such resolution (*m*).

A call may be made prospectively, *i.e.*, it may be resolved to-day that a call be made a month hence, and be payable a month after that (*n*). So, a call may be made payable by instalments (*o*). But (unless it is necessary to raise the whole capital at once) a power to make calls, as from time to time may be thought necessary, does not authorise those entrusted with the power, in calling up the whole capital at once, and make the same payable by instalments, so as to save themselves the trouble of determining at future periods whether any call shall be made or not (*p*).

It is frequently provided that no call shall be made at less than a certain interval of time since the making of the last call; and considerable difficulty has been felt in determining the exact time at which a call can be said to be made. After some hesitation, the courts have determined that a call must be considered as made when a resolution that it be made is duly passed (*q*): and this view has been adopted by the legislature so far as regards companies registered under the Companies act, 1862, and having no special regulations of their own (*r*). Where, therefore, a certain time is required to elapse between the making of two successive calls, that time must be

(*m*) *Newry, &c., Rail. Co. v. Edmunds*, 2 Ex. 118; *Sheffield, &c., Rail. Co. v. Woodcock*, 7 M. & W. 574; *Great Northern Rail. Co. v. Biddulph*, *ib.* 243.

(*n*) See *Sheffield, &c., Rail. Co. v. Woodcock*, 7 M. & W. 574.

(*o*) *Ambergate, &c., Rail. Co. v. Norcliffe*, 6 Ex. 629; *Lawrence v. Wynn*, 5 M. & W. 355; *North-Western Rail. Co. v. McMichael*, 6 Ex. 273; *Birkenhead, &c., Rail. Co. v. Webster*, *ib.* 277; *Ambergate, &c., Rail. Co. v. Coulthard*, 5 Ex. 459. As to an action of debt for the re-

covery of instalments before all are due, see the last three cases.

(*p*) *Stratford and Moreton Rail. Co. v. Stratton*, 2 B. & Ad. 518.

(*q*) See *R. v. Londonderry Rail. Co.*, 13 Q. B. 998, and 6 Rail. Ca. 1, sub nomine *Ex parte Tooke*; *Shaw v. Rowley*, 16 M. & W. 810; *Great North of England Rail. Co. v. Biddulph*, 7 M. & W. 243. See, as to calls made prospectively, *Sheffield, &c., Rail. Co. v. Woodcock*, 7 M. & W. 574.

(*r*) 25 & 26 Vict. c. 89, Table A. No. 5.

reckoned from the day on which the resolution for the first call is passed, up to the day on which the resolution for the second call is passed (*s*); and if this period is too short, the call will be invalid (*t*); and if the time required to elapse between the calls is so many days at least, neither of the days on which the calls are made ought to be included in the reckoning (*u*).

If a call is made too soon, and is then abandoned, in order to be replaced by another duly made, the irregular call should be declared void before the second is made (*v*).

A call will not be held invalid simply because the minutes of the meeting making it were signed after the meeting was over (*y*). In *Cornwall Great Consolidated Mining Company v. Bennett* (*z*), the question whether a call could be made by a resolution not reduced to writing and signed was raised, but not decided. The judges differed upon that point, but they agreed that there must be some better evidence of the making of a call than a minute neither signed nor confirmed until after the action was commenced.

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Minutes of meeting making calls.

Cornwall, &c.,
Mining Co. v.
Bennett.

2. *As to the notice of the making of a call.*—Inasmuch as a call is to be considered as made when a resolution that it be made is duly passed, and inasmuch as it would be unjust to any person liable to pay a call to treat him as in default unless he has had notice of the making of a call, it is held that such notice must be given to him before he can be dealt with as a defaulter; and this rule applies not only where notice is expressly required to be given by the company's act, charter, or deed of settlement, but also where there is no express provision upon the subject, and the shareholder has entered into an absolute covenant to pay such calls as may be made (*a*). Indeed, in one case it was said, that the notice made the

2. Irregular
notice of call.

(*s*) See generally as to the computation of time, *Railway Sleepers Supply Co.*, 29 Ch. D. 204.

(*t*) See the cases in note (*q*), and *Stratford and Moreton Rail. Co. v. Stratton*, 2 B. & Ad. 518.

(*u*) See *Watson v. Eales*, 23 Beav. 294.

(*x*) *Welland Rail. Co. v. Berrie*, 6 H. & N. 416.

(*y*) *Miles v. Bough*, 3 Q. B. 845, and see *ante*, p. 313.

(*z*) 5 H. & N. 423.

(*a*) *Miles v. Bough*, 3 Q. B. 845. See, too, *Edinburgh, &c., Rail. Co. v. Hebblethwaite*, 6 M. & W. 707; *Painter v. Liverpool Gas Co.*, 3 A. & E. 433; and as to cost-book companies, 32 & 33 Vict. c. 19, § 10.

Bk. III. Chap. 3. call (*b*); but this is not in conformity with the rule now esta-
Sect. 2. blished (*c*).

Form of notice. The notice to be valid must be in such form, if any, as may be required by the regulations of the company; and where a notice is required to be signed by the directors, it will not be sufficient if their signatures are affixed by a clerk (*d*).

A notice requiring payment to the account of a person at a particular bank, is equivalent to a notice to pay to that person (*e*).

Evidence of notice having been given. A list of persons prepared by a deceased clerk whose business it was to send the notices, and ticked or marked by him so as to show that notices were sent to the persons on the list, is admissible in evidence to prove that a notice was sent to them (*f*).

Mode of giving notice. The notice must be given in the manner required by the act or regulations applicable to each particular company (*g*).

In companies governed by 8 & 9 Vict. c. 16. By the Companies consolidation act it is provided (*h*), 1, that twenty-one days' notice at the least shall be given of each call; 2, that no call shall exceed the amount, if any, prescribed by the company's special act; 3, that successive calls shall not be made at less than the interval, if any, prescribed by the same act (*i*); 4, that the aggregate amount of calls made in any one year shall not exceed the amount, if any, prescribed by the same act; and 5, that all calls shall be paid to the persons, and at the times and places, from time to time appointed by the company. Under this act, therefore, there must first of all be a call made, and then at least twenty-one days' notice of it must be given (*k*), and the notice must state the person to whom, and the place and time at which, the call is to be paid. The twenty-one days are reckoned from and exclusively of the day on which the notice is given (*l*). If the

(*b*) *Shaw v. Rowley*, 16 M. & W. 810.

(*c*) *Ante*, p. 416, note (*q*).

(*d*) See *Miles v. Bough*, 3 Q. B. 845.

(*e*) *Ibid*. But see *The Leeds Banking Co.*, 1 Ch. 150.

(*f*) *Eastern Union Rail. Co. v. Symonds*, 5 Ex. 237.

(*g*) See *Watson v. Fales*, 23 Beav. 294.

(*h*) 8 & 9 Vict. c. 16, § 22.

(*i*) See *Ambergate Rail. Co. v. Mitchell*, 4 Ex. 540.

(*k*) § 136 provides for giving notices by post.

(*l*) *Re Jennings*, 1 Ir. Ch. 654, reversing on this point, *ib.* 236; and

notice states to whom, and when and where, the call is to be paid, it is immaterial whether the resolution for the call does the same or not (*m*). Bk. III. Chap. 3.
Sect. 2.

By the Companies act, 1862, it is provided (in Table A.) that the directors may, from time to time, make such calls upon the members, in respect of all monies unpaid on their shares, as they think fit (No. 4) ; but twenty-one days' notice, at least, must be given of each call (No. 4) (*n*). The notice may be sent by post (No. 95). A call is made at the time when the resolution of the directors authorising it is passed (No. 5). In companies
governed by the
act of 1862,
Table A.

The act makes calls specialty debts (§ 16), and gives a short form of pleading in an action for their recovery (§ 70).

By the Stannaries act, 1869 (*o*), it is provided that calls may be made at any meeting of the company with special notice (§ 10) (*p*), which may be either given personally or sent by post (§ 8). In companies
governed by the
Stannaries act,
1869.

The act does not make calls specialty debts (§ 13), but gives a short form of pleading for their recovery.

4. *Of the persons liable to pay calls.*

In order that a person may be liable to pay a call, meaning thereby a portion of the unpaid-up capital of a company, he must either have agreed to subscribe to such capital, or he must have become a shareholder in the company, or, thirdly, his liability must have devolved upon him as the representative of a subscriber or a shareholder. It will be convenient to allude—1, to subscribers ; 2, to shareholders ; 3, to the representatives of subscribers and shareholders. Persons to pay
calls.

see generally on the computation of time, *Railway Sleepers Supply Co.*, 29 Ch. D. 204.

(*m*) *Newry, &c., Rail. Co. v. Edmunds*, 2 Ex. 118 ; *Sheffield, &c., Rail. Co. v. Woodcock*, 7 M. & W. 574 ; *Great Northern Rail. Co. v. Biddulph*, ib. 243.

(*n*) A notice by a company, which

has changed its name since the call was made, may be given in the new name, *Shackleford, Ford & Co. v. Dangerfield*, L. R. 3 C. P. 407.

(*o*) 32 & 33 Viet. c. 19.

(*p*) § 5 provides that 7 clear days' notice must be given of such meetings.

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Sect. 2.

1. Calls on
subscribers.

1. *As to subscribers*.—There is no principle of common law which prevents a subscriber to an undertaking from being liable to calls before he has become an actual shareholder in the company he has agreed to join. His liability at common law depends entirely on the contract into which he has entered. But by several of the statutes relating to companies, a particular mode of proceeding for the recovery of calls is pointed out; and if that mode of proceeding applies, as it frequently does, to shareholders only (or their representatives), a person who is a mere subscriber as distinguished from a shareholder, cannot be made to pay a call by that particular mode of proceeding (*q*), whatever obligation he may have incurred by agreeing to take shares and to contribute his quota of capital (*r*).

Subscribers to
companies go-
vernied by
8 & 9 Vict.
c. 16.

By the Companies clauses consolidation act, it is expressly declared that calls may be made on the subscribers as well as on the shareholders (*s*); and as was seen in an earlier part of the work, subscribers may be registered as shareholders without any express consent on their part, and when registered they may be sued as shareholders for calls (*t*). But an allottee of shares who is not a subscriber, *i.e.*, who has not executed any instrument binding himself to contribute towards the capital of the company (*u*), cannot be sued for calls under the act in question (*r*).

Subscribers to
companies go-
vernied by the
act of 1862.

2. Calls on
shareholders.

Under the Companies act, 1862, Table A., calls are only authorised to be made on the members (*w*).

2. *As to shareholders*.—Who are shareholders, the effect of being on or off the register of shareholders, the effect of acting as a shareholder without being one,—are matters which were

(*q*) See *Galvanized Iron Co. v. Westoby*, 8 Ex. 17; *Thames Tunnel Co. v. Sheldon*, 6 B. & C. 341.

(*r*) For instances of successful actions against allottees on the contracts entered into by them, see *Duke v. Forbes*, 1 Ex. 356; *Duke v. Dice*, *ib.* 36; *Aldham v. Brown*, 7 E. & B. 164, affirmed on appeal, 6 Jur. N. S. 41.

(*s*) 8 & 9 Vict. c. 16, §§ 21, 22.

(*t*) See, accordingly, *Mil. Rail. Co. v. Gordon*, 16 M. & W. 804;

Cork and Youghal Rail. Co. v. Paterson, 18 C. B. 414, *ante*, p. 46.

(*u*) *Thames Tunnel Co. v. Sheldon*, 6 B. & C. 341.

(*v*) *Carmarthen Railway Co. v. Wright*, 1 Fos. & Fin. 282; *Waterford, Wexford, &c., Rail. Co. v. Pidcock*, 8 Ex. 279.

(*w*) 25 & 26 Vict. c. 89, Table A., No. 4; and as to who are members, see § 23 of the act, and *ante*, p. 119.

discussed in Book I. Chap. 2. In the present place, therefore, Bk. III. Chap. 3. Sect. 2. it is proposed merely to recapitulate, as shortly as possible, the results formerly arrived at, so far as they relate to the particular question of liability for calls.

A person who has never become a shareholder in the proper Person must be a shareholder, sense of the word, and who is not estopped by his own conduct from denying that he is a shareholder, is not liable to calls as a shareholder, although he may have been registered as one (*x*). Where a trustee is the person registered and recognised as a shareholder, his *cestui que trust* is not liable to the company for calls (*y*) ; and as a general principle, there must be some special ground for holding that a person who has no right as against a company to share profits, is compellable by the company to pay calls (*z*).

At the same time, whether a person is actually a shareholder or be estopped from denying that he is one. in a company or not, if he is estopped by his own conduct from denying that he is a shareholder, he cannot escape from the payment of calls properly made : and upon the ground of estoppel by conduct, subscribers to companies have frequently been held liable to calls as shareholders, although they had not complied with all the formalities necessary to render them shareholders in the strict sense of the word (*a*).

(*x*) *Galvanized Iron Co. v. Westoby*, 8 Ex. 17 ; *Waterford, Wexford, &c., Rail. Co. v. Pidcock*, 8 Ex. 279 ; *Carmarthen Rail. Co. v. Wright*, 1 Fos. & Fin. 282 ; *New Brunswick, &c., Rail. Co. v. Muggeridge*, 4 H. & N. 160, and 580. See, also, *Bloam v. Metropolitan Cub Co.*, 4 N. R. 51, where an injunction was granted.

(*y*) Not even in equity, see *Newry Rail. Co. v. Moss*, 14 Beav. 64.

(*z*) *Shropshire Union Rail. Co. v. Anderson*, 3 Ex. 401.

(*a*) *Hull Flac Co. v. Wellesley*, 6 H. & N. 38, where the shares were issued irregularly ; *Cromford, &c., Rail. Co. v. Lacey*, 3 Y. & J. 80 ; *Burnes v. Pennell*, 2 H. L. C. 497 ; *Sheffield, &c., Rail. Co. v.*

Woodcock, 7 M. & W. 574 ; *Cheltenham, &c., Rail. Co. v. Daniel*, 2 Q. B. 281 ; *London Grand Junction Rail. Co. v. Graham*, 1 ib. 271 ; *Birmingham, Bristol, &c., Rail. Co. v. Locke*, ib. 256, in all of which the calls were recovered. Compare these with *Irish Peat Co. v. Phillips*, 1 B. & Sm. 598, in which they were not, and *Wolverhampton New Waterworks Co. v. Hawksford*, 6 C. B. N. S. 336 ; 7 ib. 795 ; and 11 ib. 456, where an action for calls was partly successful and partly not. The defendant was held liable for calls made on shares properly issued and held by him, although there was no properly sealed register of shareholders ; but he was held not liable for calls on shares not num-

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Sect. 2.

Persons who are
shareholders
liable to calls.

A person who is a shareholder within the meaning of an act of Parliament which authorises calls to be made on shareholders, is liable to calls made in pursuance of the act, although if his liability had not depended on statutory provisions, he might have been able to resist payment. Upon this ground it is that infant shareholders in railway companies are liable to calls (*b*), if they do not repudiate their shares (*c*). So, a person who is a shareholder, and is as such under a statutory liability to pay calls, cannot escape from such liability on the ground that he was induced to become a shareholder by the fraud of the company; he must go further and show a repudiation of his shares, and that he is not in truth a shareholder (*d*); fraud and timely repudiation, however, afford a defence (*e*). Again, in the case of a registered joint-stock company, the company being actually created by registration, and having when created all the powers conferred upon properly constituted companies, a call upon its shareholders will be valid, although the company ought not to have been registered; and a shareholder in such a company cannot escape from his liability to pay the call, upon the ground that things required to be done before registration have never been done at all (*f*). So, in the case of a company incorporated by a special act, it is no answer to a call that the act was obtained by fraud (*g*).

Duration of
shareholder's
liability to calls.

A person who, by being a shareholder, has once become liable to pay calls, continues to be so liable until he has ceased

bered or distinguished from each other, and in respect of which there was in truth no register at all. See *ante*, p. 105; and quære whether this case can be relied upon after *Porter v. Emmens*, 1 C. P. D. 201 and 664.

(*b*) *Cork and Bandon Rail. Co. v. Cazenove*, 10 Q. B. 935; *Leeds and Thirsk Rail. Co. v. Fearnley*, 4 Ex. 26; *North-Western Rail. Co. v. McMichael*, 5 Ex. 114. Compare *Birkenhead, &c., Rail. Co. v. Pilcher*, 5 Ex. 121.

(*c*) *Newry, &c., Rail. Co. v. Coombe*, 3 Ex. 565; *Dublin and Wicklow*

Rail. Co. v. Black, 8 Ex. 181.

(*d*) *Deposit Life Assur. Co. v. Ayscough*, 6 E. & B. 761. As to giving particulars of the fraud, see *McCreight v. Stevens*, 1 H. & C. 454.

(*e*) *Bulch-y Phym Lead Mining Co. v. Baynes*, L. R. 2 Ex. 324. See bk. i., c. 3, as to rescinding contracts for fraud.

(*f*) *Banymen Iron Co. v. Barnett*, 8 C. B. 406. See, too, *Agricultural Cattle Insur. Co. v. Fitzgerald*, 16 Q. B. 432.

(*g*) See *Waterford, &c., Rail. Co. v. Logan*, 14 Q. B. 672.

to be a shareholder, or until some valid agreement has been made between him and the company by virtue of which the company is precluded from treating him any longer as liable to pay calls (*h*). If any such agreement has been made, it will afford a defence (*i*), although all the formalities required to be observed by out-going shareholders may not have been rigorously complied with (*k*).

In most companies, shares are not transferable, so long as the owner is indebted to the company for calls (*l*). Where this is the case, a person who has sold his shares, must pay all the calls made whilst the shares are registered in his name, before he or the purchaser can require the company to accept the latter as a shareholder in respect of the shares he has purchased (*m*); and so long as the purchaser is not a shareholder, the vendor continues to be one, and to be liable to calls (*n*).

Shares are not unfrequently sold after a call has been made and before it has become payable; and if in such a case the purchaser is accepted as a shareholder by the company, it may possibly find itself unable to sue either the vendor or the purchaser for the call after the time for its payment has elapsed. In *The Aylesbury Railway Company v. Mount* (*o*), which was a case of this sort, turning on the provisions of a special act of Parliament, the Court of Common Pleas held, that the call could not be recovered from the transferor, and the Court of Queen's Bench held that it could not be recovered from the transferee (*p*); for the transferor was not a shareholder when the call became payable, and the transferee was not a share-

Bk. III. Chap. 3.
Sect. 2.

When shares
have been sold.

Effect of sale
after call is
made, but before
it is payable.

Aylesbury Rail.
Co. v. Mount.

(*h*) See the cases of *Bosanquet v. Shortridge*, 4 Ex. 699; *Shortridge v. Bosanquet*, 16 Beav. 84; *Bargate v. Shortridge*, 5 H. L. C. 297; *Taylor v. Hughes*, 2 Jo. & Lat. 24, noticed *ante*, pp. 55, 56.

(*i*) *Plate Glass Co. v. Sunley*, 8 E. & B. 47. The validity of the defendant's retirement in this case was admitted by the demurrer.

(*k*) See *Bargate v. Shortridge*, and *Taylor v. Hughes*, *ante*, pp. 55, 56.

(*l*) The subject of the transfer of

shares will be alluded to hereafter.

(*m*) *R. v. Londonderry, &c., Rail. Co.*, 13 Q. B. 998; *R. v. Wing*, 17 ib. 645.

(*n*) See *London and Brighton Rail. Co. v. Fairclough*, 2 Man. & Gr. 674; *Humble v. Langston*, 7 M. & W. 517.

(*o*) 4 Man. & Gr. 651; reversed, but on purely technical grounds, 7 Man. & Gr. 898.

(*p*) *Aylesbury Rail. Co. v. Thompson*, 2 Ra. Ca. 668.

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holder when it was made; and the act in question was so worded as to render those only liable to be sued for calls who were shareholders at both those times. The Courts will, not, however, so construe an act as to deprive the company of all remedy for the recovery of a call, if they can possibly avoid it; and as the obligation to pay is created by the making of a call, the person who was the shareholder when a call was made, is *primâ facie* the person to pay it, whatever he may since have done with his shares.

North American
Colonial Assoc.
v. Bentley.

In *The North American Colonial Association of Ireland v. Bentley* (q), a company was incorporated by a special act, which provided for making calls on shareholders, and enacted that if at the time appointed for payment of a call, the holder failed to pay it, the company might sue such shareholder, and that it should be sufficient in an action for calls, to prove that the defendant was a shareholder at the time the call was made. The act also declared that shareholders who had sold their shares should remain liable for all future calls until transfers had been delivered to the secretary, and that no shareholder should be entitled to transfer his share until he should have paid all calls due upon it. Upon these somewhat conflicting enactments, it was held, that a shareholder who had transferred his shares after a call had been made, but before it had become payable, was liable to be sued for the call; and it was considered clear that the transferee could not be sued for it, although the transfer had been delivered to the secretary of the company as contemplated by the act.

Watson v. Eales.
Cost-book
company.

Again, in *Watson v. Eales* (r), which was the case of a cost-book mining company, one of the rules was, that no share should be transferred until all calls upon it were paid: and it was held that a transferee of shares in respect of which calls were in arrear, was not liable for such calls to the company, and that the company having recognised the transfer, could not forfeit the shares for non-payment of the calls.

Result of the
cases.

In the present state of the law, it cannot be said that there is any general rule determining whether the transferor or the transferee of a share is liable to the company for calls made,

but not paid before the transfer; for admitting the tendency to be in favour of holding the transferor liable, the statutory provisions generally applicable to the subject, are by no means uniform.

Under the Companies clauses act (s), and the Stannaries act 1869 (t) the person liable is the shareholder at the time of making the call.

This also appears to be the case with respect to companies governed by the Companies act, 1862, Table A. (u).

The right to forfeit shares for non-payment of calls, or for other reasons, will be examined hereafter (*infra*, c. 6), but it may be observed here, that both the Companies clauses consolidation act and the Companies act, 1862, Table A., provide that an action for calls may be maintained, although the shares in respect of which they became due, have been forfeited for their non-payment (x). Where this double remedy is not expressly given, it will not be presumed; and in such a case forfeiture will be an answer to an action (y), provided the forfeiture was in all respects legal, but not otherwise (z).

3. *As to the representatives of subscribers and shareholders.*— In adverting to the liability of the executors of a deceased person to pay calls, it is necessary to distinguish calls made before, from those made after the testator's death. Calls made before his death are payable out of his estate (a); and as to companies governed by the Companies clauses consolidation act, or the Companies act, 1862, rank like ordinary specialty debts (b). Calls made after his death, are also payable out of

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Statutory enact-
ments on this
subject.

Forfeiture of
shares for non-
payment of
calls.

3. Calls on the
representatives
of subscribers
and shareholders.

(s) 8 & 9 Vict. c. 16, §§ 26, 27. *Belfast, &c., Rail. Co. v. Strange*, 1 Ex. 739; *Birkenhead, &c., Rail. Co. v. Brownrigg*, 4 Ex. 426; *Wilson v. Birkenhead, &c., Rail. Co.*, 6 Ex. 626; *R. v. Londonderry, &c., Rail. Co.*, 13 Q. B. 998; *R. v. Wing*, 17 ib. 645. As to who is a shareholder, see *ante*, p. 104.

(t) 32 & 33 Vict. c. 19, § 13.

(u) See 25 & 26 Vict. c. 89, § 70, and Table A., No. 4; but see, also, No. 6, which throws some doubt on the point as to who is a member.

See *ante*, pp. 119, 128.

(x) 8 & 9 Vict. c. 16, § 29; 25 & 26 Vict. c. 89, Table A., No. 21. See *Great Northern Rail. Co. v. Kennedy*, 4 Ex. 417; *Inglis v. Great Northern Rail. Co.*, 1 Macqueen, 112.

(y) See *Giles v. Hutt*, 3 Ex. 18.

(z) See *Edinburgh, &c., Rail. Co. v. Hebblewhite*, 6 M. & W. 707.

(a) *Fyler v. Fyler*, 2 Ra. Ca. 813.

(b) As to 8 & 9 Vict. c. 16, see *Cork and Brandon Rail. Co. v. Goode*, 13 C. B. 826; and as to 25 & 26 Vict. c. 89, see § 16. As to com-

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his estate, if they are made whilst the shares are left in his name, and if he entered into any contract whereby he undertook to pay such calls as might be made upon his shares (*c*). In order that this liability may attach to the estate of a deceased shareholder, it is not necessary that his executors should become shareholders in respect of his shares, or that they should have been named in the contract sought to be enforced against them (*d*).

Calls not payable
by executors
personally.

By the Companies consolidation act it is expressly declared, that the executors of subscribers and shareholders shall pay the calls payable in respect of their testators' shares (*e*); but this only means that the executors are to pay out of their testators' assets; and unless they have actually become shareholders themselves, they must be sued as executors, and not as shareholders, for such calls as may be sought to be recovered from them (*f*). As a general rule it may be taken, that executors are never liable otherwise than in their representative capacity, unless they actually become shareholders (*g*).

Unless they are
themselves
shareholders.

But if they do become shareholders they become subject to the same obligations as other shareholders, and as between themselves and the company they are personally liable to calls, whatever the state of their testators' assets may be (*h*).

Trustees in
bankruptcy.

If a shareholder becomes bankrupt, calls made before his bankruptcy are provable against his estate; and under the Bankruptcy act, 1883 (*i*), his liability to future calls is also provable. Therefore, his order of discharge is a bar to all calls; even although the trustee in bankruptcy may neither sell the shares nor disclaim them (*k*).

panies governed by the Stannaries act, 1869, see § 13 of that act; and as to other companies, see *Robinson's case*, 6 De G. M. & G. 572. Specialty debts now rank with simple contract debts, 32 & 33 Vict. c. 46.

(*c*) *Heard v. Wheatley*, 3 De G. M. & G. 628; *Fyler v. Fyler*, 2 Ra. Ca. 813; *Wills v. Murray*, 4 Ex. 843; *Blount v. Hopkins*, 7 Sim. 51.

(*d*) *Ibid.*, and see *Baird's case*, 5 Ch. 725.

(*e*) 8 & 9 Vict. c. 16, § 21.

(*f*) *Birkenhead, &c. Rail. Co. v. Cotesworth*, 5 Ex. 226.

(*g*) *Buchan's case*, 4 App. Ca. 549, 583; *Wald of Kent Canal Co. v. Robinson*, 5 Taunt. 800.

(*h*) See *Armstrong v. Burnet*, 20 Beav. p. 435; *Spence's case*, 17 Beav. 203; *Duff's Executors' case*, 32 Ch. D. 301; *Buchan's case*, 4 App. Ca. 549 and 583.

(*i*) 46 & 47 Vict. c. 52, § 37.

(*k*) § 55, *infra*, c. 8.

5. *Actions for calls.*Bk. III. Chap. 3.
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An action for calls must be brought in the name of the company, if it is incorporated; and in the name of the public officer if the company is empowered to sue its shareholders in that manner (*m*). In cost-book companies the pursuer now can sue (*n*).

Several of the modern acts of Parliament relating to companies contain provisions having for their object the simplification of the pleading and proofs in actions for calls (*o*). Their general effect is to render it necessary for a statement of claim in an action for calls to state merely that the defendant, as a shareholder, is indebted to the company in so much money for calls, omitting all statements respecting the making of the calls in question (*p*). As regards proof, the general effect of the provisions referred to is to render it necessary to show merely three things; viz., first, that the calls sued for were made in point of fact; secondly, that the defendant was a shareholder when the call was made (*q*); and, thirdly, that he has had proper notice of the making of the call.

Calls made payable by statute (*r*), or by deed, are specialty debts; and an action for their recovery is not, therefore, barred by the lapse of less than twenty years (*s*).

(*m*) *Chapman v. Milvain*, 5 Ex. 61; *Wills v. Sutherland*, 4 Ex. 211, affirmed in error, 5 Ex. 715; *Skinner v. Lambert*, 4 Man. & Gr. 477; *Lawrence v. Wynn*, 5 M. & W. 355; *Smith v. Goldsworthy*, 4 Q. B. 430. See a declaration in an action for calls, by a company incorporated by the Canadian legislature, *Welland Rail. Co. v. Blake*, 6 H. & N. 410.

Verhampton, &c., Waterworks Co. v. Hawksford, 6 C. B. N. S. 336; 7 ib. 795, and 11 ib. 546; *Dundalk, &c., Rail. Co. v. Tapster*, 1 Q. B. 667; *Newport, &c., Rail. Co. v. Hawes*, 3 Ex. 476; *Wilson v. Birkenhead, &c., Rail. Co.*, 6 Ex. 626, and as to actions against executors, *Birkenhead, &c., Rail. Co. v. Cotesworth*, 5 Ex. 226.

(*q*) See, as to this, *ante*, p. 57, &c.; and p. 419 *et seq.*

(*n*) 32 & 33 Vict. c. 19, § 13.
(*o*) See 8 & 9 Vict. c. 16, §§ 26-28, 25 & 26 Vict. c. 89, § 70; and as to cost-book mining companies, 32 & 33 Vict. c. 19, § 13. See the form of statement of claim in R. S. C., Appx. C., § 4, No. 9.

(*r*) Calls made under a colonial act are simple contract debts only. See *Welland Rail. Co. v. Blake*, 6 H. & N. 415.

(*p*) See, as to the necessity of adopting the statutory forms, *Wol-*

(*s*) *Cork and Brandon Rail. Co. v. Goode*, 13 C. B. 826. Compare *Robinson's case*, 6 De G. M. & G. 572.

Actions for
calls.Statutory
enactments.Time for bring-
ing action.

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Defences.

The usual grounds of defence to an action for calls have all been considered. They may be reduced to :—

1. A denial that the defendant is a person liable to pay the call (*t*). The *cestui que trust* or principal of a shareholder is not liable to such an action (*u*). But a married woman may be sued for calls on shares standing in her own name (*x*).

2. A denial of the making of the call in point of fact.

3. A denial that the call, admitted to have been made in point of fact, was authorised (*y*), was made by competent persons (*z*), or in the proper manner (*a*), or for proper purposes (*b*).

4. A denial of any notice of the call.

5. A denial of such notice as the defendant was entitled to receive (*c*).

6. Set off (*d*).

7. Infancy (*e*).

8. Fraud (*f*).

It must be borne in mind, that if a shareholder does not avail himself of such defence as he may have at the proper time, he will be precluded from afterwards disputing either the validity of the call, or his liability to pay it (*g*).

Evidence.

Evidence of the making of a call is usually given by proving the resolution by which it was made; and this may be done either by the testimony of the company's secretary, or some other person having actual knowledge of the fact, or by the company's minute books, which, as was seen in a former

(*t*) See *ante*, p. 419 *et seq.*, and as to estoppel by conduct, *ante*, p. 421.

(*u*) *United Kingdom Mutual Ass. Assoc. v. Nerill*, 19 Q. B. D. 110.

(*x*) See 45 & 46 Vict. c. 75, §§ 1, 6, 9, and *ante*, pp. 41, 42.

(*y*) *Ante*, p. 414.

(*z*) *Ante*, p. 408.

(*a*) *Ante*, p. 414.

(*b*) *Ante*, p. 409.

(*c*) *Ante*, p. 417. In an action for calls against a contributory of a limited company being wound up voluntarily, it is no defence that the defendant had no notice that his

name was placed upon the list of contributories, see *Brighton Arcade Co. v. Dowling*, L. R. 3 C. P. 175.

(*d*) *Ante*, p. 273, and *infra*, under Winding-up. As to setting off calls not yet due where a shareholder sues a company, *Ryland v. Delisle*, L. R. 3 P. C. 17. Compare *Kent's case*, 39 Ch. D. 259.

(*e*) *Ante*, pp. 39, 422.

(*f*) *Ante*, p. 422, and *Smith v. Reese River Co.*, 2 Eq. 264.

(*g*) See *Thames Haven, &c., Co. v. Hall*, 5 Man. & Gr. 274; *Thames Haven, &c., Co. v. Rose*, 4 ib. 552.

chapter, are in many cases made admissible as evidence of the facts stated in them (*h*). Bk. III. Chap. 3.
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Evidence that the defendant was a shareholder is usually given by the production of the company's register, the effect of which has been considered already (*i*). Evidence.

Evidence that the defendant received due notice of the making of the call must be given by showing that the requisite advertisements (if any) were published, and that such notice as he was entitled to receive either actually reached him, or was so sent to him as to have probably reached him. This will be sufficient, in default of evidence that what was so sent him did not reach him (*j*).

SECTION III.—OF DIVIDENDS.

By a dividend is ordinarily meant that share of a company's profits which is payable to its members in respect of their shares. The proper fund for the payment of dividends is the excess of a company's earnings over the expenses incurred in obtaining them. But it is obvious that opinions may differ as to the items which ought to be taken into consideration in settling the two sides of the account, the balance of which may be properly divided as profit.

The power of settling questions of this kind is generally entrusted to the directors, with or without the sanction of the shareholders; and (subject to any special provision to the contrary, and to the limits placed on all powers of directors and shareholders by the doctrines of *ultra vires*) if there be a difference of opinion the voice of the majority must prevail. The majority can decide whether a dividend shall be paid before some particular debt is discharged (*k*); or before certain

(*h*) See *ante*, p. 312.

(*i*) See *ante*, p. 57.

(*j*) *Eastern Union Rail. Co. v. Symonds*, 5 Ex. 237.

(*k*) *Sterens v. South Devon Rail. Co.*, 9 Ha. 326; *Corry v. Londonderry, &c., Co.*, 29 Beav. 263.

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Cases where
dividends have
been held not
improper.

works are finished (*l*); and what losses and expenses ought to be treated as ordinary and payable out of current receipts, and what as extraordinary and payable out of capital or money borrowed (*m*). But the power of deciding such questions cannot be lawfully exercised for the dishonest purpose of making it appear that profits have been made, when in truth the current receipts have been less than the current expenses, and, in fact, there has been a loss (*n*).

Under ordinary circumstances, and in the absence of any agreement to the contrary, monies earned ought to be treated as profits of the year in which they are paid, and not as profits of the year in which they are earned (*o*); and in ascertaining the profits of a company for the purpose of making a dividend, debts incurred in the ordinary course of business ought to be deducted, but not debts incurred by exercising special powers of borrowing (*p*). Assets, moreover, may be estimated at a value which they may never realise (*q*). It has also been held that dividends may be paid by a company before its works are finished (*r*), and although its debts may be unpaid. The creditors of a company may be willing to allow their principal monies to continue unpaid, provided they are punctually paid the interest upon them; and if a company, after defraying all current expenses and the interest of its debts, has a surplus arising from its current receipts, there is no principle either of law or morality which requires that such surplus shall be accumulated, or forbids its division as profit amongst the shareholders. Whether dividends shall be paid whilst debts remain unpaid, or whether the whole or any part of the surplus of receipts over expenditure shall be accumulated or divided, are questions which it is competent for the majority of shareholders to decide (*s*).

(*l*) *Broune v. Monmouthshire, &c.*,
Co., 13 Beav. 32.

(*m*) See *Gregory v. Patchett*, 33
Beav. 595.

(*n*) *Bloxam v. Met. Rail. Co.*, 3
Ch. 337.

(*o*) See *per* Turner, L. J., in
Maclaren v. Stainton, 3 De G. F. &
J. 214. Compare *Broune v. Collins*,
12 Eq. 586.

(*p*) *Corry v. Londonderry Co.*, 29
Beav. 263.

(*q*) *Stringer's case*, 4 Ch. 475;
Rance's case, 6 Ch. 104.

(*r*) *Broune v. Monmouthshire, &c.*,
Rail. Co., 13 Beav. 32.

(*s*) *Stevens v. South Devon Rail.*
Co., 9 Ha. 313; *Corry v. London-*
derry Co., 29 Beav. 263.

Expenses incidental to the formation of a company are frequently paid off by instalments spread over a number of years, dividends being paid in the meanwhile (*t*); and if this is done openly, there seems to be nothing illegal in it. And it has been decided that if the articles allow it, dividends may be paid even by a limited company, if its income exceeds its expenditure, although its whole capital may have been sunk in obtaining wasting property, *e.g.*, a leasehold mine, and although no provision has been made for replacing the capital which is wasting away year by year (*u*).

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Expenses properly chargeable to capital, but paid out of income, may afterwards be charged to capital so as to increase a dividend. In other words, the income account may in such a case be recouped by the capital account, and the two accounts be set right by paying a dividend out of capital (*x*).

Payment of
profit out of
capital.

But except in a case of this sort payments out of capital cannot be profit; and to pay what are called profits or dividends out of capital is, under whatever disguise, tantamount to returning so much capital to the shareholders to whom such payments are made. In ordinary partnerships there is nothing to prevent the partners from withdrawing and diminishing their capitals wholly or in part if they all think proper to do so; nor is there any legal reason why partners should not, if they please, borrow money on the credit of the firm, and divide it wholly or in part among themselves. But neither course could be pursued without the consent of all the partners. With respect to companies, however, there are reasons why capital and money borrowed should not be applied in making payments to shareholders, even although they may all consent. In the first place, such an application of the money is calculated to deceive the public, and can hardly be made for any

Dividends paid
out of capital.

(*t*) See *per* Martin, B., in *Bale v. Cleland*, 4 Fos. & Fin. 144. See, also, *Burdwell v. Sheffield Waterworks Co.*, 14 Eq. 517.

(*u*) *Lee v. Neufchatel Asphalte Co.*, W. N. 1889, 31. Another case may be suggested. A newspaper may cost 100,000*l.* to start, that sum being spent its receipts may exceed

its expenses; the excess may be divided as profit, although the realisable assets, including the goodwill, may not sell for 10,000*l.* See

Buckley, 486 *et seq.*, 5th ed. See *Lee v. Neufchatel Asphalte Co.*

(*x*) *Mills v. North Rail. of Buenos Ayres Co.*, 5 Ch. 621. Compare *Hoole v. Great Western Rail. Co.*, 3 Ch. 262.

Lee v. Neufchatel Asphalte Co.
is now reported 41 Ch. D. 1

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honest purpose; and in the next place, capital raised, or money borrowed, in order to carry on the business of the company, cannot be properly applied for such a wholly different purpose as that of paying dividends to the shareholders (*y*). Even if all the shareholders can render such a course legal, a majority cannot; and the more difficult theoretical question whether all can is of little practical consequence (*z*). With respect, indeed, to companies governed by the Companies clauses consolidation act (*a*), or by the Table A. to the Companies act, 1862 (*b*), payment of dividends otherwise than out of profits is expressly prohibited, and will be restrained by injunction (*c*). Nay, more, articles of association providing for the payment of dividends out of capital are invalid, and the directors will be restrained from acting under them (*d*). Such a payment could not, it is conceived, be authorised, even by the memorandum of association (*e*).

Personal liability
of directors.

Independently of any statute, if a company pledges its funds for the payment of debts, and the directors misapply those funds by knowingly paying dividends out of capital, (or out of estimated profits which are never realised) they are compellable to replace not only the amount of dividends which they themselves have actually received in respect of their own shares, but also the whole amount of the dividends which they have caused to be paid to the other shareholders, and also interest thereon (*f*). But neither directors nor shareholders

(*y*) See *ante*, p. 321.

(*z*) See *Flitcroft's case*, 21 Ch. D. 519; *Macdougall v. Jersey Imperial Hotel Co.*, 2 Hem. & M. 528; *Fawcett v. Laurie*, 1 Dr. & Sm. 192; *James v. Eve*, L. R. 6 H. L. 335.

(*a*) 8 & 9 Vict. c. 16, § 121.

(*b*) Table A., art. 73.

(*c*) See *ante*, note (*z*), and *Dent v. London Tramways Co.*, 16 Ch. D. 344; *Davison v. Gillies*, ib. 347 n.; *Bloxam v. Metropolitan Rail. Co.*, 3 Ch. 337; *Hoole v. Great Western Rail. Co.*, ib. 262; *Holmes v. Newcastle, &c., Abattoir Co.*, 1 Ch. D. 682. Compare *Bardwell v. Sheffield Waterworks Co.*, 14 Eq. 517, as to

payment of dividends before capital is productive.

(*d*) *Guinness v. Land Corporation of Ireland*, 22 Ch. D. 349. Compare *Dent v. London Tramways Co.*, 16 Ch. D. 344, and see Buckley, p. 490, 5th ed.

(*e*) See *Trevor v. Whitworth*, 12 App. Ca. 409.

(*f*) *Oxford Benefit Building Soc.*, 35 Ch. D. 502; *Leeds Estate Building Soc. v. Shepherd*, 36 Ch. D. 787; *Alexandra Palace Co.*, 21 Ch. D. 149; *Flitcroft's case*, ib. 519; *Evans v. Coventry*, 8 De G. M. & G. 835. See the decree, clause 4. The decree was made without prejudice to the

are liable to refund dividends declared and paid on a *bonâ fide* valuation of assets, although such assets may ultimately prove valueless (*g*). Bk. III. Chap. 3.
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Moreover, directors who for fraudulent purposes and in order to induce shareholders and the public to believe that the affairs of a company are in a favourable position, declare dividends out of profits when there are no profits wherewith to pay them, and pay the dividends declared, either out of the capital of the company or out of money borrowed for the purpose, are guilty of a criminal offence, punishable both at common law (*h*) and by statute (*i*), and are liable to an action for damages at the instance of persons induced to take shares on the faith of such misrepresentation (*k*).

A resolution by the directors or shareholders of a company, to exclude a shareholder from his share of the profits, can only be defended where the right to make such a resolution has been clearly conferred by the act, charter, or deed of settlement by which it is governed. A resolution to exclude a shareholder from his share of profits is very like a resolution to forfeit his share, and is illegal unless specially authorised (*l*).

In *Adley v. The Whitstable Company* (*m*), an incorporated company of oyster fishers and dredgers made a bye-law to the effect, that if any member should sell oysters, except those taken from the company's grounds, he should forfeit 10*l.*, and be excluded from all share in the profits which the company might make after the penalty was incurred and before it was paid. A member infringed the bye-law and refused to pay the penalty, and was thereupon excluded from all share of the profits of the company. But on a bill filed by him against

Exclusion of shareholder from share of profits.

Adley v. Whitstable Company.

right of the directors to recover the dividends back from those who had received them. Compare *Turquand v. Marshall*, 4 Ch. 376.

(*g*) See *Stringer's case*, 4 Ch. 475; *Rance's case*, 6 ib. 104; and compare *Orford Benefit Building Soc.*, 35 Ch. D. 502, at p. 512; and *Leeds Estate Building Soc. v. Shepherd*, 36 Ch. D. 787.

(*h*) See *per* Lord Campbell, in

L.C.

Burnes v. Pennell, 2 H. L. C. 497; *R. v. Esdaile*, 1 Fos. & Fin. 213.

(*i*) See *infra*, p. 446, on fraudulent accounts.

(*k*) *Bale v. Cleland*, 4 Fos. & Fin. 117, and other cases, *ante*, p. 88.

(*l*) See *infra*, c. 6; and *Griffith v. Paget*, 5 Ch. D. 894.

(*m*) 17 Ves. 315; 19 ib. 304; and 1 Mer. 107.

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the company, it was held that the bye-law was invalid (*n*); that the company had no right to exclude any of its members from their share of profits on any such ground as that in question; and that it was no defence that the profits of which the plaintiff sought a share were actually gone, having been divided amongst the other members. An objection that the parties, if any, accountable to the plaintiff, were the officers of the company, who paid those profits, and not the company itself, was also overruled, and a decree was made in the plaintiff's favour.

Dividends payable rateably according to the number of shares.

Where all shares are on the same footing, the shareholders will *primâ facie* be entitled to have dividends declared and paid to them in proportion to the number of shares they respectively hold, although the amounts paid up in respect of them may be unequal (*o*). The same rule holds even where there are two issues of shares, if, by the regulations of the company, dividends are to be paid to all shareholders in proportion to their shares (*p*). But the application of this or any other general rule, may be excluded as regards any particular company by its act, charter or regulations.

Maughan v.
Leamington
Gas Company.

In *Maughan v. Leamington Gas Company* (*q*), certain shareholders in a gas company were entitled to dividends up to 10 per cent., and certain other shareholders were only entitled to dividends up to 7 per cent. The surplus profits, if any, were to be applied first, in making up the dividends of past years to these amounts, and secondly, in reducing the charges for gas. The profits not being sufficient to pay a dividend of 10 per cent. on the one set of shares, and also a dividend of 7 per cent. on the other set, it was resolved to pay a dividend of 8 per cent. on the first, and 7 per cent. on the second. It was contended that this resolution was illegal, and that the dividend ought to be declared in the proportion of 10 to 7; and a suit was instituted to enforce this view. But the Court declined to interfere; considering that, according to the true construction

(*n*) An action was directed to be brought to try this question.

(*o*) *Oakbank Oil Co. v. Crum*, 8 App. Ca. 65. Of course, unpaid calls can be set off against dividends.

See, also, 8 & 9 Vict. c. 16, § 120; 25 & 26 Vict. c. 89, Table A., art. 72.

(*p*) *Ibid.*; and see *Bridgewater Nav. Co.*, 39 Ch. D. 1.

(*q*) 15 W. R. 333.

of the statutes relating to the company, the above proportions Bk. III. Chap. 3. Sect. 3. might be departed from when the profits were insufficient to — pay both classes of shareholders their maximum amounts of dividend.

It is by no means unusual for companies who have expended Preference shares. their original capital, to raise (under some power specially conferred upon them for the purpose) further capital by the issue of "preference shares," *i.e.*, of shares the holders of which are to be entitled to share profits, up to a given amount, in preference to the other shareholders. The right to do this has been already examined (*r*).

Where preference shares have been issued by competent authority, the terms upon which they have been issued must, of course, be adhered to (*s*); and it has been decided in several cases, that unless there is some agreement or enactment to the contrary, preference shareholders are entitled to be paid out of the profits of the company their dividends to the amount guaranteed, before the other shareholders receive anything: so that if the profits divisible at a given time are not sufficient to pay the guaranteed dividends in full, the deficiency must be made good out of the next divisible profits; the ordinary shareholders taking no profits until all arrears of guaranteed dividends have been paid to the preference shareholders (*t*). This rule, however, has been altered by statute, so far as concerns companies governed by the Companies' clauses consolidation act (*u*).

No resolution of a company can vary the rights of the Rights of preference shareholders. holders of different classes of duly created shares (*x*). No resolution can deprive preference shareholders of their right to be paid the sums guaranteed out of the company's profits as soon as there are any. So long as there are no profits, the preference shareholders get nothing, for they are not creditors

(*r*) *Ante*, p. 396.

(*s*) *Bannatyne v. Direct Spanish Telegraph Co.*, 34 Ch. D. 287.

(*t*) See *Webb v. Earle*, 20 Eq. 556, and other cases cited *ante*, p. 400, note (*z*). In *Bauvor v. Port Madoe Slate Co.*, 20 Eq. 59, the preference

was held to extend to capital also.

(*u*) 26 & 27 Vict. c. 118, § 14, noticed *ante*, p. 400.

(*x*) *Ashbury v. Watson*, 28 Ch. D. 56; and 30 ib. 376; and compare *Bannatyne v. Direct Spanish Telegraph Co.*, 34 Ch. D. 287.

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Guaranteed
dividends.

of the company (*y*) ; but as soon as there are any profits to divide, they must be applied in payment of whatever is required to make up to the preference shareholders the sums guaranteed to them, including all arrears, if that is the bargain with them (*z*). Where the payment of a dividend of a certain amount is guaranteed, it becomes a question whether the monies payable under the guarantee form part of the general assets of the company, so as to be liable to the company's debts, or whether they belong to the shareholders individually. This question depends in each case upon the true construction of the contract and the *bona fides* of the transaction (*a*).

Dividends must be paid in money ; not in shares unless all the shareholders so agree (*b*).

Bonuses.

Bonuses or extra dividends may be declared out of accumulated profits or unexpected gains ; but questions as to these seldom arise, except where shares are bequeathed or are held for life only, and they will be found considered in another part of the work (*c*).

Married women.

Shares standing in the name of a married woman being now *primâ facie* her separate property, dividends payable in respect of them are *primâ facie* payable to her (*d*).

Effect of
charging order,
etc.

The law relating to the payment of dividends where charging orders have been made, where shares have been transferred, where transfers have been forged, and where a shareholder has died or become bankrupt, will be found in those parts of the work which treat of those subjects respectively.

(*y*) Preference shareholders are not necessarily entitled to a winding up to any preference in the division of assets. See, as to this, *infra*, book iv. c. 1, § 13.

(*z*) See notes (*t*) and (*y*), and *Dent v. London Tramways Co.*, 16 Ch. D. 344.

(*a*) Compare *Re Stuart's Trusts*, 4 Ch. D. 213 ; *Bouch v. Sevenoaks Rail. Co.*, 4 Ex. D. 133, where the creditors established their claim, and *Ex parte Jegon*, 12 Ch. D. 503 ; *Waterford, Dungarvan and Liltmore Rail.*

Co., 5 L. R., Ir. 103 & 584, where the shareholders were held entitled. As to the power of the company to release such a guarantee, see *Sheffield Nickel Co. v. Unwin*, 2 Q. B. D. 214.

(*b*) See *Hoole v. Great Western Rail. Co.*, 3 Ch. D. 262.

(*c*) See book iii. c. 7, § 3.

(*d*) See *ante*, p. 41 *et seq.* ; 45 & 46 Vict. c. 75, §§ 6-8. Formerly an action for them had to be brought by her and her husband ; see *Dalton v. Midland Rail. Co.*, 13 C. B. 474,

Dividends which are actually declared and payable by an incorporated company, are recoverable by action brought by the person having the legal title to receive them, against the company. The plaintiff must prove that the dividend sought to be recovered has been declared, and has become payable, and that he has the legal title to the dividend payable in respect of the shares by virtue of which he claims it. The circumstance that he is not a registered shareholder will not prejudice him if he has been wrongfully removed by the company from the register (*e*). A married woman may sue for dividends on shares standing in her own name (*f*).

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Actions for
dividends.

The non-payment of calls is, in most companies, an answer to an action for dividends; and even where it is not so, calls and dividends may be set off against each other (*ff*).

Except where an action would lie by one partner against another for money in the hands of the latter payable to the former, an action for a dividend due to a member of an unincorporated company would not lie before the passing of the Judicature acts (*g*).

Dividends of
unincorporated
companies.

Having made these general observations on the payment of dividends, it is proposed to notice shortly the legislative enactments bearing upon the same subject.

No shareholder in a company governed by the Letters Patent act, is entitled to any share of the profits of the company unless he is registered as a shareholder (*h*).

7 Wm. 4 & 1
Vict. c. 73.

The Companies' clauses consolidation act declares, that a company governed by it shall not be bound to see to the execution of any trust, and that the receipt of the person, or of any one of the persons in whose name a share may be registered, shall be a discharge to the company for all monies paid in respect of such share, notwithstanding any trusts to

8 & 9 Vict.
c. 16.

where a married woman sued alone for dividends and recovered, the non-joinder of her husband not having been pleaded in abatement.

(*e*) *Dalton v. Midland Rail. Co.*, 12 C. B. 458, and 13 ib. 474.

(*f*) 45 & 46 Vict. c. 75, §§ 1, 6-9,

and *ante*, p. 41 *et seq.*

(*ff*) *Ante*, p. 434, note (*o*), *infra*, p. 438.

(*g*) See *Lyon v. Haynes*, 5 Man. & Gr. 504. See Partn. 560 *et seq.*

(*h*) 7 Wm. 4 & 1 Vict. c. 73, § 20.

Bk. III. Chap. 3. which it may be subject (*i*). Interest upon all mortgage and
 Sect. 3. bond debts must be paid in preference to any dividends (*j*),
 which are to be declared only at general meetings of the share-
 holders (*k*). It is the business of the directors, previously to
 every meeting at which it is proposed to declare a dividend,
 to prepare a scheme showing the profits which have accrued
 since the last meeting at which a dividend was declared, and
 apportioning such profit, or so much of it as they may consider
 applicable to the purposes of dividend, among the share-
 holders (*l*). No dividend is to be paid out of capital (*ll*). The
 directors are authorised to set apart out of the profits such
 sum as they may think proper to meet contingencies, or for
 repairs and improvements (*m*). No shareholder is entitled to
 be paid any dividends unless he is registered, and has paid all
 calls due from him to the company (*n*).

Companies act,
 1862.
 Table A.

The Companies act, 1862, is silent upon the subject of
 dividends. By Table A., however, it is provided that the
 directors may, with the sanction of the members, declare a
 dividend to be paid to them in proportion to their shares
 (No. 72). But no dividend is payable except out of profits
 (No. 73); and before recommending any dividend, the directors
 may set aside out of the profits such a sum as they think
 proper as a reserve fund to meet contingencies, or for equalising
 dividends, or for repairing or maintaining the works con-
 nected with the business of the company (No. 74). Moneys
 due from any member, for calls or otherwise, may be deducted
 from the dividends payable to him (No. 75). Dividends
 unclaimed for three years may be forfeited for the benefit of
 the company (No. 76). No dividend bears interest (No. 77).
 If several persons are registered as joint holders of any share,
 the receipt of any one of them for the dividends payable in
 respect of such share is to be effectual (No. 1).

Companies act,
 1867.

The Companies act, 1867, gives a company power, if autho-
 rised by its regulations as originally framed, or as altered by

- | | |
|--|---|
| (<i>i</i>) 8 & 9 Vict. c. 16, § 20. | holders, see <i>ante</i> , p. 435, notes (<i>l</i>) |
| (<i>j</i>) <i>Ib.</i> § 48. | and (<i>n</i>). |
| (<i>k</i>) <i>Ib.</i> § 91. | (<i>ll</i>) <i>Ib.</i> § 121. |
| (<i>l</i>) <i>Ib.</i> § 120. As to withholding | (<i>m</i>) <i>Ib.</i> § 122. |
| dividends from preference share- | (<i>n</i>) <i>Ib.</i> §§ 8 & 123. |

special resolution, to pay dividends in proportion to the amount paid up on each share, in cases where a larger amount is paid up on some shares than on others (*o*). Bk. III. Chap. 3.
Sect. 4.

The Companies act, 1880, gives a company power, by special resolution, to return accumulated profits, which might be distributed as a dividend or a bonus to the shareholders in reduction of the paid up capital of the company, the unpaid capital being thereby increased by a similar amount. Any shareholder may decline to receive the return of his money, and require the company to retain it, but his share in regard to the payment of dividends is to be deemed to be paid up to the same extent only as the shares on which the repayment has been accepted. The company are to invest the amount retained on proper securities and pay the interest to the shareholder, applying the capital from time to time in paying the future calls, which may be made to replace the capital so reduced on those shares (*p*). Companies act,
1880.
Reduction of
paid-up capital.

SECTION IV.—OF THE ACCOUNTS OF COMPANIES.

1. *Of the duty to keep and the right to inspect them.*

The duty of keeping the accounts of companies necessarily devolves upon the managers and directors, or persons superintended by them. The right of the shareholders to inspect such accounts is also necessarily limited; for if every shareholder were at liberty to examine the accounts whenever he desired to do so, it would be impracticable for the accounts ever to be kept or made up in a proper manner. The right of shareholders to inspect accounts is usually qualified by express agreement; but it requires no express agreement to confer the right, for that is a consequence of their right to share profits: and where there is no agreement to the contrary, the writer apprehends that the shareholders of a company are entitled to have its accounts produced at their meetings and to appoint persons to inspect and examine them. Moreover, a right to Accounts of
companies.

Shareholders'
right to inspect
them.

(*o*) 30 & 31 Vict. c. 131, § 24 (3). (*p*) 43 Vict. c. 19, §§ 3-5.

Bk. III. Chap. 3. inspect includes a right to take a copy, if inspection is useless
Sect. 4. without a copy (*q*).

If a company's regulations provide for the inspection of its accounts by the shareholders at certain times and subject to certain restrictions, then, it seems, the shareholders are not entitled to inspect the accounts, otherwise than subject to the restrictions mentioned (*r*). Nor does a right to inspect the books of a company necessarily extend to the minutes of the meetings of the directors (*s*).

Mandamus to permit inspection.

It has been decided that a shareholder who, by the terms of a company's special act, is entitled at all seasonable times to inspect the books of the company, and who has applied for an inspection and has been refused, is not entitled to a mandamus against the company to allow inspection, unless, before inspection was refused him, he stated for what purpose he desired to see the books, and unless such purpose was, in the opinion of the Court, a reasonable purpose, and unless the refusal proceeded from the managing body (*t*).

Inspection in an action.

When a person obtains from a court of justice an order to inspect for some purpose connected with a pending litigation, he is bound to conduct himself in a peaceable, decorous, and gentlemanly manner, and not to make public, or communicate to strangers to the litigation the contents of the documents he may have had produced to him (*u*).

(*q*) See *Mutter v. Eastern and Midland Rail. Co.*, 38 Ch. D. 92.

(*r*) See *Baldwin v. Lawrence*, 2 Sim. & Stn. 18. In *Hall v. Connell*, 3 Y. & C. Ex. 707, the Court disregarded the restrictive clauses; but see *Morgan's case*, 28 Ch. D. 620; *Turney v. Bayley*, 4 De G. J. & S. 332; *Williams v. The Prince of Wales' Life Co.*, 23 Beav. 338; and as to the application of special rules after a winding-up order, see *Yorkshire Fibre Co.*, 9 Eq. 650.

(*s*) *R. v. Mariquita Mining Co.*, 1 E. & E. 289.

(*t*) *R. v. The Wilts and Berks Canal Co.*, 3 A. & E. 477; *R. v. The Grand Canal Co.*, 1 Ir. Law Rep.

337. See, too, *R. v. Clear*, 4 B. & C. 899; and generally as to the right of a member of a corporation to inspect the corporation's books, &c., see *Rea v. The Fraternity of Hostmen in Newcastle-upon-Tyne*, 2 Str. 1223, and notes to that case; *Holland v. Dickson*, 37 Ch. D. 669; *Mutter v. Eastern and Midland Rail. Co.*, 38 Ch. D. 92. In an action for calls the Court will not order the company to produce its books in order to enable the shareholders to fish out a defence, *Birm., Bristol, &c., Co. v. White*, 1 Q. B. 282.

(*u*) *Williams v. Prince of Wales' Life Ass. Co.*, 23 Beav. 338.

The directors of a company have no power, by any resolution of their own, to exclude one or more of their number from access to the company's books. This has been decided in suits against directors who, in answers to interrogatories as to the contents of the books, have sworn ignorance of those contents, and inability to ascertain them, in consequence of orders given by the other directors to the officers having charge of the books not to allow them to be seen. This answer is insufficient, for the directors interrogated must, if necessary, enforce their right to examine the books, and time will be afforded them for that purpose (*x*).

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Right of a
director to see
accounts, &c.

Some acts of Parliament relating to companies, contain express enactments upon the subject of accounts, and especially as to their audit and the right of the shareholders to examine them. These enactments, so far as they are contained in public general statutes now in force, are confined to companies governed by the Companies' clauses consolidation act, 8 & 9 Vict. c. 16, the Companies acts, 1862 and 1879, the Life Assurance Companies act, 1870, and the Stannaries act, 1887.

Statutory enact-
ments relating
to companies'
accounts.

As to companies governed by the Companies' clauses consolidation act.

The 8 & 9 Vict. c. 16, contains several provisions relating to the appointment and duties of auditors, and to the keeping and inspection of accounts, the general effect of which is as follows (*y*). Two auditors (or such other number, if any, as the company's special act may require) are to be elected by the shareholders, and one auditor is to go out of office every year, but may be re-elected. The directors are to deliver to the auditors, accounts and balance sheets before every ordinary meeting of shareholders, and the auditors are to examine the same, and either report upon them or simply confirm them,

Accounts of
companies
governed by
8 & 9 Vict.
c. 16.

(*x*) See *Taylor v. Rundell*, 1 Y. & C. C. C. 128, and 1 Ph. 222. See, too, *Stuart v. Lord Bute*, 12 Sim. 460; *Turquand v. Marshall*, 6 Eq. 112, which, however, was reversed, 4 Ch. 376.

as to taking security from officers entrusted with money belonging to the company, and to the summary method of making them account, see §§ 109-114. See, also, 30 & 31 Vict. c. 127, § 30.

(*y*) §§ 101-108, and 116-119, and

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and the auditors' report or confirmation is to be read at the meeting (z). The auditors, or any one of them, may appoint an accountant to assist in the audit (a). The directors are required to have proper accounts kept of all monies received or expended on account of the company, and to appoint a book-keeper to keep the accounts. The books of the company are to be balanced at the periods prescribed in the company's special act; and if no period is prescribed, fourteen days at least before each ordinary meeting. On the books being so balanced, a balance sheet is to be made up and signed by the chairman or deputy chairman of the directors, and such balance sheet is to exhibit a true statement of the capital, stock, credits, and property of every description belonging to the company, and the debts due by the company, and a distinct view of the profits or loss which may have arisen on the transactions of the company in the course of the preceding half-year. The books so balanced, and the balance sheet, are required to be open for the inspection of the shareholders at the principal office or place of business of the company for fourteen days before, and one month after every ordinary meeting, if no other periods are prescribed by the company's special act, and during those periods the shareholders have a right to see the books, and to take copies and extracts therefrom; but they are not entitled to demand inspection of such books at any other time, unless in virtue of an order signed by three directors (b).

As regards companies governed by the Companies act, 1862.

Accounts of com-
panies governed
by the act of
1862.

The Companies act, 1862, contains, as will be seen hereafter, some enactments relating to the production of books and accounts to inspectors specially appointed; but, with some exceptions, to be noticed presently, the act leaves each company to make what regulations it pleases respecting the keeping, inspection, and auditing of accounts on ordinary occasions.

(z) The audit does not bind the shareholders, *Bloxam v. Metropolitan Rail. Co.*, 3 Ch. 337.

(a) § 108. *Steele v. Sutton Gas Co.*,

12 Q. B. D. 68.

(b) See, also, as to loan capital accounts of railway companies, 29 & 30 Vict. c. 108.

By the regulations, however, in Table A., appended to the act (c), the directors are to cause true accounts to be kept of the stock in trade, receipts, expenditure, credits, and liabilities of the company. These books are to be kept at the registered office of the company, and are to be open to the inspection of the shareholders during the hours of business, subject to any reasonable restrictions, as to the time and manner of inspection, that may be imposed by the company in general meeting (d). The directors are required to lay before the shareholders, once a year at least, a statement of the income and expenditure of the company (e), and also a balance sheet containing a summary of the property and liabilities of the company, and a printed copy of such balance sheet is to be sent to every shareholder (f).

The accounts of the company and the balance sheets are to be examined by one or more auditors, the first of whom are to be appointed by the directors, but the others by the company at a general meeting (g). If no election is made, the Board of Trade is empowered, upon the application of one-fifth in number of the shareholders, to appoint an auditor, to be paid by the company (h). The auditors are at all reasonable times to have access to the books and accounts of the company, and are empowered to employ accountants at the expense of the company to assist in the investigation of the accounts; they are also empowered to examine the directors and other officers of the company, with reference to its accounts (i). The auditors are required to report upon the accounts and balance sheets, and their reports are to be read to the shareholders at the general meetings (k). And it is their duty to enquire into the substantial, and not merely the arithmetical, accuracy of the balance sheet, and to ascertain that it contains the particulars, if any, required by the articles

(c) By 25 & 26 Vict. c. 89, § 15, the regulations in Table A. apply to all companies limited by shares, and formed under that act, with the exception of such of those companies as have other regulations inconsistent with them.

(d) 25 & 26 Vict. c. 89, Table A.,

No. 78.

(e) Ib. Nos. 79 and 80.

(f) Ib. Nos. 81 and 82.

(g) Ib. Nos. 83 and 84.

(h) Ib. No. 91.

(i) Ib. No. 93.

(k) Ib. No. 94.

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Sect. 4.
Table A.

Bk. III, Chap. 3. of association, and correctly represents the state of the com-
 Sect. 4. ————— company's affairs (*l*). No director, and no person interested other-
 wise than as a member of the company in any of its transac-
 tions, can be an auditor (*m*).

Inspection by In addition to these regulations, the Companies act, 1862,
 Board of Trade ; enacts (*n*) that, upon the application of a certain number of the
 shareholders of any company registered under it, the Board of
 Trade may appoint inspectors to examine and report on the
 affairs of the company ; and such inspectors are empowered to
 call for and examine all the company's documents and books,
 and to examine the officers and agents of the company upon
 oath. The expenses of the inspectors are to be defrayed by
 the shareholders upon whose application they were appointed.

or by inspectors Instead of applying to the Board of Trade, the shareholders
 specially ap- themselves may, by special resolution, appoint inspectors for
 pointed by the the purpose of examining into the affairs of the company, with
 company. the same powers as are conferred upon inspectors appointed
 by the Board of Trade (*o*). A copy of the report of the
 inspectors, authenticated by the seal of the company, is ad-
 missible in evidence in any legal proceeding (*p*).

Statements to Every limited banking company, and every insurance com-
 be made by pany, and every deposit, provident, and benefit society governed
 banking, in- by the Companies act, 1862, is bound, before it begins business,
 surance and and twice a year whilst it carries on business, to make a state-
 other com- ment in a prescribed form, showing the state of its assets and
 panies liabilities ; and a copy of such statement is to be kept in some
 conspicuous place in the registered office of the company, and
 in every branch office where its business is carried on, and
 every member and creditor of the company is entitled to a copy
 of such statement on payment of sixpence (*q*).

Accounts of The accounts of every banking company registered as limited
 banking companies. after the passing of the Companies act, 1879 (*r*), are to be
 examined once at least in every year by an auditor or auditors
 who are to be elected annually by the company at a general

(*l*) *Leeds Estate Co. v. Shepherd*, 36
 Ch. D. 787.

(*m*) 25 & 26 Vict. c. 89, Table A.
 No. 86.

(*n*) *Ib.* §§ 56-59.

(*o*) *Ib.* § 60.

(*p*) *Ib.* § 61.

(*q*) *Ib.* § 44, and Schedule 1,
 Form D.

(*r*) 42 & 43 Vict. c. 76, §§ 7 and 8.

meeting. No officer of the company can be elected as auditor, but an auditor on quitting office is re-eligible. If any casual vacancy occurs in the office of auditor, the surviving auditor may continue to act, but if there is no surviving auditor, the directors are to call an extraordinary general meeting to fill the vacancy. The auditors are to be supplied with a list of all the books kept by the company, and to have access to all the books and accounts of the company in England, with power to examine the directors or other officers of the company in relation to them. It is their duty to make a report to the members on the accounts examined by them, and on every balance sheet laid before the company in general meeting, stating whether the balance sheet referred to in the report is full and fair, and properly drawn up, so as to exhibit a correct view of the state of the company's affairs as shown by the books of the company. The report is to be read to the company in general meeting. The balance sheets are to be signed by the auditors, the secretary or manager, and by at least three of the directors. The remuneration of the auditors is to be fixed by the general meeting at which they are appointed.

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As regards companies governed by the Life Assurance Companies Act, 1870.

By 33 & 34 Vict. c. 61 (s), all life assurance companies, other than those registered under the acts relating to friendly societies, are required to make out annually statements of their revenue accounts and balance sheets, and to lay the same before the Board of Trade, and to furnish printed copies to their shareholders and policy-holders.

Life assurance
companies.

As regards companies governed by the Stannaries act, 1887.

The purser of every cost-book mine is bound once at least in every sixteen weeks to enter in the cost-book accounts showing the actual financial position of the company at the end either of the financial month last preceding the entry, or of the last preceding calendar month, and to convene an ordinary

Cost-book
mining com-
panies.

(s) Amended by 34 & 35 Vict. c. 58 ; 35 & 36 Vict. c. 41.

Bk. III. Chap. 3. meeting of the shareholders, and to lay the accounts before the
 Sect. 4. meeting, and to submit them to the full inspection of all shareholders present. For any neglect of these duties he is liable to a penalty. The accounts, after they have been laid before the meeting of shareholders, are to be printed, and a copy sent to every shareholder, and to the lessors of the mine (t).

2. *Of false and fraudulent accounts.*

Fraudulent accounts.

Before quitting the subject of accounts it is necessary to draw attention to certain important statutory enactments relating to false and fraudulent accounts. The act 24 & 25 Vict. c. 96, consolidating the statutes relating to larceny and other similar offences, declares amongst other things that—

24 & 25 Vict.
c. 96.

Directors keeping fraudulent accounts.

§ 82. Whosoever, being a director, public officer, or manager of any body corporate or public company, shall as such receive or possess himself of any of the property of such body corporate or public company otherwise than in payment of a just debt or demand, and shall with intent to defraud, omit to make, or to cause or direct to be made, a full and true entry thereof in the books and accounts of such body corporate or public company, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned (u).

Directors, &c.,
destroying
books, &c.

§ 83. Whosoever, being a director, manager, public officer, or member of any body corporate or public company, shall, with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security belonging to the body corporate or public company, or make or concur in the making of any false entry, or omit or concur in omitting any material particular, in any book of account or other document, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned.

Publishing
fraudulent
statements.

§ 84. Whosoever, being a director, manager, or public officer of any body corporate or public company shall make, circulate, or publish, or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or

(t) 50 & 51 Vict. c. 43, §§ 23, 25, and 26, and compare §§ 9 and 10 of the Stannaries act, 1869 (32 & 33 Vict. c. 19).

(u) *i.e.*, by § 75, penal servitude for not more than seven nor less

than three (now five) years; or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement.

public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned.

§ 85. Nothing in any of the last ten preceding sections of this act contained shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any court, or upon the hearing of any matter in bankruptcy or insolvency; and no person shall be liable to be convicted of any of the misdemeanors in any of the said sections mentioned by any evidence whatever in respect of any act done by him, if he shall, at any time previously to his being charged with such offence, have first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding which shall have been *bond fide* instituted by any party aggrieved, or if he shall have first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency.

The Companies act, 1862, also declares, "that if any director, officer, or contributory of any company wound up under this act, destroys, mutilates, alters, or falsifies any books, papers, writings or securities, or makes or is privy to the making of any false or fraudulent entry in any register book of account or other document belonging to the company, with intent to defraud or deceive any person, every person so offending shall be deemed to be guilty of a misdemeanor, and upon being convicted shall be liable to imprisonment for any term not exceeding two years, with or without hard labour" (*x*). The same act also contains provisions by which directors and others may be ordered to be criminally prosecuted for offences relating to a company being wound up (*y*).

The Stannaries act, 1887, enacts that if any false statement or entry be made, or any material particular be omitted in the accounts of the cost-book mine with the knowledge of the purser, the purser shall be liable in respect of every such false statement, entry or omission, to a penalty not exceeding 50*l.*, to be recovered in a summary way before any two or more justices of the peace, who have power to award any portion of the penalty not exceeding one half to the prosecutor, provided

(*x*) 25 & 26 Vict. c. 89, § 166.

(*y*) *Ib.* §§ 167, 8.

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Sect. 4.

he is a shareholder in the company or a person having a legal right to inspect the accounts; and the manager of the mine is also liable to a similar penalty if any false statement or entry be made, or material particular be omitted to his knowledge (*z*).

Indictment for
conspiracy.

Independently of all statutory enactments, moreover, persons who conspire to defraud others by false representations as to the solvency of companies are indictable (*a*).

Action for mis-
representation.

It has already been seen that an action for damages will lie against directors and others who issue false reports, and thereby induce persons to take shares in a company (*c*); and that an action may be maintained to rescind contracts entered into with a company on the faith of such reports (*d*).

(*z*) 50 & 51 Vict. c. 43, § 24.

(*a*) *Ante*, p. 87.

(*c*) See *ante*, p. 88.

(*d*) *Ante*, p. 72 *et seq.*, and see *infra*, c. 9, § 4.

CHAPTER IV.

OF SHARES IN COMPANIES; THEIR TRANSFER AND SALE.

Bk. III. Chap. 4.

IN the present chapter it is proposed to examine the following subjects:—

Subject of present chapter.

§ 1. The nature of a share in a company.

§ 2. The amount of a share.

§ 3. The lien which the company has on its members' shares.

§ 4. Of charging orders on shares.

§ 5. The transfer of shares.

§ 6. The sales of shares and questions arising thereon.

SECTION I.—OF THE NATURE OF A SHARE AND OF THE DOCTRINE
THAT SHARES ARE PERSONAL ESTATE.

Speaking generally, a share in a company signifies a definite portion of its capital. A share in a company, like a share in a partnership, is a definite proportion of the joint estate, after it has been turned into money and applied as far as may be necessary in payment of the joint debts (*a*). But it includes a right to receive dividends, and, ordinarily, it confers a right to vote.

Nature of a share in a company.

What are called preferential or guaranteed shares, are nothing more than shares the owners of which are entitled to certain rights or privileges in addition to those enjoyed by other shareholders (*b*).

Preference shares.

(*a*) See *Watson v. Spratley*, 10 Ex. 222; *Sparling v. Parker*, 9 Beav. 450; *Hunt v. Gunn*, 13 C. B. N. S.

226. (*b*) See *ante*, p. 435.

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Sect. 1.

Investing in
shares.

Shares not
securities.

Shares in companies are unfortunately too often regarded by the public in the light of securities. To “invest money in shares” is a common expression not a little calculated to perpetuate this error. But it ought never to be overlooked that a shareholder is a partner in and not a creditor of the company to which he belongs; that if the company becomes insolvent, he cannot recover any part of his money invested until the company’s debts are paid in full; that whether he is personally liable for the payment of those debts, and whether the extent of his liability is unlimited or limited, depends upon the nature of the company.

Shares, in short, are property (*c*), but they are not securities; they have been held not to pass under a bequest of bonds, moneys, and securities (*d*); and no lawyer need be told that trustees who invest trust moneys in shares do that which is extremely improper, unless such an investment is clearly authorised by the trust or by statute (*e*). Directors who invest the money of their company in shares of other companies are *primâ facie* guilty of a breach of trust (*f*).

A power to invest upon the security of the funds of any company incorporated by act of Parliament, does not authorise an investment in preference railway shares (*g*).

A power to invest in the stocks, shares, or securities of an incorporated company paying a dividend, authorises an investment in the stock or shares of an incorporated company paying a fixed rate of interest to its stock or shareholders. But such a power does not justify a purchase or even the retention of stock or shares in the name of one trustee only, even although the regulations of the company do not allow shares to be held in the names of more than one person (*h*).

(*c*) *e.g.*, for purposes of succession duty, *A. G. v. Montefiore*, 21 Q. B. D. 461.

(*d*) *Oyle v. Knipe*, 8 Eq. 434; *Collins v. Collins*, 12 Eq. 455; *Hulleston v. Goultsbury*, 10 Beav. 547.

(*e*) See 23 & 24 Vict. c. 38, § 10, and R. S. C., Ord. xxii., r. 17. As to investing in shares on which the company has a lien, see *New London*

Brazilian Bank v. Brocklebank, 21 Ch. D. 302.

(*f*) *Hope v. International Financial Soc.*, 4 Ch. D. 327; *Joint Stock Discount Co. v. Brown*, 3 Eq. 139.

(*g*) *Harris v. Harris*, 29 Beav. 107.

(*h*) *Consterdine v. Consterdine*, 31 Beav. 330. See, also, *Butler v. Withers*, 1 J. & H. 332, where the Court ordered shares to be sold

Although shares are not securities on which trustees can invest without an express power so to do, shares in incorporated companies are stock within the meaning of the Trustee act, 1850, and orders for their transfer under that act may accordingly be made (*i*).

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Shares are stock within the meaning of the Trustee acts.

Shares in companies are expressly declared by statute to be personal estate in the following cases :—

Shares in companies usually personal estate.

1. Shares in companies governed by the Companies' clauses consolidation act (8 & 9 Vict. c. 16, § 7).

2. Shares in companies governed by the Companies act, 1862 (25 & 26 Vict. c. 89, § 22).

Shares in other companies are also, as a rule, personal and not real estate (*k*). But it cannot be affirmed that shares in companies are universally personal estate, inasmuch as there are undoubtedly exceptional cases which render it necessary to examine the constitution of every company before the character of its shares can be determined. The point to ascertain is whether the shareholders have individually any interest in land as land, or whether their interest is represented by mere money (*l*).

In conformity, however, with the general rule, it has been rather than leave them in the name of one trustee.

(*i*) See 13 & 14 Vict. c. 60, § 2; *Re Angelo*, 5 De G. & Sm. 278. See, also, *Re Ives*, 9 Jur. N. S. 611, as to orders under the Lunacy regulation act.

(*k*) See Partn., pp. 343 *et seq.*

(*l*) See *Morris v. Glyn*, 27 Beav. 218, where shares in an unincorporated iron company, working iron got from its own estates, and having estates for other purposes than those of iron manufacture, were held to be within the Mortmain act, although by the deed of settlement of the company the shares were declared to be personal estate. This case was, however, disapproved in *Entwistle v. Davis*, 4 Eq. 272. By act of Parliament New River shares are real estate. See *Townsend v. Ash*, 3 Atk. 336. Debentures are

not an interest in land, *Mitchell v. Moberly*, 6 Ch. D. 655; *Holdsworth v. Davenport*, 3 Ch. D. 185; *Chandler v. Howell*, 4 Ch. D. 651; and *Ashton v. Lord Langdale*, 4 De G. & Sm. 402; *Alexander v. Bearn*, 30 Beav. 153; and other cases to the contrary must be considered as overruled. See *Attree v. Howe*, 9 Ch. D. 337. Nor is debenture stock created under the Companies' clauses act, 1863, *Attree v. Howe*, *ubi sup.* See as to mortgages of rates, *Jerris v. Lawrence*, 22 Ch. D. 202; *Thornton v. Kempson*, Kay, 592; *Re Harris*, 15 Ch. D. 561; as to bonds of Harbour Commissioners, *Martin v. Lacon*, 33 Ch. D. 332; Stock of the Metropolitan Board of Works has been decided to be so, *Cluff v. Cluff*, 2 Ch. D. 222. See now 51 & 52 Vict. c. 42, §§ 4 and 10.

Bk. III. Chap. 4. held that shares in a waterworks company will pass under an unattested will if made before the present Wills act (*m*) ; that shares in dock, canal, mining, or railway companies are not interests in land within the meaning of the Mortmain act ; nor within the fourth section of the Statute of Frauds ; and do not give a right to vote for members of Parliament (*n*). And after some conflict of opinion, it seems at last settled that this is so, although the shares are not expressly declared to be personalty in the act, charter, or deed of settlement constituting the company. The cases establishing these propositions are here collected for reference :—

Mortmain act,
51 & 52 Vict.
c. 42.

1. *Shares not interests in land within the old Mortmain acts.*

Land companies, *Entwistle v. Davis*, 4 Eq. 272.*

Dock companies, *Hilton v. Giraud*, 1 De G. & Sm. 183 ;* *Sparling v. Parker*, 9 Beav. 450 ;* *Walker v. Milne*, 11 Beav. 507.*

Railway companies, *Ashton v. Lord Langdale*, 4 De G. & Sm. 402,* (shares and scrip) ; *Linley v. Taylor*, 1 Giff. 67, and 2 De G. F. & J. 84.

Canal companies, *Ashton v. Lord Langdale*, ubi sup. ;* *Edwards v. Hall*, 6 De G. M. & G. 74 ; *Walker v. Milne*, 11 Beav. 507 ;* *Langham's Trusts*, 10 Hare 446 (*o*).

Gas companies, *Sparling v. Parker*, 9 Beav. 450.*

Waterwork companies, *Ashton v. Lord Langdale*, ubi sup.*

Banking companies, *Ashton v. Lord Langdale*, ubi sup. ; (*p*) *Myers v. Perigall*, 11 C. B. 90, and 2 De G. M. & G. 599.*

Cost-book Mining companies, *Hayter v. Tucker*, 4 K. & J. 243.

Foreign Mining companies, *Baker v. Sutton*, 1 Keen, 234.

Insurance companies, see *March v. A.-G.*, 5 Beav. 433, where the question arose on the bequest of a policy payable out of the funds of the company.

* In all the cases thus marked, the shares were declared to be personal estate by the company's charter,

act, or deed of settlement. In the other cases nothing was declared as to this point.

(*m*) *Bligh v. Brent*, 2 Y. & C. Ex. 268, and *Weekley v. Weekley*, ib. 281, note.

(*n*) *Watson v. Black*, 16 Q. B. D. 270 ; *Bulmer v. Norris*, 9 C. B. N. S. 19 ; *Acland v. Lewis*, ib. 32 ; *Tripper v. Nichols*, 18 ib. 121. See, also, *Bennett v. Blain*, 15 ib. 518,

and *Freeman v. Gainsford*, 18 ib. 185.

(*o*) *Tomlinson v. Tomlinson*, 9 Beav. 459, *contra*, cannot be relied upon.

(*p*) *Ware v. Cumberland*, 20 Beav. 503, *contra*, was overruled in *Edwards v. Hall*, 6 De G. M. & G. 74.

2. *Shares not interests in land within the meaning of the 4th section of the Statute of Frauds.*

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Statute of
frauds, § 4.

Waterwork companies, *Bligh v. Brent*, 2 Y. & C. Ex. 268; *Weekley v. Weekley*, ib. 281, note.

Cost-book Mining companies, *Powell v. Jessopp*, 18 C. B. 336; *Walker v. Bartlett*, 18 C. B. 845; *Watson v. Spratley*, 10 Ex. 222 (q).

Banking companies, *Humble v. Mitchell*, 11 A. & E. 205.

Railway companies, *Duncuft v. Albrecht*, 12 Sim. 189; *Bradley v. Holdsworth*, 3 M. & W. 422.*

Although, however, shares in companies holding land are not interests in land, it does not therefore follow that they have all the attributes of goods and chattels. They are not goods, wares, or merchandise within the exception in the Stamp acts, exempting agreements relating to the sale of goods, shares, and merchandise from stamp duty (r). Nor are they goods and chattels within the meaning of the Factors acts (s); nor within the seventeenth section of the Statute of Frauds, which requires an agreement for the sale of goods and chattels for the price of 10*l.* and upwards, to be in writing (t); but their price may be recovered in an action for "goods and chattels" sold and delivered (u); they were *bona notabilia* in the diocese where the chief office of the company was

Shares, how far
goods and chat-
tels.

(q) *Vice v. Anson*, 7 B. & C. 409, in which it was held that a share in a mine was real estate, and could not be transferred except by deed is scarcely consistent with the modern decisions. In *Boyce v. Green*, Batty, 608, cited in Sugd. V. & P. p. 101, ed. 13, a share in a mining company was held to be an interest in land within the meaning of the 4th section of the Statute of Frauds, the share having been regarded as a share of the land as land, rather than as a share of a money capital. If this really had been so, the case would have been rightly decided (see *Watson v. Spratley*, 10 Ex. 222; *Hayter v. Tucker*, 4 K. & J. 243); but having regard to the terms of the Company's act, it is

difficult to arrive at the conclusion that the shareholders had more than a money interest.

(r) *Knight v. Barber*, 16 M. & W. 66.

(s) *Freeman v. Appleyard*, 32 L. J. Ex. 175, and see 38 Ch. D. 408.

(t) See *Humble v. Mitchell*, 11 A. & E. 205, as to banking companies; *Tempest v. Kilner*, 3 C. B. 249, as to projected railway companies; *Watson v. Spratley*, 10 Ex. 222, as to cost-book mining companies; *Bowlby v. Bell*, 3 C. B. 284, and *Duncuft v. Albrecht*, 12 Sim. 189, as to railway companies. See, too, *Colt v. Nettervill*, 2 P. W. 304; *Pickering v. Appleby*, Com. 354.

(u) *Lawton v. Hickman*, 9 Q. B. 563, railway shares.

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situate (*r*); and they have been decided to be property in respect of which bail may justify (*x*). Whether shares in a cost-book mine are goods and effects attachable in the Lord Mayor's court has been discussed, but not decided (*y*).

Chose in action.
Colonial Bank
v. Whinney.

In *Colonial Bank v. Whinney* (*z*) the question whether shares are choses in action was much discussed, and it was ultimately held by the House of Lords that shares in a company incorporated by a special act are things in action within the meaning of the proviso to the reputed ownership clause in the Bankruptcy act, 1883 (*a*).

Shares in companies governed by modern statutes differ, however, in some important respects from ordinary choses in action; the legal, as well as the equitable, interest in them is capable of transfer; and where the legal ownership in them, or even only the legal right to be registered, is acquired by a *bonâ fide* purchaser for value without notice of a prior equitable interest, the title of such purchaser cannot be impeached (*b*).

If a share in a company governed by the Companies act, 1862, or the Companies' clauses consolidation act, or by any statute containing a provision similar to § 30 of the Companies act, 1862, is equitably assigned or mortgaged more than once, the priority of the assignees or mortgagees will be determined *ceteris paribus*, by the priority of the assignments or mortgages, and not by the priority of the notices thereof, given to the company (*c*).

Slander of title. An action may, it is apprehended, be sustained by a shareholder whose title is slandered, and who can prove special damage (*d*).

(*r*) See *A.-G. v. Higgins*, 2 H. & N. 339, railway shares.

(*x*) *Pierpoint v. Brewer*, 15 M. & W. 201, 10 Jur. 79.

(*y*) *Tredinnick v. Oliver*, 5 H. & N. 780.

(*z*) 11 App. Ca. 426, reversing S. C. 30 Ch. D. 261, where all the earlier authorities will be found.

(*a*) 46 & 47 Vict. c. 52, § 44. The effect is that shares do not now pass to trustees in bankruptcy under the

reputed ownership clause. See *infra*, Ch. VIII.

(*b*) See *infra*, pp. 471 *et seq.*, under transfers in blank, and the next note.

(*c*) *Société Générale de Paris v. Walker*, 14 Q. B. D. 424 : 11 App. Ca. 20; overruling *Martin v. Sedgwick*, 9 Beav. 332 and the cases there cited, and *Umving v. Prescott*, 2 Y. & C. Ex. 488.

(*d*) See *Malachy v. Soper*, 3 Bing. N. C. 371.

SECTION II.—THE AMOUNT OF A SHARE.

Bk. III. Chap. 4.
Sect. 2.

Shares in companies, like shares in partnerships, must be taken to be equal, unless the contrary is proved. In point of fact, shares in a company always are equal, except when there have been successive issues of shares arising from successive increases of capital. But it sometimes happens that a capital of a certain amount divided into a certain number of equal shares, is raised; and that then a further capital is raised by the issue of a certain number of new shares, equal to each other, but not equal to the old shares. Moreover, it sometimes also happens, that whilst the old shareholders have paid up their shares in full, the new shareholders have paid in respect of theirs, less than the amount per share paid up by the old shareholders. In such a case there is not only inequality of shares, but inequality of money paid in respect of them; and questions then arise as to the relative rights of the holders of the different kinds of shares, and especially with respect to the payment of dividends, and in case of dissolution, the apportionment of surplus assets. These questions are investigated elsewhere in connection with those subjects (*dd*). Their solution depends on the true construction of the company's act, charter, or deed of settlement; but where they are silent on the point, the rights of the shareholders to surplus assets will, it is conceived, be proportionate to the money paid to the company in respect of their respective shares, and not to the nominal value of such shares. If one shareholder has paid 100*l.*, and another only 50*l.*, it is clear that unless some reason to the contrary can be shown, the first ought to receive for surplus assets, twice as much as the last (*e*). The same rule does not, however, necessarily apply to dividends (*f*).

(*dd*) As to dividends see *ante*, p. 434. As to distribution of surplus assets, see *infra*, b. iv., c. 1, § 13.

(*e*) See *Somus v. Currie*, 1 K. & J. 605; *Exchange Drapery Co.*, 38 Ch. D. 171; *Bridgewater Nav. Co.*, 39

Ch. D. 1.

(*f*) See *Oakbank Oil Co. v. Crum*, 8 App. Ca. 65, where the dividends were payable in proportion to the shares held.

Bk. III. Chap. 4.
Sect. 3.

SECTION III.—OF THE LIEN WHICH A COMPANY HAS ON THE
SHARES OF THEIR MEMBERS.

Lien of company
on share of
member.

Each member of an ordinary partnership has a lien on the shares of his co-partners for what is due from them as partners to the firm (*g*); and by analogy to this rule every company should have a lien on the shares of its members for what may be due from them to the company in respect of such shares. The writer is not aware of any case expressly establishing such a lien in favour of companies generally; but he conceives that its existence cannot be successfully disputed, except where it is inconsistent with an express right of transfer; and he has not met with any decision or dictum opposed to this view.

Lien of one
shareholder
as against
another.

It must, however, be observed that the lien which each partner has on the assets of the partnership, and on the shares of his co-partners, cannot be held to reside in every member of an incorporated company, without considerable modification; for its existence is to a great extent inconsistent with the principle that a company is distinct from the individuals composing it, and would destroy many of the advantages resulting from that principle. Upon these grounds Lord Cottenham, in

Rheam v. Smith.

Rheam v. Smith (h), declined to restrain a creditor of a company from proceeding at law against one of its members; although the creditor was himself a member of the company, and it was insisted that each member had a right to have the accounts of the company taken, and to have its assets applied in payment of its debts.

Lien of company
for debts due
to it.

Pinkett v.
Wright.

Again, the ordinary partnership lien is inconsistent with an unrestricted right of transfer. Hence it was held, in *Pinkett v. Wright (i)*, that an Irish banking company had no lien on the shares of one of its shareholders for advances made to him by the bank. The Court was of opinion that with respect to the advances, the shareholder was in the position of an ordinary customer to whom the bank had advanced money, and

(*g*) See Partn. 331 *et seq.*

(*h*) 2 Ph. 726. See, too, *Hardinge v. Webster*, 1 Dr. & Sm. 101.

(*i*) 2 Ha. 120, and 12 Cl. & Fin. 764, *sub nomine Murray v. Pinkett*.

See also *Dunlop v. Dunlop*, 21 Ch. D. 583, *infra*. Compare *Hague v. Dundeson*, 2 Ex. 741; *Ex parte Plant*, 4 Deac. & Ch. 160, where there was an agreement for lien.

that what was due from him as a customer did not give any right of lien upon his shares. The question arose between the bank and a transferee of the shares of the customer; and to have allowed the lien would have gone far to destroy the transferability of the shares. The inconsistency of the lien contended for with the general objects of the company is well put by the Vice-Chancellor Wigram in the case in question.

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Sect. 3.

Again, in *Dunlop v. Dunlop (k)*, a banking company had, by its deed of settlement, power to forfeit shares if the holder did not on demand pay all monies due from him to the company; and shareholders indebted to the company could not transfer their shares. But it was held that these provisions gave the company no lien in the sense of an equitable charge on the shares of a person indebted to it enforceable by an action for their sale.

Dunlop v.
Dunlop.

It need scarcely be observed, that if it is expressly enacted or agreed by the members of a company that the company shall have a lien on their shares for all monies which may be due from them to the company on any account whatever, a lien will be created in cases where it would not otherwise have existed; and the lien so created is not a mere passive right of retainer, but is an equitable charge actively enforceable (l). In the case of companies which are exempted from the duty of taking notice of trusts, the lien is available against a shareholder who is merely a trustee for others for debts due from him personally; and it is conceived that this is so even if the purchase of the shares was a breach of trust (m). On the other hand, the company has no lien on shares held by a trustee for the debts of the *cestui que trust*, and has no right to transfer the shares from the trustee to the *cestui que trust* in order to assert such a lien (n). So far as the lien gives a right to prevent a transfer, it is available against all persons claiming under a member

Agreements
for lien.

(k) 21 Ch. D. 583. The question arose between the devisee of land mortgaged to the company and a legatee of the shares. The latter was held not bound to contribute with the former to the payment of

the mortgage debt.

(l) *Re Lewis*, 6 Ch. 818.

(m) *New London and Brazilian Bank v. Brocklebank*, 21 Ch. D. 302.

(n) *Ystalyfera Gas Co.*, W. N. 1887, p. 30.

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Sect. 3.

indebted to the company (*o*). Whether it prevents a transfer if the member has given the company a bill for the amount due, and such bill is still running, depends upon the true construction of the enactment or agreement. The currency of the bill will usually be found to suspend the lien (*p*); but a case may arise where it does not produce this effect (*q*).

Extent of lien.

Primâ facie a clause conferring a lien on shares will extend not only to the shares, but to dividends and other moneys payable in respect of them (*r*).

Lien of companies governed by particular statutes.

As regards banking companies governed by 7 Geo. 4, c. 46, it is expressly enacted that no claim which any member may have in respect of his share shall be set off either at law or in equity against any demand which the company may have against such member, on account of any other matter or thing whatsoever (*s*).

Unpaid-up shares in a company governed by the Companies' clauses consolidation act, are not transferable so long as anything is due to the company from their holder for calls either upon them or upon any other shares (*t*).

Cost-book mining companies are not bound to recognise transfers, unless all calls on the shares transferred, with interest and expenses, have been paid (*u*).

The Companies act, 1862, contains nothing on this subject, neither does the Letters Patent act, 7 Wm. 4 & 1 Vict. c. 73. But by Table A. to the Companies act, 1862, it is provided that the company may decline to register any transfer of shares made by a member who is indebted to it (*x*). This article applies to all debts owing by a member to the company how-

(*o*) *Ex parte Plant*, 4 D. & C. 163.

(*p*) *Stockton Malleable Iron Co.*, 2 Ch. D. 101, which see as to the words "due" and "indebted."

(*q*) *Lond. Birm. and S. Staff. Bank*, 34 Beav. 332; but see the case in the preceding note.

(*r*) *Re Lewis*, 6 Ch. 818; *Hague v. Dandeson*, 2 Ex. 741.

(*s*) 1 & 2 Vict. c. 96, § 4. See *Ex parte Davidson*, 1 Mon. M. D. & De G. 648; *Ex parte Caldecott*, 2 ib.

368.

(*t*) 8 & 9 Vict. c. 16, § 16; *Hubbersty v. Manchester, Sheffield, &c., Rail. Co.*, L. R. 2 Q. B. 59 and 471.

(*u*) 32 & 33 Vict. c. 19, § 14.

(*x*) 25 & 26 Vict. c. 89, Table A., cl. 10. This hardly confers a right to have the shares sold for payment of the debt. As to the right to deduct debts from dividends, see cl. 75.

ever contracted (*y*), and whether the debt is owing by him solely or jointly with others (*z*).

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Assuming a company to have a lien on the shares of a member for all money which he may owe it, let us suppose that he pledges his shares. The pledger must be treated as having notice of the lien; and as regards moneys then due to the company the lien will prevail. With respect to moneys not then due to the company, there is more difficulty. It would be obviously unjust to the company to enable the member to deprive the company of its lien for money which afterwards becomes due from him by virtue of his contract of membership, and it is apprehended that for such a debt the lien takes priority over the pledge (*a*). But as regards debts which a company allows a member to contract with it in respect of dealings and transactions which the company need not engage in unless it chooses, the case is different. Hence, if a shareholder pledges his shares and the pledger gives notice of the pledge to the company, such pledge is entitled to priority over any lien of the company for such a debt subsequently contracted by the shareholder (*b*). This was recently decided

Priority of lien
over equitable
charges.

by the House of Lords in the *Bradford Banking Co. v. Briggs & Co.* (*c*). *Briggs & Co.* was a colliery company governed by the Companies act, 1862. One of its articles of association entitled it to a "first and permanent lien and charge available at law and in equity upon every share for all debts due from the holder thereof." A shareholder deposited his share certificates with his bankers as a security for the balance due and to become due on his current account with them. Notice of this pledge was given to *Briggs & Co.* Afterwards, the share-

Bradford Bank-
ing Company v.
Briggs & Com-
pany.

(*y*) *Ex parte Stringer*, 9 Q. B. D. 436.

(*c*) See *per* Hall, V.-C., in *Bentham Mills Spinning Co.*, 11 Ch. D. 900.

(*a*) An assignee of a share in a partnership takes only what the partner is entitled to when paid out. See Partn., p. 364.

(*b*) *Bradford Banking Co. v. Briggs & Co.*, 12 App. Ca. 29, reversing S. C. 31 Ch. D. 19, and affirming

S. C. 29 Ch. D. 149. *Miles v. New Zealand, &c., Co.*, 32 Ch. D. 266, is overruled by this decision.

(*c*) See the last note. The case was decided in conformity with *Rolt v. Hopkinson*, 9 H. L. C. 514, the principle of which was also followed in the Scotch case of *Union Bank of Scotland v. National Bank of Scotland*, 12 App. Ca. 53.

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Sect. 4. — holder became indebted to *Briggs & Co.* for coals sold to him and became bankrupt. *Briggs & Co.* claimed a lien on the shares for the price of the coal in priority to the amount due to the bankers. The House of Lords decided that the bankers had priority over the company, notwithstanding § 30 of the Companies act, 1862, which enacts that no notice of any trust shall be entered on the register. This section was held not to apply to such transactions.

SECTION IV.—OF CHARGING ORDERS ON SHARES.

Execution for
separate debt of
shareholder.

Shares in public companies are rendered available for the payment of the separate debts of their holders by a very different method from that to which recourse must be had in the case of partnerships (*d*). There is no interference with the company or its property by the sheriff; but the judgment creditor applies to one of the judges of the High Court for an order charging the shares of the judgment debtor with payment of the debt for which judgment has been recovered. Such an order has the effect of a charge made by the debtor himself in favour of the creditor (*e*), subject, however, to this qualification, that no proceedings can be taken to have the benefit of the charge created by the order until the expiration of six calendar months from its date (*f*).

Charging order.

Where shares are charged by a judge's order under 1 & 2 Vict. c. 110, the dividends must nevertheless be paid to the judgment debtor; for he is the person entitled to them at law (*g*), and his receipt discharges the company even in equity (*h*). The payment of dividends to a particular shareholder may, however, be restrained under 5 Vict. c. 5, § 4, or under R. S. C., Order XLVI. (*i*), and an interim order for this

(*d*) See Partn., 356 *et seq.*

(*e*) See *Ouslow's Trusts*, 20 Eq. 677.

(*f*) See as to this, *Bristol v. Wilkins*, 3 Ha. 235; *Reece v. Taylor*, 5 De G. & S. 480.

(*g*) See *Fowler v. Churchill*, 11 M. & W. 57; *Churchill v. Bank of England*, ib. 323.

(*h*) See *Bristol v. Wilkins*, 3 Ha. 235.

(*i*) See *infra*.

purpose can be obtained, although the six months above mentioned have not expired (*k*). Bk. III. Chap. 4.
Sect. 4.

As a charging order only affects the interest of the judgment debtor in the shares charged, if he is a trustee of those shares the order is useless to the judgment creditor (*l*). The interest of a *cestui que trust* of shares may, however, be charged by an order in the proper form (*m*); but not, it seems, if his only interest in them is in the produce of their sale (*n*).

An order *nisi* may be obtained *ex parte*, and without notice Order nisi. to the debtor; and it restrains the company from permitting a transfer of the shares held by the debtor, or by any person in trust for him, until the order is made absolute or discharged; and if the company permits a transfer of the debtor's shares during the continuance of the order, the company becomes liable to the creditor to the extent of the value of the shares transferred (*o*).

An order *nisi* is to the effect that unless cause be shown to the contrary by the judgment debtor within a given time, the shares in the — company, standing in the name of —, shall be, and shall in the meantime stand, charged with the payment of the amount for which judgment has been recovered (*p*). The order *nisi* prevents the shares from being transferred or dealt with, and when made absolute the order takes effect from the date of the order *nisi* (*q*). The order is not “an execution against the goods of a debtor” within § 45 of the Bankruptcy act, 1883 (*r*). For the purpose of obtaining the full benefit of

(*k*) See *Watts v. Jeffries*, 3 Mc. & G. 372; *Brereton v. Edwards*, 21 Q. B. D. 488.

(*l*) *Gill v. Continental Union Gas Co.*, L. R. 7 Ex. 332; compare *Cragg v. Taylor*, L. R. 1 Ex. 148.

(*m*) See *Cragg v. Taylor* (No. 2), L. R. 2 Ex. 131; *South-Western Loan Co. v. Robertson*, 8 Q. B. D. 17.

(*n*) *Dixon v. Wrench*, L. R. 4 Ex. 154.

(*o*) 1 & 2 Vict. c. 110, §§ 14 and 15; 3 & 4 Vict. c. 82, § 1. R. S. C. Ord. xlvii. r. 1.

(*p*) For the form see R. S. C. App. K. No. 27; and see *Fowler v. Churchill*, 11 M. & W. 57; *Robinson v. Burbridge*, 9 C. B. 289.

(*q*) *Brereton v. Edwards*, 21 Q. B. D. 488; *Italy v. Barry*, 3 Ch. 452, explaining *Warburton v. Hill*, Kay, 470; *Scott v. Lord Hastings*, 4 K. & J. 633; *Watts v. Porter*, 3 E. & B. 743. See those cases as to the priorities of creditors. See, also, *ante*, notes (*l*), (*m*), (*n*).

(*r*) *Re Hutchinson*, 16 Q. B. D. 515.

Bk. III. Chap. 4. the order, application must be made to the court in separate
Sect. 4. proceedings for a foreclosure or sale (s).

Effect of arrest- If the creditor causes the debtor to be arrested before the
ing debtor. shares have been applied in satisfaction of the debt, the benefit
of the charging order is lost (t).

What are public The statute which enables shares to be charged in the manner
companies. above explained, applies only to "public companies;" (u)
but there is no statutory or other authoritative definition of
this phrase; and questions of considerable difficulty may con-
sequently arise with reference to many companies, as to whether
they are "public" or not.

Macintyre v. In *Macintyre v. Connell* (r), the Court came to the conclu-
Connell. sion, 1, that transferability of shares was not the test of
publicity; 2, that the attribute of publicity could not be
denied in the case of a company empowered to sue and be
sued by a public officer, and required to keep a register of its
shareholders and to make official returns of their names and
addresses.

What shares may Taking this decision as a guide, and having regard to the
be charged under law relating to companies at the time of the passing of the
1 & 2 Vict. 1 & 2 Vict. c. 110, the following companies must be considered
c. 110. as public companies within the meaning of that act:—

1. Joint-stock banking companies governed by the 7 Geo. 4,
c. 46 (x).

2. Joint-stock companies governed by the Letters Patent
act, 7 Wm. 4 & 1 Vict. c. 73 (y).

3. Incorporated joint-stock companies generally. Incor-
poration itself makes a company a public company; for its
existence is authorised by public authority, viz., the Crown

(s) See *Leggott v. Western*, 12 Q. Carr v. *Griffith*, 12 Ch. D. 655.

B. D. 287; *Bristol v. Wilkins*, 3 (x) *Macintyre v. Connell*, 1 Sim.
Ha. 235, and *Macintyre v. Connell*, N. S. 225, related to a joint-stock
1 Sim. N. S. 225, 252. banking company governed by 7

(t) 1 & 2 Vict. c. 110, § 16. But Geo. 4, c. 46, and 7 & 8 Vict. c. 113,
arrest for debt is now only possible and removes the doubts formerly
in cases excepted by 32 & 34 Vict. entertained respecting such com-
c. 62, § 4. panies. See *Graham v. Connell*, 19

(u) See too R. S. C., Ord. xlvii., L. J. Ex. 361.
r. 3.

(y) See *Macintyre v. Connell*, 1
(c) 1 Sim. N. S. 225. See also Sim. N. S. 225.

or the legislature, and is required by the same authority to be publicly recognised.

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Unincorporated companies, not being banking companies, governed by the 7 Geo. 4, c. 46, or companies governed by the Letters Patent act, are *primâ facie* not public companies (z).

This last conclusion, if correct, is of great importance to mining companies formed on the cost-book principle; for if these companies are not public companies within the meaning of 1 & 2 Vict. c. 110, it follows that their mines and plant may be seized under writs issued against individual shareholders for their separate debts. And this appears to be the case; for although the writer is not aware that the propriety of such a seizure has been actually decided (a), he is enabled to state of his own knowledge that if judgment is recovered against a shareholder in a Cornish cost-book mining company for a private debt owing by him, and a *fi. fa.* upon such judgment is delivered for execution to the sheriff of Cornwall, he treats the company as a mere partnership, and seizes its property and sells the share and interest of the judgment debtor therein in the ordinary way. This is not so well known as it deserves to be (b).

As to cost-book
companies.

Whether shares can be attached in the Lord Mayor's court appears doubtful (c).

Attachment of
shares.

In connection with this subject it should be observed that any party interested in any stock or shares can, by filing a proper affidavit and notice, and serving it, restrain any public company from permitting the transfer of any stock or shares standing in the name of any person in the books of such company, or from paying any dividend thereon (d). The mode of

Restraining
orders.

(z) See the judgment of *Macintyre v. Connell*, 1 Sim. N. S. 225.

(a) In *Nicholls v. Roscarne*, 6 C. B. N. S. 480, the question whether shares in cost-book mines can be charged under 1 & 2 Vict. c. 110, was mooted but not decided.

(b) The writer is enabled to make the above statement as to the practice of the sheriff of Cornwall, by

having himself (as trustee) issued execution against a person who was a shareholder in several Cornish cost-book mines. Qu. if the acts 1869 and 1887 have rendered unincorporated cost-book companies public companies?

(c) See *Tredinnick v. Oliver*, 5 H. & N. 780.

(d) 5 Vict. c. 5, § 4.

Bk. III. Chap. 4. procedure is now regulated by R. S. C., Ord. XLVI., to which
Sect. 5. the reader is referred (*e*). The restraint is temporary only
until the Court itself makes an order.

SECTION V.—OF THE TRANSFER OF SHARES.

1. *Of ordinary transfers.*

Right to
transfer.

One of the most important distinctions between partnerships and companies is the comparatively unlimited right of members of the latter to transfer their shares (*f*). In what are called scrip companies this right is wholly unlimited; the right to the shares passing by the delivery of the scrip certificate (*g*). In other companies, also, the right to transfer is frequently unfettered.

Consent to
transfer.

Whether a share in a company is transferable at the will of its owner for the time being, or whether its transfer requires the consent of the other shareholders, or of the directors of the company, depends upon the constitution of each company.

No consent
requisite.

Speaking generally, if shares are transferable, and no restriction on the right to transfer them is imposed by the regulations of the company, or by the statute or charter by which it is governed, the right to transfer is absolute, and the directors cannot lawfully prevent a transfer, even if they are *bonâ fide* of opinion that it is for the interest of the company that they should do so (*h*). It follows from this, that where no restriction on the right to transfer exists, a transfer to a pauper, in order to escape from liability, is valid, and cannot be prevented (*i*). This is certainly going very far; and in cost-book mining companies the legislature has thought fit to interfere, by declaring

(*e*) The old procedure by dis-
tringas is abolished.

(*f*) See Partn., p. 5.

(*g*) See *Barclay's case*, 26 Beav.
177; *Grisewood's case*, and *De Pass's*
case, 4 De G. & J. 544.

(*h*) *Moffatt v. Farquhar*, 7 Ch. D.
591; *Stranton Iron, &c., Co.*, 16 Eq.

559; *Weston's case*, 4 Ch. 20, re-
versing 6 Eq. 238. Compare *Ex*
parte Parker, 2 Ch. 685.

(*i*) *Ib.*, and see *Jefferys v. Smith*,
3 Russ. 158, and *infra*, book iv.,
under the head Contributories.
Compare *South London Fish Market*
Co., 39 Ch. D. 324. but the Court will
not grant a prerogative writ of mandamus
to compel registration in such a case
see p. 603 and *R. v. Lambourn Vale*
Rail Co 22 2. B. D. 463 -

such transfers fraudulent and void (*k*). But the company may be precluded from disputing the validity of a transfer by its dealings with the transferee (*l*). Bk. III. Chap. 4.
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But notwithstanding the length to which the courts have gone in holding the right to transfer to be free from all implied restriction, a transfer which is fraudulent in the sense of not being a real transfer out and out, or a transfer made for a fraudulent purpose, can be lawfully objected to by the directors (*m*). But a transfer to avoid future liability or to multiply votes is held not to be fraudulent (*n*). Fraudulent
transfers.

Where, by the constitution of a company, certain definite restrictions are placed on the right to transfer its shares, the directors have no implied authority to impose any other restrictions on the exercise of that right (*o*), *e.g.*, if the only restriction is that no calls shall be in arrear, the directors cannot refuse to permit a transfer, if all calls made have been paid. So, again, a right to object to a transferee does not entitle them to object to a transfer to an unobjectionable person, although made for a purpose the directors may disapprove, *e.g.*, to multiply votes (*p*). Moreover, where, as frequently happens, the restriction is that the directors shall consent to the transfer, their consent is regarded so much as a mere matter of form, that the necessity for it does not practically affect the marketable value of the shares. Nor can directors withhold their consent to a transfer without good reason; for the power of assenting or dissenting to a transfer is reposed in them as trustees, and they must exercise that power accordingly, and not capriciously (*q*). At the same time, if their Consent
requisite.

(*k*) 32 & 33 Vict. c. 19, § 35.

(*l*) *Chynoweth's case*, 15 Ch. D. 13.

(*m*) This is admitted in *Weston's case*, 4 Ch. 20. See further under the head Contributories in book iv.

(*n*) See the last five notes, and *infra*.

(*o*) This follows from *Weston's case*, *ubi supra*. See also, *Chappell's case*, 6 Ch. 902; *Gilbert's case*, 5 Ch. 559, and the next note.

(*p*) *Moffatt v. Farquhar*, 7 Ch. D. 591; *Pender v. Luskington*, 6 Ch. D. 70; *Stranton Iron Co.*, 16 Eq. 559.

(*q*) In *Ex parte Penney*, 8 Ch. 446, it was held that they need give no reasons for their refusal; but that whether they give reasons or not, the Court will interfere if it is proved that they are not acting honestly in the discharge of their duty. See *ib.* and *Poole v. Middleton*, 29 Beav. 646; *Robinson v. Chartered Bank*, 1 Eq. 32; *Pinkett v. Wright*, 2 Ha. 120. See also *Faure Electric Accumulator Co.*, 40 Ch. D. 141.

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consent to a transfer is necessary, and in giving (*qq*) or refusing their consent to a transfer, they act *bonâ fide*, with a view to the protection of the interests of the company, the exercise of their discretion will not be interfered with (*r*); and, in such a case, it is competent for them, if the company is in embarrassed circumstances, to resolve not to allow any transfers at all (*s*). A director may consent to a transfer of his own shares (*t*). As to consenting to transfers to executors, &c., see below.

Informal consent.

A consent to a transfer given and acted upon is not invalid on the ground that it has been given informally (*u*); but a consent fraudulently obtained can be treated by the company as invalid (*u*).

Payment of calls.

In most companies payment of calls is a condition precedent to the exercise of a right of transferring shares (*b*). A call must be actually made before its non-payment can justify a refusal to permit a transfer (*c*). If calls are due on some only of the shares held by a shareholder he cannot be prevented from transferring other shares on which no arrears are due, unless the statutory or other regulations of the company clearly go to that extent (*d*), as is the case with respect to companies governed by the Companies' clauses consolidation act, 1845, and companies governed by Table A. to the Companies act, 1862. Such, however, is not the case in companies governed by the Stannaries act, 1869 (*e*). The right, however, to prevent a transfer of shares on which calls are due may be waived,

(*qq*) *Flaure Electric Accumulator Co.*, 40 Ch. D. 141.

(*r*) *Taft v. Harrison*, 10 Ha. 489; *R. v. Liverpool and Manchester Rail. Co.*, 21 L. J. Q. B. 284; and see *Birmingham v. Sheridan*, 33 Beav. 660. But compare *Stranton Iron Co.*, 16 Eq. 559, *ante*, note (*p*).

(*s*) *Nelson Mitchell v. City of Glasgow Bank Liquidators*, 4 App. Ca. 624; and see *Mitchell's* and *Rutherford's cases*, *ib.* 548; *Shepherd's case*, 2 Eq. 564, and 2 Ch. 16.

(*t*) *Bush's case*, 6 Ch. 246, and L. R. 6 H. L. 37; and see *Gilbert's case*, 5 Ch. 559.

(*u*) *Bargate v. Shortridge*, 5 H. L. C. 297; *Taylor v. Hughes*, 2 Jo. & Lat. 24. See *ante*, pp. 55, 56.

(*u*) See *Payne's case*, 9 Eq. 223; *Ex parte Kintrea*, 5 Ch. 95, and others of that class.

(*b*) See *ante*, p. 423.

(*c*) *R. v. Inns of Court Hotel Co.*, 2 N. R. 397, and 32 L. J. Q. B. 369. Compare *Gilbert's case*, 5 Ch. 559.

(*d*) 8 & 9 Viet. c. 16, § 16. *Hubbersty v. Manchester Rail. Co.*, L. R. 2 Q. B. 59 and 471. See also Table A., Art. 10, and *Ex parte Stringer*, 9 Q. B. D. 436.

(*e*) 32 & 33 Viet. c. 19, § 14.

e.g., by registering the transfer (*f*); and if waived, a transfer of them cannot be afterwards impeached (*g*). Bk. III, Chap. 4.
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Whether upon the sale of shares it is the business of the buyer or of the seller to procure the consent of the directors to a transfer will be examined hereafter (*h*). Procuring con-
sent to transfer.

Shares in companies are not all legally transferable in the same way: some are transferable by deed only, some by writing not under seal, some apparently by parol. The mode in which the shares of a given company are transferable, depends on the constitution of the company, and on the statute, if any, by which it is governed (*i*). Acceptance by the transferee is essential (*j*); but it will be presumed in the absence of evidence to the contrary (*k*). Mode of trans-
ferring shares.

Shares in companies governed by the Companies' clauses consolidation act, are transferable by deed, which must be delivered to the secretary properly executed by the transferor and the transferee, and be properly stamped (*l*). A form of transfer is given by the act (*m*). In companies
governed by
8 & 9 Vict.
c. 16.

The Companies act, 1862, declares that shares in companies formed and registered under that act shall be capable of being transferred in manner provided by the regulations of the company (§ 22) (*n*). Table A. contains a form of transfer, and requires it to be executed both by the transferor and the transferee (see Nos. 8 and 9). Whether executed means sealed and delivered is, however, left in obscurity (*o*). Shares In companies
governed by the
act of 1862.

(*f*) *Ex parte Littledale*, 9 Ch. 257, and the case in the next note.

(*g*) *Ibid.*, and *Orpen's case*, 9 Jur. N. S. 615.

(*h*) See *London Founders' Association v. Clarke*, 20 Q. B. D. 576; *Stray v. Russell*, 1 E. & E. 888; and compare *Wilkinson v. Lloyd*, 7 Q. B. 27, *infra*, pp. 463, 470, and 491.

(*i*) In *Ex parte Sargent*, 17 Eq. 273, a deed was held not necessary, although the practice was to have one. The articles only required an instrument in writing.

(*j*) See *Cartmell's case*, 9 Ch. 691.

(*k*) *Standing v. Bowring*, 31 Ch. D. 282.

(*l*) *Nanney v. Morgan*, 37 Ch. D. 346, and compare *West v. West*, 9 L. R. Ir. 121.

(*m*) 8 & 9 Vict. c. 16, § 14. Railway stock belonging to a lunatic may be transferred without a deed, under an order obtained in lunacy. See 16 & 17 Vict. c. 70, §§ 141, 142, and *Re Ives*, 9 Jur. N. S. 611.

(*n*) The repealed acts 7 & 8 Vict. c. 110, § 54, and c. 113, § 23, both required transfers to be by deed. See as to scrip, &c., transferable to bearer, *infra*, p. 474.

(*o*) *Ex parte Sargent*, 17 Eq. 273, tends to show that a deed is not necessary.

Pl. III. Chap. 4. in these companies cannot, however, be made transferable by
Sect. 5. mere delivery (*p*), except under the provisions of the Companies act, 1867, which only applies to fully paid-up shares in limited companies (*q*).

Transmission to executors, &c. The Companies' consolidation act, 1845, requires executors to be registered (see § 18). Executors or administrators of members of companies governed by the Companies act, 1862, and Table A. may, at their option, either register themselves as members (Table A., No. 13), or transfer the shares which have devolved upon them, without becoming members themselves (Nos. 14 to 16, and see § 24 of the act). The same observation applies to trustees of bankrupt members, and to persons marrying female members (see Table A., Nos. 13—16). It is to be observed that the power given to directors of declining to register a transfer of shares does not entitle them to decline to register shares in the name of a person claiming them by transmission (*r*); but if the person so claiming endeavours to combine his title by transmission with some other person's title by transfer, in order to deprive the company of its right of lien, the directors may refuse to register the shares in his name (*s*).

In other companies. The transfer of shares in other companies is not regulated by any general act of Parliament now in force (*t*). Shares in cost-book mining companies, although usually transferred by some written document, appear to be transferable by parol only (*u*). Shares in what are called scrip companies are apparently transferable by the delivery of the scrip certificate (*x*).

Companies formed under the repealed acts of 1856—8, may cause their shares to be transferred in manner in use before November, 1862, or in such other manner as such companies may direct (*y*).

(*p*) See *General Co. for the Promotion of Land Credit*, 5 Ch. 363; *Reuss v. Bos*, L. R. 5 H. L. 176.

(*q*) See 30 & 31 Vict. c. 131, § 27 *et seq.*

(*r*) *Bentham Mills Spinning Co.*, 11 Ch. D. 900.

(*s*) *Ex parte Harrison*, 28 Ch. D. 363.

(*t*) As to agreements for the

transfer of shares in banking companies, see 30 Vict. c. 29, noticed *infra*, p. 489.

(*u*) *Walker v. Bartlett*, 18 C. B. 845.

(*x*) *Barclay's case*, 26 Beav. 177; *Grisewood's case*, 4 De G. & J. 544; *De Pass's case*, *ib.*

(*y*) 25 & 26 Vict. c. 89, § 178.

The forms of transfer given by the various acts are short, and are framed with a view to convenient registration; and although shares may be transferred by instruments in other forms, still, if they are complicated, and differ substantially from those prescribed, the company need not register them (*z*).

Shares standing in the names of trustees or lunatics may be transferred in proper cases under an order of the Chancery Division, or an order in lunacy as the case may be (*a*).

Shares are not held to be goods, wares, or merchandise within the clause in the Stamp act, exempting contracts for the sale of goods from stamp duty (*b*); and written agreements for their sale must therefore be stamped (*c*). Shares, moreover, are property within the meaning of the Stamp acts: and instruments of transfer must therefore have the true consideration for the transfer expressed upon them, and be stamped accordingly (*d*). Several shareholders, however, may join in one transfer, and if the stamp covers the total consideration money it is sufficient (*e*). Where shares are themselves the consideration for a purchase, the stamp is regulated by their market value at the time of sale (*f*).

A transferee of a share does not become a shareholder, nor does a transferor of a share cease to be a shareholder, until those forms and ceremonies which by the constitution of each company are necessary to be observed, have been either duly complied with or waived by competent authority. The decisions on this subject having been already examined need not be again adverted to (*g*). It is the duty of the transferee to

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Forms of
transfer.

Shares of
trustees and
lunatics.

Stamp.

When transfer
is complete.

(*z*) *Copeland v. North-Eastern Rail. Co.*, 6 E. & B. 277; *R. v. General Cemetery Co.*, ib. 415.

(*a*) See *Re Angelo*, 5 De G. & Sm. 278; *Re Lees*, 9 Jur. N. S. 611; *ante*, p. 467, note (*m*).

(*b*) *Knight v. Barber*, 16 M. & W. 66.

(*c*) *Ib.* See also 51 Vict. c. 8, §§ 16 and 17, imposing a duty of 6d. on contract notes for the sale of shares of the value of £100 or upwards.

(*d*) See 33 & 34 Vict. c. 97, under the head Conveyance, and as to foreign shares, &c., 51 Vict. c. 8, §§ 12 and 13, and mortgages of shares, ib. § 14.

(*e*) *Wills v. Bridge*, 4 Ex. 193.

(*f*) See 33 & 34 Vict. c. 97, tit. Conveyance; and 51 Vict. c. 8, §§ 12 & 13; and *Ulverstone Rail. Co. v. The Commissioners of Inland Revenue*, 2 H. & C. 855.

(*g*) *Ante*, bk. i., c. 2, § 2, and see *infra*, bk. iv., c. 1, § 10, Contribu-

Bk. III. Chap. 4. obtain recognition of himself as shareholder (*h*). The trans-
 Sect. 5. feror must ascertain by inquiry whether his transfer has been accepted by the company or not; it is not the duty of the company to give him this information if he does not ask for it (*i*).

Companies act,
 1867, § 26.

The Companies act, 1867, § 26, obliges companies registered under the Companies act, 1862, to register a transfer on the application of the transferor in the same manner and subject to the same conditions as on the application of the transferee.

A transferee has a right to be registered subject always to the conditions of the Company's act, charter, or regulations; and this right can be enforced by action of *mandamus* (*k*); or in companies governed by the Companies act, 1862, by an application under § 35 to rectify the register (*l*). But the company is entitled to a reasonable time to ascertain that all is right before it registers a transfer (*m*); and in practice notice is usually sent to the transferor that a transfer of his shares has been lodged for registration (*n*).

Rights of the
 transferee.

The transferee of a share in a company acquires, as a rule, no greater rights than the transferor (*o*); and this doctrine has been carried so far that it has been held that a transferee is precluded from objecting to conduct which has been sanctioned or acquiesced in by his transferor (*p*); but this may well be doubted (*q*). The extent to which a transferee of shares takes upon himself the liabilities of the transferor, is examined in other parts of the treatise (*r*); it may, however, be observed generally, that the transferee, as between himself and his transferor, takes the place of the latter, not only as regards

tories. See also, *Nanney v. Morgan*, 37 Ch. D. 346.

(*h*) See *Skinner v. City of London Marine Corporation*, 14 Q. B. D. 882; *Ward and Henry's case*, 2 Ch. 431, 438.

(*i*) See *Gustard's case*, 8 Eq. 438.

(*k*) See *infra*, c. 9, § 4.

(*l*) See *ante*, bk. i., c. 2, § 3.

(*m*) See *per* Lord Blackburn, in *Société Générale de Paris v. Walker*, 11 App. Ca. 11.

(*n*) *Ib.*, pp. 34 *et seq.*

(*o*) See further on this point, *infra*, pp. 475.

(*p*) *Ffooks v. South-Western Rail. Co.*, 1 Sm. & G. 168. See, also, *Peck v. Gurney*, 13 Eq. 79, and L. R. 6 H. L. 377.

(*q*) See *per* Fry, L.J., in *Ashbury v. Watson*, 30 Ch. D. 379 & 386.

(*r*) See as to creditors, *ante*, bk. ii., c. 7, § 3; as to calls, *ante*, bk. iii., c. 3, § 2, and *post*, bk. iv., c. 1, §§ 10 & 11.

what is past, but also as regards what is to come (s). With Bk. III. Chap. 4. Sect. 5. respect, however, to the title of a transferee, it will be seen presently that a *bonâ fide* purchaser of shares for value without notice of any invalidity in the title of his transferor, acquires a title which cannot be impeached by persons claiming a prior equitable interest (t); moreover, if the company has actually registered such a purchaser, in ignorance of material facts, the company cannot lawfully afterwards remove his name from the register (u).

Where any company is being wound up by the Court, or Transfers when company is being wound up. subject to the supervision of the Court,² all transfers of shares in it subsequent to the presentation of the petition, and prior to the winding-up order, are invalid unless otherwise ordered by the Court (x). Transfers after the winding-up order are not expressly prohibited, but such a transfer does not discharge the transferor from liability to be put on the list of contributories as a present member (y). After a resolution to wind up voluntarily transfers of shares, unless to, or with the sanction of, the liquidators, are also invalid (z). The effect of these provisions upon the question whether a buyer or seller ought to be put on the list of contributories will be examined hereafter (a).

Having made the above observations on ordinary transfers, it is necessary to consider the important and difficult questions which arise when transfers are executed in blank, and when transfers are forged. The title acquired to shares by estoppel will be examined in the course of this inquiry.

2. Of transfers in blank.

Whatever may be the legal method of transferring shares, Transfers in blank. and whether a formal deed is or is not requisite, it is a common practice for a seller of shares to sign a deed or instrument of transfer with the name of the transferee in blank.

(s) See *Mayhew's case*, 5 De. G. pany.
M. & G. 837.

(x) 25 & 26 Vict. c. 89, § 153.

(t) See the next heading.

(y) See *ib.* §§ 38, 74, & 84.

(u) *Ward v. South-Eastern Rail.*
Co., 2 E. & E. 812, where a fraud
had been committed on the com-

(z) *Ib.*, § 131.

(a) See *infra*, bk. iv., c. 1, §§ 6 &
10.

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The buyer then inserts his own name, or without doing so resells, and hands the blank transfer to the new purchaser, who again either inserts his own name as the transferee, or resells and delivers the transfer, still in blank, to the purchaser from him, and so on. The effect of executing transfers in blank, and handing them from one person to another, is very different with respect to different classes of shares.

In the first place there are shares (*e.g.*, shares in scrip and cost-book mining companies) which are transferable without the intervention of any formal document; and a letter signed by a shareholder, and transferring his shares to —, amounts, if delivered to a purchaser, to a transfer to him, and authorises him to fill up the blank with any name he likes (*b*).

Blank deeds of transfer.

But let us suppose a deed to be required. A deed executed by A., and purporting to transfer property to —, *i.e.*, to nobody, is altogether inoperative as a deed; and consequently, if a shareholder in a company, the shares in which are transferable by deed only, executes a transfer of his shares in blank, he still remains legal owner of the shares, and the holder of the deed acquires no other title to the shares than a right to have them properly transferred, or to have the transferor declared a trustee of them (*c*). But although a blank deed is invalid as a deed, it by no means follows that all transfers in blank are worthless.

In the first place, circumstances may be proved which justify the inference that the instrument has been re-executed since the blanks were filled up (*d*). This inference may be drawn if the transferor has recognised the transfer since he knew that it was filled up, but not otherwise (*e*).

Effect in equity of transfers in blank.

In the next place, the equitable ownership in shares agreed to be sold depends on the contract of sale and not on the form

(*b*) See *Walker v. Bartlett*, 18 C. B. 345; *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194.

(*c*) *Société Générale de Paris v. Walker*, 11 App. Ca. 20; 14 Q. B. D. 424; *Nanney v. Morgan*, 37 Ch. D. 346; *Hibbetewhite v. McMorine*, 6 M. & W. 200; *Humble v. Langston*, 7 M. & W. 517; *Sayles v. Blanc*, 14

Q. B. 205, and 6 Ra. Ca. 79. See, too, *Consols Insur. Assoc. v. Newall*, 3 Fos. & Fin. 130, and *Swan's case*, 7 C. B. N. S. 400, and *Swan v. North British Australian Co.*, 7 H. & N. 603, noticed *infra*, p. 486.

(*d*) See *Hudson v. Kevett*, 5 Bing. 368.

(*e*) *Société Générale de Paris v. Walker*, *ubi supra*.

of transfer; and as there is no law requiring a contract for the sale of shares to be by deed or even in writing, there is nothing to prevent a purchaser of shares from being held to his bargain, nor from being ordered to accept the shares he has agreed to buy, and with them all the liabilities incident thereto. Consequently, where there is a binding agreement for the sale and transfer of shares, it is comparatively immaterial as between the buyer and the seller whether a transfer in blank has been executed or not. The purchaser can be compelled at the instance of the seller to take his place as from the time of the making of the contract; in other words, the purchaser will be compelled to accept a proper transfer of the shares, to procure himself to be registered as a shareholder in respect of them, and to indemnify the seller from all liabilities accruing in respect of the same shares since the time when they were agreed to be sold (*f*). So the purchaser can compel the seller to execute a proper transfer and to account for all dividends received by him since he ceased to be the equitable owner of the shares.

Similar observations apply to transfers in blank by way of pledge.

Where, however, there is no valid contract, a transfer in blank of shares not passing by delivery is as invalid in equity as at law, unless the transferor has so acted as to estop himself from disputing its validity.

This is well illustrated by the case of *Taylor v. Great Indian Peninsula Railway Company* (*g*). In that case the plaintiff, who was entitled to some 20*l.* and some 2*l.* shares in a company, directed his broker to sell the latter. The broker obtained forms of transfer, stamped sufficiently to pass the 20*l.* shares; and the plaintiff executed these forms, leaving the blanks to be filled in by the broker. The broker inserted

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*Taylor v. Great
Indian Railway
Company.*

(*f*) *Morris v. Cunnan*, 4 De G. F. & J. 581. See *Cheale v. Kenward*, 3 De G. & J. 27; *Wynne v. Price*, 3 De G. & S. 310; *Shaw v. Fisher*, 5 De G. M. & G. 596, affirming S. C. 1 Jur. N. S. 971, and 2 De G. & Sm. 11. See, also, *Contract Corporation*, 3 Ch. 105. In *Jackson v.*

Cocker, 4 Beav. 59, a purchaser of scrip was held to be under no such obligations; but see *Beckett v. Bilbrough*, 8 Ha. 188.

(*g*) 4 De G. & J. 559. See further as to forged transfers, *infra*, p. 483 *et seq.*

Bk. III. Chap. 4. the description of the 20*l.* shares, but left the names of the
 Sect. 5. transferees still in blank. The shares were then sold, and the names of the purchasers were ultimately filled in, they knowing that the transfers had been previously executed in blank. The plaintiff having discovered that the wrong shares had been sold, filed a bill to set aside the sale, and to have the transfers delivered up, and to restrain their registration. A decree was made in his favour by the V.-C. Wood, and an appeal from this decision was dismissed.

Transfers in
 blank not
 negotiable.

A transfer in blank is in practice generally accompanied by the certificate of the transferor's ownership of the shares to which the transfer relates. Attempts have frequently been made to induce the Courts to hold that a transfer executed by a transferor in blank as regards the transferee and accompanied by the transferor's share certificates are negotiable instruments transferable by delivery, and conferring a good title to the shares mentioned in the transfer to any *bonâ fide* holder of the documents without notice of any defect in the title of the person from whom he receives them. These attempts, however, have as yet invariably failed (*h*). Whether in the present state of the law such documents can become negotiable on proof of a general mercantile usage to that effect is doubtful (*i*). The fact that such documents are negotiable abroad, *e.g.*, in America, does not render them negotiable in this country (*k*).

Scrip, &c.,
 transferable
 to bearer by
 usage.

It has, however, been decided that scrip certificates may be shown to be transferable to bearer by general usage where there is no enactment or agreement to the contrary; and where this is shown the title of a *bonâ fide* purchaser for value of the scrip without notice of any infirmity in the title of the seller, will be unimpeachable, even although the seller himself may have had no title (*l*). There is as yet no decision to this

(*h*) *Williams v. Colonial Bank*, 38 Ch. D. 388; *France v. Clark*, 26 Ch. D. 257; *London and County Bank v. London and River Plate Bank*, 20 Q. B. D. 232, and 21 *ib.* 535; *Colonial Bank v. Hepworth*, 36 Ch. D. 36.

Ca. 476, and L. R. 10 Ex. 377, and *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194; *Crouch v. Crédit Foncier of England*, L. R. 8 Q. B. 374.

(*k*) See *Williams v. Colonial Bank*, *ubi supra*.

(*i*) Compare the cases in the last note with *Goodwin v. Roberts*, 1 App.

(*l*) *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194, a case of a limited company.

effect with respect to shares; and in the present state of the authorities it is doubtful whether proof of a similar usage as to them would make them negotiable (*m*). Under existing acts of Parliament, shares transferable to bearer can hardly exist; for they are not consistent with the statutory enactments relating to registers. But regulations might be made to the effect that share certificates should be transferable to bearer; and that the bearer should be entitled to be registered; but that the persons on the register should alone be members of the company. Such certificates might then become negotiable by usage.

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A person, who signs a transfer in blank and gives it with the certificate of shares to another person, does in fact enable that person to insert his own name in the transfer as transferee and to take the transfer so filled up with the certificate to the company and procure himself to be registered as owner. Nay more, the person, to whom the transfer is handed, may, without filling it up with his own name, pass it and the certificate on to a third person, and he may do the like, and ultimately some holder of the transfer may fill in his own name and procure himself to be registered. Such transactions are of daily occurrence, and give rise to no difficulty where each step in the transaction is honest and in accordance with the real intention of the parties to it (*n*). But where this is not the case, questions of great difficulty arise. The principles to be borne in mind for the purpose of solving them may be gathered from the following considerations and authorities.

Effect of transfers in blank as regards third parties.

Except where a shareholder is estopped from denying the title of some particular transferee, the general rule of English law is that a purchaser of a share acquires no better title than his vendor himself has (*o*); shares being in this respect like other goods and chattels (*p*). As regards ordinary goods there are three exceptions, viz., 1, where they are bought in market overt; 2, where they are bought from agents entrusted with

Title acquired by purchasers under blank transfers, &c.

(*m*) See the cases in the last two notes.

(*n*) See the cases cited below and *Roffe v. Roscoe*, referred to in 26 Ch. D. 265, where the transferor autho-

rised what the transferee did.

(*o*) *Williams v. Colonial Bank*, 38 Ch. 388, and other cases cited below.

(*p*) As to which see *Cole v. North-Western Bank*, L. R. 10 C. P. 354.

Bk. III. Chap. 4. them and who by the Factors acts can make a good title by sale
Sect. 5.

or pledge; 3, where the equitable title is in one person and the legal title is in another and is acquired by a purchaser *bonâ fide*, and without notice of the equitable title.

Factors acts. The Factors acts do not it seems apply to shares (*q*).

Market overt. A sale in market overt (if proved) followed by delivery would, it is presumed, protect a buyer; but no decision upon the point is known to the author. The exception in question does not apply to pledges (*r*).

Purchasers for value without notice. The equitable doctrines applicable to purchasers for value without notice apply to shares as well as to other property; shares not being for this purpose regarded as mere choses in action (*s*). In applying those doctrines the following points must be borne in mind, viz.,—

1. The purchaser must have acquired the legal title to the shares, or at all events, the legal right to be registered in respect of them (*t*).

2. This legal title or right must have been acquired without notice of the equitable title affecting the shares; and without notice of such circumstances as rendered it reasonable to inquire into the title of the transferor (*u*). If the legal title or right is acquired with notice of a prior equitable title the latter will of course prevail (*v*).

As to notice. 3. A person who knowingly accepts the share certificates of a transferor from the holder of a blank transfer, has notice that

(*q*) See 38 Ch. D. 408.

(*r*) *Ib.* 405. Query, if there is a market overt for shares.

(*s*) See the cases *infra*, and *Taylor v. Blakelock*, 32 Ch. D. 560, a case of stock; *London and County Banking Co. v. London and River Plate Bank*, 20 Q. B. D. 232, and 21 *ib.* 535.

(*t*) *Roots v. Williamson*, 38 Ch. D. 485; *Société Générale de Paris v. Walker*, 14 Q. B. D. 424, and 11 App. Ca. 20; *Donaldson v. Gillot*, 3 Eq. 274. Observe that in this case the transferor (Govett) executed

two transfers. The second under which the defendant claimed was invalid; the first under which the plaintiff claimed was valid.

(*u*) See *per* Lord Bramwell, 13 App. Ca. 345–6.

(*v*) *Nanney v. Morgan*, 37 Ch. D. 346, where the person acquiring the legal title had made a voluntary settlement of the shares whilst he was their equitable owner. *Dodds v. Hills*, 2 Hem. & M. 424, where the purchaser had notice before he was registered.

the holder is not the owner of the shares, and that the transferor's legal title is still in him (*y*). Bk. III. Chap. 4.
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4. Again, where registration is necessary to complete the title of a transferee, a person who accepts a transfer (whatever its form) does not acquire the legal title until he is registered as owner (*z*).

5. If the transfer is duly executed and the transferee has the transferor's share certificates, the transferee has a legal right to complete his title; but he has no such right if the transfer is not in proper form, or if the transferee has not got the certificates, and the company has not waived their production (*a*).

6. A person who has property stolen from him and gets it back is in the same position as a *bonâ fide* purchaser of it, even although he is not aware of the theft or restitution. Whether he has the legal title or notice of titles created between the date of the theft and restitution, depends on the nature of the property and the facts of each case (*b*).

The effect of giving or not giving notice to a company registered under the Companies act, 1862, was much discussed in the *Société Générale de Paris v. Walker* (*c*), which will be noticed presently. The Court of Appeal decided, and Lords Selborne and Blackburn (*d*) agreed with them, that no priority was gained by an equitable mortgagee of shares giving the company notice of his equitable claim, and that no priority was lost by omission to give such notice; and that having regard to § 30 of the Companies act, 1862, companies governed by that act cannot be affected by notices of trusts or of equitable titles. This has always been and is the author's opinion (*e*), and the same observation applies to companies governed by

Companies act,
1862, § 30.
Notices to
companies.

(*y*) See *France v. Clark*, *infra*, p. 479.

(*z*) *Nanney v. Morgan*, 37 Ch. D. 346; *Société Générale de Paris v. Walker*, 11 App. Ca. 20, and 14 Q. B. D. 424; *Roots v. Williamson*, 38 Ch. D. 485.

(*a*) *Ibid*.

(*b*) *London and County Banking Co. v. River Plate Co.*, 21 Q. B. D. 535, and 20 ib. 232, where some of the

securities were negotiable and were not the same as those stolen.

(*c*) 11 App. Ca. 20, and 14 Q. B. D. 424. See *infra*, p. 479.

(*d*) See 11 App. Ca. pp. 30 & 41. In *The Bradford Banking Co. v. Briggs & Co.*, 12 App. Ca. 29, some members of the House of Lords seemed indisposed to accept this view of the acts.

(*e*) See 14 Q. B. D. 424.

Bk. III. Chap. 4. 8 & 9 Vict. c. 16 (see § 20). But as already seen, companies
 Sect. 5.

cannot take advantage of this doctrine to acquire priority in their own favour over equitable rights against the company of which their directors or agents have actual knowledge (*f*).

Let us now attempt to apply the principles above mentioned to sales and pledges, and to other cases where shareholders have left their transfers and certificates with persons who have improperly used them.

Sales.

1. In the first place the shareholder signing the transfer in blank may give it with the certificate to a buyer. In such case the buyer is impliedly authorised by the seller to deal with the documents as his own. He can consequently insert his own name and procure himself to be registered as owner; or he can pass the documents on to some one else to deal with in a similar way. In the case supposed, the original shareholder has transferred his right to the documents, and although he remains the legal owner of the shares, he is a trustee of them for the buyer or for the persons claiming under him as the case may be (*g*).

Pledges.

2. Secondly, the shareholder signing the transfer in blank may deposit it and his share certificates as a security for money. The real authority given to the pledgee may simply be to hold the documents as a security. But if he fills in his own name as transferee and procures himself to be registered as owner, his title as owner is apparently perfect; and although so long as he holds the shares they are subject to redemption, yet if he then transfers them to a *bonâ fide* purchaser for value without notice of his real title, his mortgagor will, it is conceived, be without redress against such a purchaser (*h*). If, however, the mortgagee disposes of the transfer and certificate whilst they are in the state in which he received them from his mortgagor, the documents themselves show that the mortgagee is disposing of what is not his own, and the purchaser from him acquires no better title than the mortgagee himself had.

(*f*) *Bradford Banking Co. v. Briggs & Co.*, 12 App. Ca. 29, *ante*, p. 459. ment, although none are directly in point.

(*g*) The cases cited below are really authorities for this state- (*h*) See the judgments in the cases next cited.

This was decided in *France v. Clark* (i). In that case France Bk. III, Chap. 4.
Sect. 5. was the registered owner of some shares in a company registered under the Companies act, 1862. He signed a transfer of France v. Clark. them with the name of the transferee and the date, and the consideration all in blank; and he gave this document and his share certificates to Clark as a security for £150. Clark deposited the same documents unaltered with Quilhampton as a security for £250. Clark died insolvent. Quilhampton then inserted his own name in the transfer, filled in the date, and sent it to the company for registration. The company sent France the usual notice that the transfer had been received, and he stopped the registration of the transfer (k). France demanded the shares from Quilhampton on payment of the £150 and interest. Quilhampton required £250 and interest, and insisted that he was a *bonâ fide* purchaser for value of the shares without notice of France's title. It was, however, decided that although this might have been true if Clark had procured himself to be registered as owner before pledging the shares, yet that the blank transfer and certificate showed that France was the owner and not Clark, and consequently Quilhampton's title was no better than Clark's, and that on paying £150 and interest, France was entitled to the shares. Lord Selborne in giving the judgment of the Court of Appeal Notice given by
the blanks. said, "The defence of purchaser for value without notice, by anyone who takes from another without inquiry an instrument signed in blank by a third party, and then himself fills up the blanks, appears to us altogether untenable." This decision has been followed by others which afford further illustration of the important principle above enunciated.

In *The Société Générale de Paris v. Walker* (l), A. was the registered owner of 100 shares in a company registered under the Companies act, 1862. The shares were transferable by deed. A. executed a transfer of them in blank and deposited the transfer and his share certificates with B. as a security for a Blank transfer
without certi-
ficate.

(i) 26 Ch. D. 257, and 22 ib. 830. *Ex parte Sargent*, 17 Eq. 273, if opposed to this cannot be relied upon.

seems to have been effected in fact, see 26 Ch. D. 261.

(l) 11 App. Ca. 20, affirming S. C., 14 Q. B. D. 424. See, also, *Roots v. Williamson*, 38 Ch. D. 485.

(k) The registration, however,

Bk. III. Chap. 4. debt. A. then executed another transfer in blank as regards
 Sect. 5. — the name of the transferee and the numbers of the shares, and
 Société Générale deposited it with his bankers, giving them a memorandum as
 de Paris v. Walker. to the shares and an excuse for not handing over his share
 certificates; afterwards the name of an officer of the bank and
 the numbers of the shares were inserted in this last transfer,
 and it was sent to the company for registration. Before, how-
 ever, it was registered B.'s executors gave the company notice
 of their title, and thereupon the company declined to register
 the bank's nominee. The bankers then sued the company
 and B.'s executors, and claimed a declaration that they were
 entitled to the shares and for delivery of the certificates to
 them. But it was decided that the bankers had not acquired
 either the legal title to the shares nor the equitable title to
 them. Not the legal title, because the transfer was void as a
 deed; not the equitable title, because that title was subsequent
 in point of time to B.'s equitable title which there was nothing
 to displace. The House of Lords held that as the bankers
 never had the share certificates they would not have been in a
 position to compel the company to register them as owners of
 the shares, even if the transfer itself had been by deed duly
 executed, for the company was entitled to reasonable time
 for inquiry and to an indemnity even before they received
 notice from B.'s executors not to register the transfer to the
 bank (*m*).

Other improper
 dealings with
 share transfers,
 &c.

3. A registered owner of shares may send a blank transfer
 with his share certificates to a broker for sale or mortgage, and
 the broker may exceed his authority, or may sell or mortgage
 pursuant to it, and misapply the money he receives. Accord-
 ing to *France v. Clark* the person dealing with the broker and
 taking the blank transfer from him obtains no better title to
 the shares than the broker is authorised to confer. If he has
 no authority to sell without further orders he can confer no
 good title; if he has authority to sell he can sell but not
 pledge; if he has authority to pledge on behalf of his prin-
 cipal he cannot pledge for his own debt.

(*m*) See, *per* Lord Selborne, 11 App. Ca. 29, and *per* Lord Blackburn,
 ib. p. 41.

In *The Earl of Sheffield v. The London Joint Stock Bank* (n), the plaintiff gave *Easton* authority to borrow £26,000 for him on the security of certain stocks and shares, and gave him (*Easton*) transfers executed in blank and share certificates. *Easton* raised £26,000 on them by depositing them with *Mozley*, a money dealer. *Mozley* deposited them with other securities belonging to other customers with various banks as security for loans to himself to a large amount. The transfers were filled in with the names of officials of the banks, and were registered in their names. *Mozley* failed, and the banks claimed to retain the shares, &c., as security for what was due to them respectively from *Mozley*. The plaintiff sought to redeem his shares on payment of the £26,000 which *Mozley* had advanced upon them, with interest on that sum. The Court of Appeal decided in favour of the banks on the ground that they were purchasers for value without notice; but the House of Lords reversed this decision on the ground that the banks had notice that *Mozley* was pledging shares, &c., which were not his own; and that there was no proof of any authority, by custom or otherwise, enabling *Mozley* to pledge his customers' shares for more than he himself advanced upon them.

It is said that if a shareholder in an American company signs transfers in blank, and gives them with his share certificates to another, the transferor impliedly authorises that other to deal with them as he chooses (o). But whether this is so or not by the law of America, the title of a person who acquires such documents in this country is governed by the law of this country, and he can acquire no better title than his transferor himself has, unless indeed the owner of the shares has so conducted himself as to be estopped by the law of this country from denying the title of the transferee.

The leading case on this head is *Williams v. Colonial Bank* (p). Williams v. Colonial Bank, Bk. III. Chap. 4. Sect. 5. — Earl of Sheffield v. London Joint Stock Bank.

(n) 13 App. Ca. 333, reversing *Easton v. London Jt. St. Bank*, 34 Ch. D. 95. Some of the documents deposited were negotiable securities; but the House of Lords made no distinction between them and the others. Qu. whether this

was in accordance with previous decisions on negotiable instruments?

(o) See the next two cases.

(p) 38 Ch. D. 388; reversing S. C., 36 Ch. D. 659.

Bk. III. Chap. 4. There *Williams* was the registered holder of shares in an
 Sect. 5. American company. He died, and his executors signed a transfer of the shares in blank, and sent them with share certificates made out in *Williams'* name to *Thomas & Co.* (sharebrokers) for transmission to America; so that the shares, if sold, might be registered in the names of the purchasers, and if not sold, might be registered in the names of the executors themselves. *Thomas & Co.* deposited the documents with their bankers in London as security for advances, and then became bankrupt. *Williams'* executors claimed the certificates from the bankers, and were held entitled to recover them. The Court decided that the documents were not negotiable instruments; that the bankers had no better title to the documents than *Thomas & Co.* had; that the Factors' acts did not apply; and that the executors were not estopped by what they had done, nor by having left the documents with *Thomas & Co.* for a considerable time, from denying the title of the bankers. This last point was the most difficult; but the transfers were signed by the executors, and the share certificates were in the name of the deceased; and the evidence showed that in this state the documents were not "in order," i.e., that business men would not take them without inquiry (q).

Colonial Bank
 v. Hepworth.

The Colonial Bank v. Hepworth (r), was another case arising from *Thomas & Co.'s* misconduct. There *Hepworth* employed *Thomas & Co.* to buy shares in American companies for him. They did so, and received from the sellers transfers executed by them in blank and their share certificates. *Thomas & Co.* retained these documents for *Hepworth* in order to procure registration in his name. Instead, however, of doing so, *Thomas & Co.* pledged them with their bankers for an advance. *Thomas & Co.* afterwards got the documents back from the bankers by a false representation, and sent the documents with *Hepworth's* name filled in to the company's agents for registration, in *Hepworth's* name, and they were so registered (s). The bankers then claimed the shares from *Hepworth*, but it

(q) This removed all difficulty. But qu. whether the result would not have been the same in any case? See the judgment of Cotton, L. J., and *France v. Clark*, ante, p. 479, and the case next cited.
 (r) 36 Ch. D. 36.
 (s) See 36 Ch. D. 39.

was decided that he was entitled to retain them. He had obtained the legal title *bonâ fide* for value, and without notice of the equitable title of the bankers (t). Bk. III. Chap. 4.
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3. *Of forged transfers.*

A forged transfer is no transfer, and is simply a void document, in no way affecting the title of the person whose name is forged. Forged transfers.

If the officer of a company, acting upon the faith of a forged transfer or power of attorney, wrongfully but innocently transfers the shares of one of its shareholders, the company is liable to make good the loss (u); and an action will lie against the company to compel it to replace the shares, and to pay to the plaintiff the dividends declared since the transfer (v). The transferee need not be a party to such an action, but he may be added as a third party under Ord. XVI., r. 48 (w). As regards the Statute of limitations, time begins to run in favour of the company from the moment when it refuses to treat the plaintiff as the owner of the shares (x). The above statements apply to cases where shares are standing in the joint names of several persons, one of whom forges the names of the others (y), and to shares standing in the name of a corporation whose clerk improperly puts its seal to a transfer (z).

(t) See, also, *London and County Bank v. River Plate Bank*, 20 Q. B. D. 232, and on appeal 21 Q. B. D. 535, ante p. 477.

(u) See the cases in the next notes, and *Ashby v. Blackwell*, 2 Eden, 299, and 1 Amb. 503. *Hildyard v. The South Sea Co.*, 2 P. W. 76, cannot be relied upon; see the case last cited, and *Bank of Ireland v. Evans's Charity Trustees*, 5 H. L. C. 389; *Orr v. Union Bank of Scotland*, 1 McQueen, 513.

(v) See the cases in the next notes, and *Barnett, Houres & Co. v. South London Tramway Co.*, 18 Q. B. D. 815; *Johnston v. Renton*, 9 Eq. 181; *Cottam v. Eastern Counties Rail. Co.*,

1 J. & H. 243; *Marsh v. Keating*, 2 Cl. & Fin. 250, which shows that the forgery is no bar to civil proceedings for damages sustained by the transfer.

(w) *Barton v. Lond. and N.-W. Rail. Co.*, 38 Ch. D. 144; *Carshore v. North-Eastern Rail. Co.*, 29 Ch. D. 344. See, as to interpleader, *Dalton v. Midland Rail. Co.*, 12 C. B. 458, and 13 ib. 474.

(x) *Barton v. North Staffordshire Rail. Co.*, 38 Ch. D. 458.

(y) *Ib.* where the registered holders were executors.

(z) *Mayor, &c., of the Staple of England v. Governor and Co. of Bank of England*, 21 Q. B. D. 160.

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False certificates.

Again, a company is liable to an action for damages at the instance of a person who has bought shares or advanced money on the faith of a certificate of title issued by a company, and who has been damnified thereby (*a*), although the company may have been induced to issue the certificate by fraud or forgery (*b*).

Shaw v. Port Philip Gold Mining Company.

In *Shaw v. Port Philip Gold Mining Co.* (*c*) it was the duty of the secretary of the company to issue certificates under the seal of the company to persons entitled to them; but by the regulations of the directors the certificates required the signatures of a director, the secretary, and the accountant. The secretary improperly affixed the seal of the company to a certificate in favour of a purchaser from himself, and forged the signature of one of the directors to such certificate. The purchaser acted in good faith and transferred the shares to the plaintiff for value. The company was held bound by the certificate, and liable to the plaintiff for damages.

Simm v. Anglo-American Telegraph Company.

But the mere fact that a company has registered a forged transfer or issued a certificate which is untrue, will not render the company liable in damages to the person wrongly registered as a shareholder or to whom the certificate was issued, unless he has acted on the faith of the validity of the registration, or of the truth of the certificate, and has thereby suffered damage. This is well illustrated by the case of *Simm v. Anglo-American Telegraph Co.* (*d*). In that case *Burge* bought some stock in the defendant company, and received a transfer which purported to be signed by one *Coates*, who held stock in the company.

(*a*) *Simm v. Anglo-American Tel. Co.*, 5 Q. B. D. 188, where the plaintiff had advanced money on the shares, but had been paid off.

(*b*) *Bahia and San Francisco Rail. Co.*, L. R. 3 Q. B. 584; *Hart v. Frontino, &c., Co.*, L. R. 5 Ex. 111. Compare *Shropshire Union Rail. Co. v. The Queen*, L. R. 7 H. L. 496, reversing S. C., L. R. 8 Q. B. 420, which turned on the fact that the certificate was true, but only pur-

ported to show the legal title.

(*c*) 13 Q. B. D. 103, see *ante*, p. 64. Compare *Mayor, &c., of the Staple of England v. Governor of Bank of England*, 21 Q. B. D. 160, and *British Mutual Banking Co. v. Charnwood Forest Rail. Co.*, 18 Q. B. D. 714.

(*d*) 5 Q. B. D. 188. The judgment of the Court of appeal in this case is particularly instructive.

Burge sent this transfer to the company, who registered it after making the usual enquiries. *Burge* then transferred the stock to *Simm*. The company registered this transfer, and issued a certificate to *Simm*, stating that he was the holder of the stock. *Simm*, who was secretary to the National Bank, held the stock as trustee for *Burge*, subject to any lien the bank might have on it for advances to *Burge*. The bank made advances to *Burge* on the stock, but these advances had been repaid before the action was brought. The company having discovered that *Coates's* signature was a forgery, refused to acknowledge *Simm* as a stockholder, or to pay him any dividends. Under these circumstances, *Simm* and *Burge* brought an action against the company for the recovery of the purchase-money of the stock, and the dividends thereon. It was contended on their behalf, first, that the *National Bank* having advanced money to *Burge* on the faith of the transfer to *Simm*, and of the certificate issued to him, *Simm* as trustee for the bank had as against the company acquired a title to the stock by estoppel, and that this title could not be defeated by any fluctuations of the account between the bank and *Burge*; and secondly, that it was the duty of a company to keep a correct register, and that the defendant company having entered *Simm* on the register, could not afterwards refuse to acknowledge his right to the stock. These views prevailed in the Court of first instance, but the Court of Appeal reversed this decision and gave judgment for the company, on the ground as regards *Simm*, that although he as trustee for the National Bank would have had a right to recover damages against the company, if the bank had suffered loss from having advanced money to *Burge* on the faith of the certificate issued to *Simm*, yet that these advances had been repaid, and no loss had been incurred; and as regards *Burge*, that the loss sustained by him had arisen from his having accepted as genuine a forged transfer, and not from any representation made to him by the company.

In connection with this subject, it should be remembered that a company cannot be estopped from denying that it has done something which it had no power to do; so that if a person has bought shares or advanced his money on the faith of a certificate, which the company had no power to issue, he cannot

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13k. III. Chap. 4. not recover damages from the company for the loss he has
 Sect. 5. sustained (c).

Estoppel by carelessness.

Carelessness
 when an
 estoppel.

The most difficult cases which arise in practice are those in which the shareholder, whose shares have been improperly transferred from his name into the name of someone else, has been guilty of some carelessness which has facilitated the improper dealing with his shares. The mere fact that he has signed transfers in blank, and entrusted them with his share certificates to a broker or banker, does not without more estop the transferor from claiming his shares as against a purchaser who knew that the transfer was in blank (f). Again, carelessness in leaving share certificates or transfers about, although it facilitates fraud and even forgery, does not cause it, and does not of itself estop the owner of the shares from recovering them (g). So, carelessness on the part of a corporation as to the custody of its common seal, does not prevent the corporation from recovering shares transferred from its name by an unauthorised and fraudulent use of its seal (h).

Swan's case.

The leading case on the kind of carelessness which will prevent the person guilty of it from recovering shares wrongfully transferred from his name, is *Swan's case*. The facts there were somewhat like those in *Tayler v. Great Indian Peninsula Railway Co.* (noticed *ante*, p. 473). But in *Swan's case* the transfers had been actually registered, and the vendor sought to have the registration cancelled. The case came first before the Common Pleas (i), and then before the Exchequer (k), and lastly before the Exchequer Chamber (l). All the judges

(c) See *ante*, book ii. c. 2, § 2, and *British Mutual Banking Co. v. Charnwood Forest Rail. Co.*, 18 Q. B. D. 714.

(f) See the cases *ante* p. 476, *et seq.* and *Tayler v. Great Indian Peninsula Rail. Co.*, 4 De G. & J. 559; *Swan v. North British Australian Co.*, 2 H. & C. 175, noticed *infra*.

(g) *Johnston v. Renton*, 9 Eq. 181.

(h) *Bank of Ireland v. Evans's*

Charity Trustees, 5 H. L. C. 389; *Mayor, &c., of the Staple of England v. Governor and Co. of Bank of England*, 21 Q. B. D. 160.

(i) *Ex parte Swan*, 7 C. B. N. S. 400.

(k) *Swan v. North British Australian Co.*, 7 H. & N. 603.

(l) 2 H. & C. 175.

agreed that the transfers were wholly void, and conferred no title on the transferee, although he was a *bonâ fide* purchaser; and it was also held by the Exchequer Chamber that the vendor was not estopped, by his own negligence in signing the blank transfers, from asserting his title to the shares. On this point the judges in the courts below had been equally divided (*m*). Bk. III. Chap. 4.
Sect. 6.

In order that carelessness may estop one person from denying his title as against another, it is necessary that the carelessness shall be in the transaction in which that other has been engaged, and shall be the proximate cause of his being misled, and must be the neglect of some duty owing to him or to the public, of whom he is one. But the neglect of what is prudent, having regard to one's own interests or neglect of duty to third persons through whom the person relying on the estoppel does not claim, is not sufficient for the purpose (*n*).

Similar observations apply to acts done, not by carelessness, but under the influence of fraud or misrepresentation, or of misplaced confidence (*o*).

SECTION VI.—OF SALES OF SHARES AND QUESTIONS ARISING THEREON.

There is nothing illegal at common law in the sale of shares or scrip (*p*). At the same time, if a company or projected company is itself illegal, the sale of its shares or scrip is illegal also (*q*). Illegal sales.

(*m*) See some observations on this case in 11 Eq. 319.

(*n*) See Lord Blackburn's celebrated judgment in *Swan v. North British Australasian Co.*, 2 H. & C. 175; *Mayor, &c., of Staple of England v. Governor and Co. of Bank of England*, 21 Q. B. D. 160; *Carr v. Lond. and N.-W. Rail. Co.*, L. R. 10 C. P. 307. See, on estoppel generally, Cababé on Estoppel, 1888; *Davis v. Bank of England*, 2 Bing. 393, where the careless drawing of a cheque estopped the drawer from

complaining of a forgery, is commented on in the above cases.

(*o*) *Johnston v. Renton*, 9 Eq. 181, and see *Donaldson v. Gillot*, 3 Eq. 274.

(*p*) See *Barclay's case*, 26 Beav. 177; *Aston's case*, 4 De G. & J. 320, and 27 Beav. 474; *Grisewood's case*, 4 De G. & J. 544; *Ex parte Bugge*, 13 Beav. 162.

(*q*) *Josephs v. Pebrer*, 3 B. & C. 629; *Buck v. Buck*, 1 Camp. 547. The statute of 7 & 8 Vict. c. 110, prohibited the sale of shares in a

Bk. III. Chap. 4. There is nothing illegal in the sale of shares in companies
Sect. 6. which are being wound up (*r*).

Gaming and
wagering in
shares.

A *bonâ fide* contract by a person to deliver shares which he has not got, is legal (*s*). But a contract for their purchase and sale, where neither party intends to accept or deliver them, and they only intend to pay "differences," according to the rise or fall of the market, is void as a gaming or wagering contract within 8 & 9 Vict. c. 109, § 18 (*t*). But such contracts can seldom be proved; for in the ordinary course of business there is a valid contract to buy and another to sell (*u*); and it is now settled that a broker who pays differences for his principal can recover them from him (*r*).

Conspiracy.

A conspiracy to obtain a settling day by fraudulent means in order to defraud buyers of shares, or a conspiracy by fraudulent means to raise or lower the price of shares with intent to defraud buyers or sellers, is an indictable offence (*x*).

Settling day.

By the rules of the London Stock Exchange, bargains in the shares of a new company are contingent on the appointment of

company governed by it, until after the company had obtained a certificate of complete registration, and even then by any subscriber not registered as a shareholder, § 26; *Ex parte Neilson*, 3 De G. M. & G. 556; *Morris v. Cannan*, 4 De G. F. & J. 581. But the statute is now repealed; and the prohibitions in question never extended to companies, the formation of which was commenced before the 1st Nov. 1844 (as to which see *Baker v. Phaslitt*, 5 C. B. 262; *Aston's case*, 27 Beav. 474, and 4 De G. & J. 320), nor to railway or other companies requiring the authority of Parliament: *Young v. Smith*, 15 M. & W. 121; *Bousfield v. Wilson*, 16 ib. 185; *Lawton v. Hickman*, 9 Q. B. 563.

(*r*) See *Rudge v. Bowman*, L. R. 3 Q. B. 689, and *infra*, p. 494.

(*s*) *Hibblewhite v. McMorine*, 5 M. & W. 462; *Barry v. Croskey*, 2 J. & H. 1; *Ex parte Phillips*, and

Ex parte Maridun, 2 De G. F. & J. 634.

(*t*) *Grisewood v. Blane*, 11 C. B. 539; *Rees v. Fernie*, 4 N. R. 539, and the cases in the last note. The old Stock-jobbing act (Sir John Barnard's act), 7 Geo. 2, c. 8, was repealed by 23 & 24 Vict. c. 28. It did not apply to shares in companies. See *Hewitt v. Price*, 4 Man. & Gr. 355; *Williams v. Trye*, 18 Beav. 366. See, too, *Ex parte Turner*, 3 De G. & J. 46, and the cases there cited.

(*u*) See *Thacker v. Hardy*, 4 Q. B. D. 685, the leading case on this subject, and *infra*, pp. 500 *et seq.*

(*v*) *Rosewarne v. Billing*, 15 C. B. N. S. 316; *Thacker v. Hardy*, 4 Q. B. D. 685; *Ex parte Rogers*, 15 Ch. D. 207. See, also, *Read v. Anderson*, 13 Q. B. D. 779.

(*x*) See *R. v. Aspinall*, 1 Q. B. D. 730, and 2 ib. 48; *R. v. De Baringer*, 3 M. & S. 67; *R. v. Esdaile*, 1 Fos. & Fin. 213.

a settling day : but the validity of contracts in relation to such shares is not affected by reason of the appointment having been obtained by a fraud to which the contracting persons were no parties (*y*). Bk. III. Chap. 4.
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By 30 Vict. c. 29, § 1, it is enacted that all contracts made after the 1st of July, 1867, for the sale or transfer of any shares, stock, or interest in any Joint-stock Banking Company in England or Ireland, constituted under or regulated by any act of Parliament, royal charter, or letters patent, issuing shares or stock transferable by any written instrument, shall be void unless such contract sets forth in writing the distinguishing numbers of such shares, stock, or interest on the register, or if there is no register, the person in whose name such shares, stock, or interest shall at the time of making such contract stand in the books of the company. The object of this enactment is to prevent runs on banks which may be occasioned by a fall in the price of their shares resulting from gambling transactions (*z*). It is the custom on the Stock Exchanges of London and Bristol to disregard the provisions of this act : but such custom is illegal. Contracts in violation of the statute are, however, simply void, not illegal. Consequently, a stockbroker employed to sell shares in a joint stock bank, is liable in damages to his employer if the sale goes off owing to his having disregarded the provisions of the act (*a*). Again, a stockbroker employed to purchase such shares has no claim against his principal who refuses to take them, although the broker may have been himself obliged by the rules to pay for the shares (*b*). But it is otherwise if the principal knew of the custom, and authorised the contract (*c*) ; and a person who has, by accepting a transfer in pursuance of the contract, become owner of the shares, may be compelled to indemnify the vendor against all liability in respect of them (*d*). Banking
Companies.

(*y*) *Ex parte Ward*, 20 Ch. D. 546.
356.

(*z*) See, as to numbering shares, *ante*, p. 50 ; and see on this act in addition to the cases below, *Mitchell v. City of Glasgow Bank*, 4 App. Ca. 624.

(*a*) *Neilson v. James*, 9 Q. B. D. 625.

(*b*) *Perry v. Barnett*, 15 Q. B. D. 388, and 14 ib. 467.

(*c*) *Seymour v. Bridge*, 14 Q. B. D. 460. See, also, *Read v. Anderson*, 13 ib. 779, and 10 ib. 100.

(*d*) *Loring v. Davis*, 32 Ch. D.

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Sect. 6.

Agreements for
sale of shares.

Stamp.

Dividends on
sales.

Delivery of the
shares.

Neither scrip nor shares are goods or chattels or interests in land within the Statute of Frauds; and (subject to the qualification introduced by the act just noticed) a contract for the sale of them is therefore valid, although not reduced into writing and signed by either buyer or seller, or by any agent of either of them (*e*). At the same time, if a contract for the sale of shares is reduced into writing, that writing is the proper evidence of the contract, and must therefore be produced properly stamped (*f*). Moreover, by the Customs and Inland Revenue act, 1888 (51 Vict. c. 8), any person who effects any sale or purchase of any stock or marketable security as broker or agent, is bound under penalty to make and execute a contract note (§ 17), and such note must be properly stamped with a duty of 6*d*. if the shares are of the value of 100*l*. or upwards (§ 16, and 33 & 34 Vict. c. 97, § 69 *et seq*).

Under a contract for the sale of shares which is silent as to dividends, the price covers all future dividends, and the purchaser becomes entitled to all dividends declared after the contract is made, though they may be declared in respect of a period antecedent to the contract, and before the time fixed by the contract for completion has arrived (*g*).

As regards delivery, it is to be observed that shares and certificates are different things; and an agreement to *deliver shares* is performed by the execution and delivery of a proper transfer. Actual delivery of the share certificates is not essential to the performance of such a contract (*h*). The transferee can generally procure himself to be registered, or to be otherwise recognised by the company as a shareholder without them, although he cannot do so without trouble and delay (*i*). In practice the vendor's share certificates are usually handed to the purchaser with the transfer; and if the vendor does not send his certificates to the purchaser within a reasonable time, the purchaser may decline to accept the shares (*k*).

(*e*) *Ante*, p. 453.

(*f*) *Knight v. Barber*, 16 M. & W. 66, and *ante*, pp. 453 and 469; 33 & 34 Vict. c. 97, § 69 *et seq.*: 51 Vict. c. 8.

(*g*) *Black v. Homersham*, 4 Ex. D. 24.

(*h*) *Hunt v. Gurn*, 13 C. B. N. S. 226, and 3 Fos. & Fin. 223.

(*i*) See *Société Générale de Paris v. Walker*, 11 App. Ca. 34, *ante* p. 479, as to the effect of not getting the certificates.

(*k*) *De Waal v. Adler*, 12 App.

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Sect. 6.I. *Sales not on Stock Exchange.*

A contract for the sale of shares, although usually made through members of the Stock Exchange, may be made without their intervention.

A simple contract for the sale of shares imposes on the vendor the obligation of delivering to the purchaser on the day fixed, or if no time be fixed within a reasonable time after the date of the contract (*d*), the number of shares agreed to be sold. But, except in cases to which 30 Vict. c. 29 is applicable (*m*), or unless there be some special stipulation to that effect, the vendor is not bound to deliver any particular shares; nor is it important whether when he agreed to sell he actually had any shares or not (*n*); it is sufficient if he procures them in time. Neither is it necessary that the shares should be actually vested in him, or that he should be the actual transferor; it being immaterial to the purchaser by whom the transfer to him is made, provided only the transferor's title is good (*o*).

It has been said that it is the vendor's duty to procure the registration of the shares in the name of the purchaser (*p*). But this is going too far; and it appears more correct to say that in the absence of express agreement (*q*), the purchaser takes the risk of any objection being made by the company to himself as the transferee; and also the risk of all other objections not based on the right of the transferor to transfer his shares (*r*). The vendor, however, must do whatever is neces-

Ca. 141. The constitution of the company does not appear, and shares and certificates were apparently treated as the same things.

(*l*) *De Waul v. Adler*, 12 App. Ca. 141.

(*m*) *Ante*, p. 489.

(*n*) *Ante*, p. 488, note (*s*).

(*o*) See the judgment of Lord Blackburn in *Masted v. Paine*, No. 2, L. R. 6 Ex. 132.

(*p*) *Wilkinson v. Lloyd*, 7 Q. B. 27; *Lloyd v. Crispe*, 5 Taunt. 249. See, also, *Birmingham v. Sheridan*,

33 Beav. 660.

(*q*) See *per* Lord Campbell in *Stray v. Russell*, 1 E. & E. 900.

(*r*) See *London Founders' Association v. Clarke*, 20 Q. B. D. 576; *Shimur v. City of London Marine Insurance Corporation*, 14 Q. B. D. 882; *Stray v. Russell*, 1 E. & E. 888, and Lord Blackburn's judgment in *Masted v. Paine*, No. 2, L. R. 6 Ex. 132; and the cases *Evans v. Wood*, 5 Eq. 9; *Hodgkinson v. Kelly*, 6 Eq. 496; *Sheppard v. Murphy*, Ir. R. 2 Eq. 544, which, however, are all Stock Exchange cases.

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sary to perfect his right to transfer, *c.g.*, pay all calls which become due before the purchaser becomes in equity the owner of the shares (s).

Vendor's title.

With respect to the title which a vendor of shares can be required to show, the distinction between incorporated and unincorporated companies is of great importance. A vendor of a share in an incorporated company has only to show a title to the shares he proposes to transfer; and he cannot be required to show any title in the company to its landed property or other assets (t). But the title of a vendor of a share in an unincorporated company is not so clearly separable from the title of the company; and a vendor who sells a share in such a company without special conditions runs the serious risk of finding himself embarrassed by requisitions respecting the title of the company to its landed property (u).

The cases referred to below are quite sufficient to render it prudent for a vendor of shares in an unincorporated company to stipulate that he shall not be required to adduce any evidence of the title of the company to any property whatever; and for a vendor of shares in any company to stipulate that he shall not be required to adduce any evidence of his own title, except the registry of himself as a shareholder in respect of the shares offered for sale (x).

Purchaser's
obligations.

The obligation of the purchaser is to pay the price agreed upon, and to accept a transfer of the shares, and to indemnify the vendor from all liability in respect of them accruing after the purchaser has become their equitable owner (y). It has long been established that a contract for the sale and purchase of shares is one of which specific performance will be enforced (y); whence it follows that from the time when his

(s) As to his right to procure registration, see 30 & 31 Vict. c. 131, § 26, *ante*, p. 470.

(t) See *Shaw v. Fisher*, 2 De G. & Sm. 11, and 5 De G. M. & G. 596, as to the title which can be required in these cases.

(u) See *Curling v. Flight*, 6 Ha. 41, and 2 Ph. 613; *Stevens v. Guppy*, 3 Russ. 171; *Morris v. Kearsley*, 2

Y. & C. Ex. 139.

(x) See *Hare v. Waring*, 3 M. & W. 362, as to evidence of title by entries in a company's books.

(y) *Cheale v. Kenward*, 3 De G. & J. 27; *Duncuft v. Albrecht*, 12 Sim. 189; *Shaw v. Fisher*, 2 De G. & S. 11, and 5 De G. M. & G. 596. Fry on Sp. Per., pp. 26 & 620 *et seq.*, 2nd ed.

contract ought to have been performed, the purchaser becomes in equity the owner of the shares; and all the rights and obligations incidental to such ownership attach to him (c). Moreover, this relation of trustee and *cestui que trust* may be created, not only by a direct contract between the parties, but in other ways—*e.g.*, if there is a series of assignments by equitable owners, the ultimate assignee will be the *cestui que trust* of the legal owner, and be bound to indemnify him accordingly. Numerous authorities illustrate these principles; but as they relate to purchases and sales through brokers, they will be noticed hereafter (a).

The obligation of a purchaser to pay the price, accept the shares, and indemnify the vendor against liability in respect of them, was recognised at law even before the Judicature acts; and for a breach of such an obligation an action will lie (b). Moreover, this obligation exists and will be enforced, notwithstanding the shares may have become valueless since the date of the contract by reason of the stoppage of the company or otherwise (c), and notwithstanding they cannot be registered in the name of the purchaser (c). The risk is on the purchaser, and as he benefits by a rise in the value of the shares, so he suffers if they become worthless or worse. But the terms of the agreement may throw the risk on the vendor (d).

(c) *Loring v. Davis*, 32 Ch. D. 625. As to dividends declared before this time, see *Black v. Homersham*, 4 Ex. D. 24, *ante*, p. 490.

(a) See *inter alia*, *Shepherd v. Gillespie*, 3 Ch. 764, and 5 Eq. 293; *Evans v. Wood*, 5 Eq. 9; *Paine v. Hutchinson*, 3 Eq. 257, affirmed 3 Ch. 388, where forms of decree are given.

(b) See *Kellock v. Enthoven*, L. R. 9 Q. B. 241; affirming S. C. 8 Q. B. 458, where the vendor was made a contributory as a past member; *Walker v. Bartlett*, 18 C. B. 845, and *Humble v. Langston*, 7 M. & W. 517.

(c) See, at law, *inter alia*, *Chapman v. Shepherd*, L. R. 2 C. P. 228; *Bow-*

ring v. Shepherd, L. R. 6 Q. B. 209; and in equity, *inter alia*, *Paine v. Hutchinson*, 3 Eq. 257, and 3 Ch. 388; *Evans v. Wood*, 5 Eq. 9; *Hodgkinson v. Kelly*, 6 Eq. 496; *Harkins v. Mulhby*, 6 Eq. 505, and 4 Ch. 200; *Loring v. Davis*, 32 Ch. D. 625, which, however, were all cases in which the defendant had accepted the transfers. Compare *Birmingham v. Sheridan*, 33 Beav. 660, which, however, cannot now be relied on, as was admitted by the M. R. in *Fenwick v. Wood*, 6 June, 1870, and see 3 Ch. 393.

(d) See *per* Lord Campbell in *Stray v. Russell*, 1 E. & E. p. 900; and *Wilkinson v. Lloyd*, 7 Q. B. 27. Fry, Sp. Per., p. 632, 2nd ed.

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Sales of shares
in companies
being wound up.

Position of parties where the shares bought and sold are not identical.

Kempson v. Saunders.

Ex parte Panmure.

Further, a contract for the sale of shares in a company being wound up under the act of 1862 is perfectly valid, although made during the liquidation of the company. The provisions of the Companies act, 1862, §§ 131—153, declaring certain transfers made after the commencement of the winding up to be void, operate only to prevent the register of shareholders or the list of contributories from being altered by reason of such transfer (*e*); and such a contract is binding upon a purchaser, although he can show that he was ignorant of the fact of the company having gone into liquidation (*f*).

On the other hand, a contract for the sale and purchase of shares does not bind the purchaser to accept what does not answer the description of the shares which he agreed to buy. If, therefore, such shares do not exist, he is not compellable to pay the price agreed upon; and if he has paid it in ignorance of the facts, he can recover it back as money paid for a consideration which has failed (*g*).

In *Kempson v. Saunders* (*h*) it was held that a purchaser of shares in a projected company which was never formed, was entitled to recover back his money from the vendor, although the vendor was not an original subscriber, and had himself purchased the shares from other persons.

Again, an authority to obtain shares from company A. is not pursued by obtaining shares from company B., and if they are obtained by mistake or otherwise the principal is not bound to take them, and can repudiate them if they are registered in his name (*i*). In such a case the agent is liable to company B. for the damages that company may have sustained by losing the allottee as a shareholder (*k*).

Again, where shares are apparently bought, and the certi-

(*e*) *Biederman v. Stone*, L. R. 2 C. P. 504; *Rudge v. Bowman*, L. R. 3 Q. B. 689. See *ante*, p. 471.

(*f*) *Rudge v. Bowman*, L. R. 3 Q. B. 689, 697. See, as to enforcing such a contract in equity, *Emmerson's case*, 1 Ch. 433, explained by Wood, L. J., in *Paine v. Hutchinson*, 3 Ch. 388, 391. Fry, Sp. Per., 634.

(*g*) *Watkins v. Huntley*, 2 Car. & P. 410, note; *Westropp v. Solomon*, 8 C. B. 345.

(*h*) 4 Bing. 5. Compare *Stout v. Bailis*, 2 P. W. 217; *Mitchell v. Newhall*, 15 M. & W. 308.

(*i*) *Ex parte Panmure*, 24 Ch. D. 367.

(*k*) *Ib.*, where the damages were the whole amount of the shares.

icates for them prove to be forged, the purchaser can recover Bk. III. Chap. 1. Sect. 6. their price from the vendor (*l*).

Strictly speaking, it is the purchaser's duty to prepare the Preparation of transfer. transfer, and to tender it to the transferor for execution (*m*) ; but the form of transfer is so simple that in practice the vendor fills it up and sends it to the purchaser to execute.

The effect of a transfer in blank (*n*), and also the question whose duty it is to procure it to be registered (*o*) have been already considered.

An important question connected with the transfer is, whether Transfer to purchaser's nominee. the vendor is bound to transfer to any person nominated by the purchaser, or can insist on transferring to the purchaser himself. As will be seen hereafter, a purchaser of shares sold on the Stock Exchange is entitled to require a transfer to himself or his nominee (*p*). Lord Blackburn has stated his opinion to be that any other purchaser has the same right (*q*). But it must be borne in mind that a transfer does not always relieve a transferor from all liability (*r*), and that it is often a matter of great importance to a transferor that his transferee shall be a person of substance. Whatever, therefore, the rule may be in cases where the transferor is under no liability, or where by his transfer he frees himself from all liability, it is very questionable whether a vendor of shares who has not agreed expressly or impliedly (by selling on the Stock Exchange) to transfer to the nominee of the person with whom he has contracted, is under any obligation to transfer to such nominee (*s*). A vendor of a leasehold estate who has himself entered into onerous covenants, is surely not under any obligation to assign to a pauper at the request of the purchaser, unless indeed the purchaser enters into a covenant

(*l*) *Royal Exchange Assur. Co. v. Moore*, 2 N. R. 63, Q. B., a case of forged debentures. 6 Ex. 132.

(*m*) *Humble v. Langston*, 7 M. & W. 517, and *per* Lord Blackburn, in *Macted v. Paine*, No. 2, L. R. 6 Ex. 132. (*q*) See his judgment in the case last cited.

(*n*) *Ante*, p. 471 *et seq.* (*r*) *E.g.*, in companies formed and registered under the Companies act, 1862, from liability as a past member.

(*o*) *Ante*, p. 491. (*s*) *Coles v. Bristow*, 4 Ch. 3, is an authority to the effect that he is not.

(*p*) *Macted v. Paine*, No. 2, L. R.

Bk. III. Chap. 4. for indemnity which would obviously remove the vendor's
Sect. 6. objections.

Lien of vendor It is conceived that an unpaid vendor of a share in a com-
for unpaid pur- pany has the same right of stopping the delivery to an in-
chase-money. solvent purchaser that a seller of ordinary goods has in similar
cases.

Fraudulent sale. A person who fraudulently sells shares in a company which
he knows has no existence, is criminally responsible (*t*). But
the rule *carcat emptor* renders it lawful for a person holding
shares in an insolvent company to sell them to any one willing
to buy them; and in the absence of misrepresentation by
the seller, the buyer is apparently without remedy against
him (*u*).

Fraud by the A person who has been induced to purchase shares by fraud
seller. on the part of the seller, can, at his option, either keep the
shares and sue for the damage he has sustained by the fraud,
or repudiate the contract, and recover the money paid under
it. But he cannot adopt the latter alternative unless he can,
when the action is brought, restore the shares in the same
state in which he took them, and place the seller in the same
position in which he stood before the sale (*x*). The purchaser
can also maintain an action to rescind the contract, and to
compel the vendor to indemnify him. And the fact that the
plaintiff sold some of the shares before he knew of the fraud,
will not disentitle him to relief, if the contract is severable,
and this it has been held to be, where all the shares bought
are shares in the same company (*y*). Nor will the forfeiture
of the shares after the commencement of the action affect
his rights (*z*). Unless, however, the company is implicated
in the fraud, the purchaser, if he has become a share-

(*t*) See *Maccallum v. Turton*, 2 Y. & J. 183.

(*u*) See *Remfry v. Butler*, E. B. & E. 887; *Stray v. Russell*, 1 E. & E. 888, and *ante*, p. 493.

(*x*) *Clarke v. Dickson*, E. B. & E. 148; and see *Maturin v. Tredinnick*, cited in the next note. As to actions for damages sustained by

taking shares on the faith of fraudulent statements, see *Clarke v. Dickson*, 6 C. B. N. S. 453; *Bedford v. Bagshaw*, 4 H. & N. 538; *Davidson v. Tulloch*, 3 Macqueen, 783; *Torycross v. Grant*, 2 C. P. D. 469.

(*y*) *Maturin v. Tredinnick*, 2 N. R. 514, and 4 ib. 15.

(*z*) *Ibid*.

holder, cannot, it is conceived, prevent calls being made upon him (*a*). Bk. III. Chap. 4.
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If a person is induced to sell shares by the fraud of the purchaser, the vendor has similar rights to those which a purchaser has in the converse case already considered. But where the purchaser is innocent of the fraud, and a person's shares have been fraudulently sold and transferred by others, his rights against the purchaser will depend upon whether the latter has acquired the legal ownership or the right to call for the legal ownership, *bonâ fide*, for value, and without notice of the fraud. If he has, his title cannot be impeached (*b*); but if he has not, the shares may be recovered from him, unless the claimant has lost his right to relief by his own negligence, lapse of time, or some other special circumstance (*c*). Fraud on seller.

Effect of fraud
on title of pur-
chaser.

Shares are not unfrequently sold by auction. If an auctioneer sells shares, without disclosing the persons on whose behalf he sells, he will be personally responsible for the due completion of the sale, and will be liable to the purchaser in damages for the non-transfer of the shares to him (*d*). Moreover, if in such a case the auctioneer, when called upon to transfer the shares refers the purchaser to the owners, it becomes unnecessary for the purchaser to tender a deed of transfer to the auctioneer before suing him, for by such a reference the auctioneer discharges the purchaser from tendering any deed of transfer to him (*e*). If shares are sold subject to a condition that if they are not paid for by a certain time, the seller shall be at liberty to resell them, and shall be entitled to recover from the purchaser any loss sustained by the resale, and the shares are sold and resold under this condition, the first purchaser can be sued on the special contract entered into by him (*f*). Sales of shares
by auction.

(*a*) See *ante*, book i. c. 3, and *infra*, book iv. c. 1, § 10, under the head Contributories. *Bloxam v. Metropolitan Cab Co.*, 4 N. R. 51, V.-C. W., where an injunction was granted is, it is conceived, not opposed to this, as the plaintiff was not a shareholder.

(*b*) See *ante*, pp. 476 *et seq.*

L.C.

(*c*) See *Taylor v. Great Indian Rail. Co.*, 4 De G. & J. 559, *ante*, p. 473, and other cases of forged transfers cited *ante*, p. 483 *et seq.*

(*d*) *Franklyn v. Lamond*, 4 C. B. 637.

(*e*) *Ib.*

(*f*) *Lamond v. Davall*, 9 Q. B. 1030.

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Actions by purchaser against seller.

In an action by a purchaser of shares against a seller, for not transferring the shares bought, the purchaser must prove —1, that he was ready and willing to pay for the shares (*g*), and 2, that he tendered to the seller for his execution a proper instrument of transfer (*h*). The necessity for such tender, however, only exists upon the supposition that some formal document is required to render the transfer of the shares complete, and upon the further supposition that the seller has not discharged the purchaser from making the tender (*i*).

Actions by seller against purchaser.

Again, a seller suing a purchaser for not accepting shares must prove readiness and willingness on his, the seller's part, to transfer those shares to the purchaser (*k*). The circumstances that a call is due upon shares agreed to be sold, and that they are not transferable so long as the call remains unpaid, do not disprove readiness and willingness on the part of the seller to transfer, if he was in fact ready and able to pay the call in question (*l*).

Transfers in blank.

The effect of transfers in blank has been already considered (*m*). The decisions at law on this subject must now be taken with the qualifications rendered necessary by the decisions in equity.

Damages recoverable when contract for sale is broken.

In an action by the seller of shares against the purchaser for not accepting them, the damages are measured by the difference between the contract price and the market price at the time of the purchaser's breach of contract (*n*); and it is for the jury to determine when this time was (*o*). So, in an action by the purchaser of shares against the seller for not delivering them, the damages are measured by the difference

(*g*) *Lawrence v. Knowles*, 5 Bing. N. C. 399. In *Tempest v. Kilner*, 2 C. B. 300, the averment of readiness and willingness was traversed too largely.

(*h*) *Stephens v. De Medina*, 4 Q. B. 422; *Bowlby v. Bell*, 3 C. B. 284; *Green v. Murray*, 6 Jur. 728, Q. B.

(*i*) *Franklyn v. Lamond*, 4 C. B. 637.

(*k*) *Hannin v. Goldner*, 11 M. &

W. 849. As to the duty to procure a transfer, see *ante*, p. 491, and *infra*, p. 506.

(*l*) *Shaw v. Rowley*, 16 M. & W. 810.

(*m*) *Ante*, p. 471 *et seq.*

(*n*) *Shaw v. Holland*, 15 M. & W. 136; *Stewart v. Cauty*, 8 M. & W. 160; *Pott v. Flather*, 5 Ra. Ca. 85.

(*o*) *Ibid.*, and see *Barned v. Hamilton*, 2 Ra. Ca. 624.

between the contract price and the market price at the time when they ought to have been delivered (*p*). Where, however, an action is brought for not re-delivering shares lent and agreed to be returned on a given day, the damages are measured by the market price of the shares at the time of the trial (*q*); and the same rule is adopted in estimating damages in actions against companies for not delivering shares at the time they ought (*r*).

An action will lie for specific performance of a contract for the purchase and sale of shares (*s*) if it is capable of being performed (*t*): and the purchaser will be compelled to pay the price, although it may have been expressed to be paid in the deed of transfer, if, in fact, it was not thus paid (*u*); and will be compelled to accept a transfer of the shares he has bought, and to indemnify the seller from all liabilities accruing subsequently to the sale (*x*); and the seller will be compelled to account for any monies he may have received from an improper subsequent sale to another person (*y*). The Court has, however, refused to compel a purchaser of scrip to accept shares, and indemnify the seller from calls upon them (*z*); and to compel an allottee of shares to accept them, and to execute the company's deed in respect of them (*a*); and to compel the

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Specific perform-
ance of contract
of sale.

(*p*) *Tempest v. Kilner*, 3 C. B. 253.

(*q*) *Owen v. Routh*, 14 C. B. 327. If the shares have been returned, the damages must be limited to the loss caused by their detention. *Williams v. Archer*, 5 C. B. 318.

(*r*) *Cockerell v. Van Diemen's Land Co.*, 18 C. B. 454, and 1 C. B. N. S. 732.

(*s*) *Ante*, p. 493.

(*t*) See, as to this, *Birmingham v. Sheridan*, 33 Beav. 660, and compare *Poole v. Middleton*, 29 Beav. 646; and see *ante*, p. 493, from which it appears, that although registration in the purchaser's name may be impossible, he can be compelled in equity to indemnify the vendor.

(*u*) *Wilson v. Keating*, 27 Beav.

121, and 4 De G. & J. 588. The case seems, at first sight, to have been a hard one upon the defendant; but the deed stated that *he* had paid the money, and this he knew was not the fact. He could not, therefore, be treated as having been misled by the plaintiff or by the contents of the deed.

(*x*) *Wynne v. Price*, 3 De G. & S. 310, and other cases cited, *ante*, pp. 492, 493. As to the right of a mortgagee of shares to an indemnity from his mortgagor, see *Phene v. Gillan*, 5 Ha. 1.

(*y*) *Beckitt v. Billbrough*, 8 Ha. 188.

(*z*) *Jackson v. Cocker*, 4 Beav. 59. Compare this with the last case.

(*a*) *Sheffield, &c., Gas Co. v. Harrison*, 17 Beav. 294.

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Relief where
directors refuse
to allow a
transfer.

Jurisdiction
under § 35 of
the Companies
act, 1862.

promoters of a company to deliver shares to a subscriber to the company (*b*). Neither will the Court interfere to compel the completion of a gratuitous and intended transfer (*c*).

In *Poole v. Middleton* (*d*), a purchaser of shares obtained a decree against the seller for the specific performance of the contract of sale, although the directors refused to allow the defendant to transfer his shares. The contract was valid without their consent; and they could not prevent the defendant from completing it, nor object to that mode of transfer which they were in the habit of allowing in other cases.

How far disputes between the vendor and purchaser of shares may be determined by means of the summary jurisdiction conferred by § 35 of the Companies act, 1862, has been often discussed, but is not yet satisfactorily settled. The jurisdiction apparently exists, but it is discretionary only, and the decisions seem to show that the Court will be slow to exercise the jurisdiction except where the legal title of the applicant is clear (*e*).

2. Sales on the Stock Exchange.

Sales of shares
on the Stock
Exchange.

Having now alluded to contracts for the sale of shares otherwise than on the Stock Exchange, it is proposed to notice the effect of entering into such contracts through members of that body. In practice scrip and shares are usually bought and sold through jobbers and brokers (*f*); and a person employing

(*b*) *Columbine v. Chichester*, 2 Ph. 27. In this case, however, the promoters did not appear to have any shares which they could allot.

(*c*) See *Milroy v. Lord*, 4 De G. F. & J. 264.

(*d*) 29 Beav. 646.

(*e*) See *Ward and Henry's case*, 2 Ch. 431; *Musgrave and Hart's case*, 5 Eq. 193; *Ex parte Sargent*, 17 Eq. 273; *Ex parte Shaw*, 2 Q. B. D. 463, and see Fry, Sp. Per., p. 488, 2nd ed.

Brokers and
jobbers.

(*f*) Brokers buy and sell for principals, jobbers for themselves; but as between all members of the Stock

Exchange brokers are always regarded as principals; and for the purposes of the text there is no material distinction between brokers and jobbers. That their liabilities on these contracts are alike, see Lord Blackburn's judgment in *Macted v. Paine*, No. 2, L. R. 6 Ex. 132. See, as to brokers, Partn., p. 97, and *Baring v. Corrie*, 2 B. & A. 137. In this case it is said brokers have no business to contract as principals; but this has no application to sharebrokers, as is evident from the cases alluded to in the text.

a broker to buy or sell is, in the absence of evidence to the contrary, presumed to authorise him to buy or sell according to the rules and usages prevailing in the market where the commodity is to be bought or sold (*g*); and persons employing members of the Stock Exchange as their brokers are bound by the rules and usages which govern that body (*h*); provided they are not unreasonable, or on some other ground illegal, *e.g.*, contrary to 30 Vict. c. 29 (*i*). What these rules and usages are is a question of fact to be proved by the person who relies on them: and in considering the cases it is important to bear in mind that the decisions are made only with reference to the custom as proved or admitted in the particular case under consideration, and do not conclude the question as to what the custom really is.

Besides the printed rules of the Stock Exchange there are certain established practices observed by its members, and which are as binding upon them as the printed rules themselves. Both the rules and unwritten practices are altered from time to time, but a contract must be interpreted according to the custom as it existed at the date of the contract (*k*).

The rules and practices of the Stock Exchange respecting the sale and purchase of shares will be found stated in *Maxted v. Paine* (*l*), *Bowering v. Shepherd* (*m*), *Grissell v. Bristowe* (*n*), *Coles v. Bristowe* (*o*), *Rennie v. Morris* (*p*), *Merry v. Nickalls* (*q*), and *Thacker v. Hardy* (*r*); and from those cases it appears that in the ordinary course of events a sale of shares on the Stock Exchange is essentially a transaction of the following description:—

(*g*) See *Fleet v. Murton*, L. R. 7 Q. B. 126; *Robinson v. Mollett*, L. R. 7 H. L. 802, reversing L. R. 5 C. P. 646, and L. R. 7 C. P. 84, and the cases there referred to.

(*h*) *Stray v. Russell*, 1 E. & E. 888; *Biederman v. Stone*, L. R. 2 C. P. 504; *Grissell v. Bristowe*, L. R. 4 C. P. 36; *Coles v. Bristowe*, 4 Ch. 3; *Bowering v. Shepherd*, L. R. 6 Q. B. 309; *Duncan v. Hill*, L. R. 6 Ex. 255, reversed in part, L. R. 8 Ex. 242.

(*i*) *Ante*, p. 489.

(*k*) *Per* Lord Blackburn, *Maxted v. Paine*, 2nd action, L. R. 6 Ex. 132, 160.

(*l*) L. R. 4 Ex. 203, and 6 Ex. 132.

(*m*) L. R. 6 Q. B. 309.

(*n*) L. R. 4 C. P. 36, and 3 C. P. 112.

(*o*) 4 Ch. 3, and 6 Eq. 149.

(*p*) 13 Eq. 203, overruled by *Merry v. Nickalls*.

(*q*) 7 Ch. 733, and L. R. 7 H. L. 530. See, also, *Ex parte Grant*, 13 Ch. D. 667.

(*r*) 4 Q. B. D. 685.

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1. There is a contract between the selling and buying broker or jobber, to the effect that on a given day, called the account day, the shares shall be deliverable and the price payable.

2. That on the day before the account day (called the name day) the buying broker or jobber gives or passes to the selling broker a ticket containing the name of the person to whom the shares are to be transferred, and the price which that person has agreed to pay for them.

3. That the name so passed can be objected to within a limited time (10 days); and if objected to on reasonable grounds, must be replaced by another name; the committee of the Stock Exchange deciding, in case of dispute, whether another name is to be given or not.

4. That the above-mentioned ticket is prepared by the broker of the ultimate purchaser, and is passed (between 12 and 2 o'clock on the name day) by such broker to his immediate vendor, and by him to his vendor, and so on, until it reaches the broker of the original seller. The ticket is indorsed by each member of the Stock Exchange, with his own name, as it passes through his hands.

5. That the original seller executes a transfer (prepared by his broker) to the ultimate purchaser; the consideration for such transfer being usually stated to be the price agreed to be paid by such purchaser (s).

6. That the selling broker looks for payment of the price at which he sold to the broker or jobber who bought of him; but usually takes from the broker of the ultimate purchaser the money he has agreed to pay, and then settles for the difference, if any, with the broker or jobber with whom he, the selling broker, originally contracted.

From this statement it is apparent that important and difficult questions of law are likely to arise, and, in order to solve them, it is proposed to consider the position—

(s) The confusion introduced by this circumstance led to a variance between the pleadings and the evidence in *Hawkins v. Maltby*, 3 Ch.

188, which, however, was put right in the 2nd suit, 6 Eq. 505, and 4 Ch. 200.

1. Of the vendor and of the broker or jobber who agrees to buy from him. Bk. III, Chap. 4.
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2. Of the vendor and the ultimate purchaser.
3. Of the vendor and the undisclosed and intermediate purchasers.
4. Of the vendor and purchaser as regards their respective brokers.

1. *As to the position of the vendor and of the broker or jobber who agrees to buy from him.*

There is a clear contract between these parties which each can enforce against the other. This has never been doubted; but the real nature of the contract has given rise to much controversy. From the most recent decisions, however, it seems that the true contract is to the effect that the vendor will transfer to the buyer or to his nominee, and that the broker or jobber will either accept the shares and pay for them and indemnify the seller against all liability in respect of them, or find some other person to do so; and that person must be a person *sui juris* who has himself agreed to take the shares, and to whom no reasonable objection can be taken (t).

Contract between vendor and purchasing broker or jobber.

Accordingly where the name of an infant was passed, and the transfer was made to him, the purchasing jobber was held liable to the vendor, although being ignorant of the infancy he had made no objection to the transferee within the time fixed by the rules of the Stock Exchange (u). So, where a jobber passed the name of a person whose broker had exceeded his authority, by extending the time for completing the sale, and that person declined to accept a transfer, it was held that the jobber had not relieved himself from liability in respect of his contract (x). So, also, where the name passed was that of a foreigner resident at Smyrna, it was held, in substance, that

Instances of jobber's liability.

(t) See *Marted v. Paine*, No. 2, L. 530, and 7 Ch. 733; overruling L. R. 6 Ex. 132, and the cases cited in the next few notes.

(x) *Marted v. Paine*, 1st action, L.

R. 4 Ex. 81.

(u) *Merry v. Nickalls*, L. R. 7 H.

Bk. III. Chap. 4. the vendor might reasonably object to it; and having done so,
Sect. 6. — that the jobber remained liable (*y*).

Waiver of
objection to
nominee.

But if the person whose name is given is *sui juris*, and is one to whom the vendor may reasonably object, and he allows the time for objecting to pass, and executes a transfer to that person, the purchasing broker or jobber is discharged from all further liability, unless, as sometimes happens, he has expressly undertaken some further obligation, *e.g.*, to guarantee registration of the transfer.

Grissell v.
Bristowe.
Coles v.
Bristowe.

In *Grissell v. Bristowe* (*z*), and *Coles v. Bristowe* (*a*), the seller had executed a transfer to the person whose name was given as the ultimate purchaser, and he paid for the shares and kept the transfers, but did not execute them, and did not procure them to be registered in his name. The seller consequently remained liable to the company for calls, and he sought to compel the jobber who first bought the shares to indemnify him. But it was held both by the Court of Exchequer Chamber and by the Court of Appeal in Chancery that the jobber had duly discharged his obligations, and had ceased to be liable. In these cases it did not appear that the transferee could have been reasonably objected to; but the decisions showed the true position of purchasing jobbers, and paved the way to those which follow.

Marted v. Paine,
No. 2.

In *Marted v. Paine*, No. 2 (*b*), the name passed was one which could have been reasonably objected to, and was the name of a nominee of the true purchaser, who was paid by him for accepting the transfer. It was, nevertheless, held, that there being no fraud on the part of the defendant (the first purchasing jobber), he had discharged his obligation, by procuring the acceptance of a transfer by a person who could not himself repudiate it, and to whom the vendor had not objected in due time. This case shows conclusively that as between the vendor and purchasing jobber, and where they

(*y*) *Allen v. Graves*, L. R. 5 Q. B. 625.
478.

(*z*) L. R. 4 C. P. 36, reversing S.
C. 3 C. P. 112.

(*a*) 4 Ch. 3, reversing S. C. 6 Eq.
149; *Loring v. Davis*, 32 Ch. D.

(*b*) L. R. 6 Ex. 132, and 4 Ex.
203. See as to the judgment of
Lord Blackburn, in this case, *Merry*
v. Nickalls, 7 Ch. 733.

both act *bonâ fide*, it is the duty of the vendor to make inquiry respecting his proposed transferee.

If, as sometimes happens, the purchasing broker or jobber has expressly guaranteed the registration of the shares, he is liable to indemnify the seller against the consequences of their non-registration in the name of the transferee (*c*); but he is not liable for the solvency of the transferee.

2. *As to the position of the vendor and the ultimate purchaser.*

When the ticket containing the name of the ultimate purchaser issued by his brokers is delivered to the vendor, and he has executed a transfer of his shares, and that transfer has been accepted by the purchaser, and he has paid the price, it is plain that the vendor has become a trustee for the purchaser, and that the purchaser is bound to indemnify the vendor against all liability in respect of the shares (*d*). This has been decided even where the purchaser has not executed the transfer (*d*); and where the registration of the transfer cannot take place by reason of the stoppage of the company (*e*). The most recent decision on this point is *Loring v. Davis* (*f*), where the original contract was void under Leeman's act, 30 Vict. c. 29, and the transfer had not been executed by the purchaser; but he had authorised his agents to accept the shares, and they had done so.

Contract between
 vendor and his
 transferee.

Loring v.
 Davis.

Even before the Judicature acts, where the vendor and ultimate purchaser had been thus brought into direct communication with each other, the vendor could sue the purchaser at

(c) *Cruse v. Paine*, 6 Eq. 641, and 4 Ch. 441.

(d) *Paine v. Hutchinson*, 3 Eq. 257, and 3 Ch. 388; *Holykinson v. Kelly*, 6 Eq. 496; *Hawkins v. Mulby*, 6 Eq. 505, and 4 Ch. 200; *Shepherd v. Gillespie*, 5 Eq. 293, and 3 Ch. 764; *Sheppard v. Murphy*, Ir. Rep. 2 Eq. 544, and 16 W. R. 948; *Wynne v. Price*, 3 De G. & Sm. 310.

(c) *Erans v. Wood*, 5 Eq. 9 ;

Hodgkinson v. Kelly, 6 Eq. 496; *Holmes v. Symons*, 13 Eq. 66. Compare *Birmingham v. Sheridan*, 33 Beav. 660, which cannot now be relied upon. See, on it, 3 Ch. 393.

(f) 32 Ch. D. 625. The authority to accept the shares was revoked by one letter but conferred by another sent with it.

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Sect. 6.

Privity of
contract.

law for such indemnity (*g*): for then, at all events, there was clearly a contract between them (*h*).

The precise moment when the contract in these cases is first created, has given rise to some difference of opinion, but the better opinion seems to be that a contract between the vendor and the ultimate purchaser exists, as soon as the ticket containing the purchaser's name has been handed, by his authority, to the vendor, and he has accepted the name, and indicated that acceptance to the purchaser (*i*). This opinion is based upon the ground that the ticket is drawn up and issued by the agent of the purchaser, who is authorised to use the machinery of the Stock Exchange, and to transmit the ticket to any person to whom the operation of that machinery may bring it. When that person is ascertained, and the ticket is handed to him, an offer is made by the purchaser to buy of the vendor, upon the terms specified on the ticket: and if the vendor accepts that offer, and informs the purchaser that he has done so, it is difficult to see that anything further is required to make a contract between the parties. This point, however, has ceased to be of the same importance as before the Judicature acts: for now, if the relation of trustee and *cestui que trust* is shown to exist, it becomes unnecessary to consider whether there was a contract between the plaintiff and the defendant or not.

Duty to procure
transfer.
Stray v. Russell.

It was settled in *Stray v. Russell* (*k*), that in sales on the Stock Exchange, it is not the duty of the seller of shares to

(*g*) *Kellock v. Enthoven*, L. R. 9 Q. B. 241; *Bowring v. Shepherd*, L. R. 6 Q. B. 309; *Davis v. Haycock*, L. R. 4 Ex. 373; *Walker v. Bartlett*, 18 C. B. 845, reversing S. C. ib. 446; *Humble v. Langston*, 7 M. & W. 517. The action should be for not indemnifying the seller. See *Sayles v. Blane*, 14 Q. B. 205, and 6 Ra. Ca. 79, and the cases above.

(*h*) See, as to this, *Hackins v. Maltby*, 3 Ch. 188, where the contract was held to be misstated. This, however, was put right in the 2nd suit, 6 Eq. 505, and 4 Ch.

200.

(*i*) See acc. *per* Christian, L. J., *Shppard v. Murphy*, 16 W. R. 948, 956; *per* Brett, J., in *Bowring v. Shepherd*, L. R. 6 Q. B. 309, 328; *per* Kelly, C. B., in *Davis v. Haycock*, L. R. 4 Ex. 373, 384-386. See, also, *per* Lord Blackburn, in *Macted v. Paine*, 2nd action, L. R. 6 Ex. 132, 166. See, *contra*, Mr. Justice Lush's judgment in the same case. See, also, Fry, Sp. Per., 628, 2nd ed.

(*k*) 1 E. & E. 888. As to sales not on the Stock Exchange, see p. 491 *et seq.*

procure their transfer to the purchaser; and that a person who buys shares through a broker may be compelled to pay for them, although the company may decline to accept him as a shareholder; and he has endeavoured to repudiate the shares. The facts of this case were as follows:—Some shares in the Royal British Bank were sold by the defendant to the plaintiff through brokers, who were members of the Stock Exchange. Soon after the sale the bank stopped payment, and the directors refused to allow any transfers of shares. The plaintiff, the purchaser, repudiated the purchase, and directed his broker not to pay the purchase-money. The broker, however, did pay it, as he was bound to do by the rules of the Stock Exchange. By the same rules it was incumbent on the purchaser, and not on the seller, to obtain the consent of the directors to the transfer. The plaintiff took no steps to procure such consent, and refused to repay his broker the money he had paid for the shares. This, however, the plaintiff was ultimately compelled to do by an action at law (*l*), and he then brought an action to recover their price from the seller. It was held that the action could not be sustained: 1. Because there had not been a total failure of consideration, inasmuch as the plaintiff had got the transfers and the certificates; 2. Because, by the rules of the Stock Exchange, it was not the duty of the seller to procure the consent of the directors to the transfers; and 3. Because the plaintiff was not himself ready and willing to perform the contract on his part.

It follows that if the buyer has paid the seller or his broker on the receipt of a proper transfer (which is the usual practice), and the company declines to accept the buyer, he cannot recover from the seller the amount paid for the shares, the vendor himself being in no default (*m*).

A reasonable time for the transfer of shares bought and sold is implied in the contract for sale; and where the sale is made through brokers, the rules of the Stock Exchange fixing the time within which shares sold are to be delivered are admis-

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London Founders'
Association v.
Clarke.

Time for com-
pleting transfers.

(*l*) See *Taylor v. Stray*, 2 C. B. N. S. 175, 197.

(*m*) *London Founders' Association v. Clarke*, 20 Q. B. D. 576.

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Sect. 6.

sible in evidence upon the question what is reasonable time, although the buying and selling brokers are not proved to be members of the Exchange (*n*). As to the delivery of certificates, see *ante*, p. 490.

Same broker
acting for both
parties.

A curious and instructive case arose in Ireland in which the same broker acted for both buyer and seller without their knowing it. He was instructed to sell shares in a company by some of his customers, and he was instructed to buy shares in the same company for others of his customers. He sent bought and sold notes to them respectively, and in his books he debited the buyers with the price and credited the sellers with the same amount. Some of the buyers sent him cheques for the money they had to pay. Others of the buyers had money in his hands. No money reached the sellers, and they knew nothing of what was being done about the payment of the purchase-money. The broker became bankrupt. The buyers sued the sellers for the shares: a decree was made in their favour, by the Court of first instance, but this was reversed on appeal, on the ground that the parties did not know that the same broker was acting for them, and that the vendors had not been paid, and that until they were, the purchasers were not entitled to the shares (*o*).

3. *As to the position of the vendor and the undisclosed and intermediate purchasers.*

Undisclosed
principals.

If the first purchaser is a broker buying for a principal, the liabilities of such principal are the same as the liabilities of a purchasing broker or jobber (*p*). These have been already examined.

Intermediate
purchasers.

But in the course of a sale on the Stock Exchange, the only persons who are brought into contact with the vendor are the first and ultimate purchasers. With the intermediate pur-

(*n*) *Stewart v. Cauty*, 8 M. & W. 160. See, also, *Field v. Lelean*, 6 H. & N. 617, where evidence of a custom among mining sharebrokers to pay on delivery was held admissible upon the question of reasonable time. In this case both the

plaintiff and the defendant were mining sharebrokers.

(*o*) *M'Deritt v. Connolly*, 15 L. R., Ir. 500, reversing S. C., 13 ib. 207.

(*p*) See Lord Blackburn's judgment in *Masted v. Paine*, No. 2, L. R. 6 Ex. 132.

chasers he has ordinarily nothing to do, and unless under exceptional circumstances, he has no rights against them (*q*). — Bk. III. Chap. 4. Sect. 6. — A vendor, for example, has ordinarily no remedy against an intermediate purchaser who passes the name of some one else as the ultimate purchaser and transferee (*r*).

But an intermediate jobber may enter into a contract with the vendor through his broker, and in such a case the intermediate jobber will be liable to the vendor for any breach of such contract (*s*).

Moreover, if the ultimate purchaser is a mere nominee of Cestui que trust of transferee. and trustee for an intermediate purchaser, or for any one else, and the transfer to the ultimate purchaser is never registered, but the vendor continues the legal owner of the shares, and incurs liability in consequence, he is entitled to be indemnified against that loss by the person in whom the beneficial interest of the shares is really vested (*t*). This liability arises not out of any contract between the legal and beneficial owners; but from the relation of trustee and *cestui que trust* which exists between them; and from the principle that the interposition of intermediate trustees does not affect the rights of the legal and true equitable owner. Upon this principle it was held in *Brown v. Black* (*u*), that a vendor of shares who had trans- Brown v. Black.ferred them to an infant, but whom he did not know to be such, was entitled to be indemnified by the real purchasers who had used the infant's name, although the infant had been registered in respect of the shares for two years. His infancy was discovered on the winding-up of the company; and, the transfer to him being invalid, the transferor became a contributory in his place, and then successfully claimed indemnity from the real owners of the shares (*x*).

(*q*) See, however, Lord Blackburn's judgment in *Moxed v. Paine*, L. R. 6 Ex. 167-8.

(*r*) *Torrington v. Lowe*, L. R. 4 C. P. 26. Compare *Castellan v. Hobson*, 10 Eq. 47.

(*s*) As in *Allen v. Graves*, L. R. 5 Q. B. 478, where there was a special arrangement between the plaintiff's broker and the defendant, an inter-

mediate jobber.

(*t*) *Castellan v. Hobson*, 10 Eq. 47; and see *ante*, p. 506.

(*u*) 8 Ch. 939, and 15 Eq. 363.

(*x*) Compare *Maynard v. Eaton*, 9 Ch. 414, a similar case, but where a compromise effected between the plaintiff and the infant was held fatal to the plaintiff's claim. See, also, *Heritage v. Paine*, 2 Ch. D. 594.

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Sect. 6.

For convenience of reference, the following analysis of the principal decisions, referred to in the preceding pages upon the rights of vendors, is appended :—

I. Vendor against jobber.

1. Successful actions and suits.

(a) Actions at law.

Martel v. Paine, No. 1, L. R. 4 Ex. 81.

Allen v. Graves, L. R. 5 Q. B. 478.

In both of these the transferee was objected to.

(b) Suits in equity.

Merry v. Nickalls, L. R. 7 H. L. 530 ; 7 Ch. 733.

Heritage v. Paine, 2 Ch. D. 594.

Transferee an infant.

Cruse v. Paine, 6 Eq. 641, and 4 Ch. 441.

Registration guaranteed.

2. Unsuccessful actions and suits.

(a) Actions at law.

Grissell v. Bristowe, L. R. 4 C. P. 36, reversing L. R. 3 C. P. 112.

Macted v. Paine, No. 2, L. R. 6 Ex. 132, and L. R. 4 Ex. 203.

In both of these the transferee had accepted the transfer.

(b) Suits in equity.

Coles v. Bristowe, 4 Ch. 3, reversing 6 Eq. 149.

Transferee had accepted the transfer.

Rennie v. Morris, 13 Eq. 203.

Transferee an infant ; overruled by *Merry v. Nickalls*, 7 Ch. 733 ; and L. R. 7 H. L. 530.

II. Vendor against ultimate purchaser.

1. Successful actions and suits.

(a) Actions at law.

Bowring v. Shepherd, L. R. 6 Q. B. 309.

Davis v. Haycock, L. R. 4 Ex. 373.

Walker v. Bartlett, 18 C. B. 845.

Humble v. Langston, 7 M. & W. 517.

Kellock v. Enthoven, L. R. 8 Q. B. 458, and 9 Q. B. 241.

Where the purchaser had himself transferred the shares.

(b) Suits in equity.

Wynne v. Price, 3 De G. & Sm. 310.

Paine v. Hutchinson, 3 Eq. 257, and 3 Ch. 388.

Shepherd v. Gillespie, 5 Eq. 293, and 3 Ch. 764.

Sheppard v. Murphy, Ir. Rep. 2 Eq. 544, and 16 W. R. 948.

Hawkins v. Maltby, 6 Eq. 505, and 4 Ch. 200.

Holmes v. Synnons, 13 Eq. 66.

Loring v. Davis, 32 Ch. D. 625.

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In none of these cases was the transfer executed
by the transferee.

Evans v. Wood, 5 Eq. 9.

Holkinson v. Kelly, 6 Eq. 496.

In both of which the company had stopped.

2. Unsuccessful suits.

Hawkins v. Maltby, 3 Ch. 188, reversing S. C. 4 Eq. 572.

The case on appeal turned on the pleadings.

Birmingham v. Sheridan, 33 Beav. 660.

Not now to be relied upon. See *ante*, p. 505,
note (c).

III. Vendor against *cestui que trust* of transferee.

(a) Successful suits.

Castellan v. Hobson, 10 Eq. 47.

Brown v. Black, 15 Eq. 363, and 8 Ch. 939.

Transfer to an infant.

(b) Unsuccessful suit.

Maynard v. Eaton, 9 Ch. 414.

Compromise with transferee held to be a defence.

IV. Purchaser against vendor.

M Devitt v. Connolly, 15 L. R., Ir. 500, *ante*, p. 508.

4. As to the position of the real vendor and purchaser as regards their respective brokers.

The duty of a broker employed to sell is to sell according to his instructions if he can do so, and if he cannot, not to sell at all. His duty is performed when he has entered into a binding contract for sale, and has given the name of the buyer to his employer (*y*). If the selling broker receives the price, it is his duty to hand it over to his principal; but it is no part of a selling broker's legal duty to his employer to procure payment of the price, nor to procure the execution by the purchaser of the transfer, nor to procure the registration thereof (*z*). Nor has it yet been decided that it is part of his duty to inquire into the solvency of the transferee (*a*). As between the vendor and his own broker, the sale is effected by the contract to sell, although the vendor may refuse to carry it out (*b*).

Duty of selling
broker.

(*y*) A broker who by disregarding the requirements of 30 Vict. c. 29, fails to effect a binding contract, is liable to his employer for negligence, see *Neilson v. James*, 9 Q. B. D. 546, *ante*, p. 489.

(*z*) See Clark's Law of Joint Stock Companies (Scotch), 145.

(*a*) See, on this subject, Lord Blackburn's judgment in *Martel v. Paine*, No. 2, L. R. 6 Ex. 132.

(*b*) *Ross v. Moses*, 1 C. B. 227.

Bk. III. Chap. 4.
Sect. 6.

Duty of buying
broker.

Again, the duty of a broker employed to buy is to buy according to his instructions if he can; and if he cannot, not to buy at all. He has no implied authority to enlarge the time for completing the purchase when that time has once been fixed; in other words, he has no implied authority to continue the account (*c*). If he exceeds his authority he exposes himself to liability to persons who rely on his having authority to buy, and are damnified by its absence (*d*).

Broker buying
what he was not
directed to buy.

A broker instructed to buy shares of a particular kind, fulfils his instructions if he buys what are commonly bought and sold as such shares in the share market. Thus, where a broker was instructed to buy "Kentish Coast Railway Scrip," and he bought what was known as such, and was paid for it, it was held, that he was not liable to refund the money he had received, although it turned out that what he had bought was scrip issued without due authority, and was in fact utterly worthless (*e*). Upon the same principle, if a broker is told to buy shares and he buys scrip; if nothing but scrip has found its way into the market, and if such scrip has been usually bought and sold as shares, and if there is nothing to show that the broker was to wait until shares were issued, he will be held to have pursued his authority (*f*).

Revocation of
broker's autho-
rity.

Until the broker has acted upon his authority to buy, it may be revoked; and if any money has been given him in order to enable him to pay for them, it may be demanded back (*g*). But this cannot be done after he has entered into a contract for purchase, and become personally responsible for the due performance of that contract (*h*).

Right of broker
to indemnity.

On the other hand, a person who employs a broker to buy or sell is bound to indemnify him against any losses which he may incur by reason of his having contracted in his own behalf, and of being afterwards, without any default of his own, unable

(*c*) See *Moxted v. Paine*, No. 1,

L. R. 4 Ex. 81.

(*d*) *Ex parte Panmure*, 24 Ch. D.

367. See *ante*, p. 494.

(*e*) *Lamert v. Heath*, 15 M. & W. 486.

(*f*) *Mitchell v. Newhall*, 15 M. & W. 308. Compare *Kempson v.*

Saunders, 4 Bing. 5.

(*g*) *Fletcher v. Marshall*, 15 M. & W. 755.

(*h*) *McEwen v. Woods*, 11 Q. B.

13. See, also, *Read v. Anderson*, 13 Q. B. D. 779, affirming 10 Q. B. D.

100.

duly to complete his contract (*i*). The following cases will serve to illustrate this doctrine.

Bk. III. Chap. 4.
Sect. 6.

1. Where a broker is employed to sell.

In *Sutton v. Tatham* (*k*), a person ordered a broker to sell for him 250 shares. The broker entered into a contract for their sale, and was afterwards informed that a mistake had been made, and that fifty only were intended to be sold. The broker not being enabled to deliver the shares which he had agreed to sell, was compelled to make good to the purchaser the difference between the price agreed upon and the price at which the purchaser had procured shares elsewhere. It was held, that the broker was entitled to recover this difference from his employer.

Sales through
brokers.
Sutton v.
Tatham.

In *Bayliffe v. Butterworth* (*l*), the defendant instructed the plaintiff, a broker, to sell shares for him, which the plaintiff accordingly did. When the time came for the delivery of the shares to the purchaser, the defendant made default, and did not furnish them. The plaintiff having been compelled by the rules of the Stock Exchange to pay the difference between the price agreed to be paid by the purchaser and that actually paid by him for other shares, was held entitled to recover such difference from the defendant.

Bayliffe v.
Butterworth.

2. Where a broker is employed to buy.

In *Bayley v. Wilkins* (*m*), the defendant requested the plaintiff, a broker, to buy shares for him, which the plaintiff accordingly did. At the time of their purchase, a call had been made, but such call had not become payable. The plaintiff paid the amount of the call to the selling broker in pursuance of the rules of the Stock Exchange, and was held entitled to recover the money so paid from the defendant.

Purchases
through brokers.
Bayley v.
Wilkins.

In *Taylor v. Stray* (*n*), the defendant instructed the plaintiff,

Taylor v. Stray.

(*i*) See, in addition to the cases cited, *infra*, *Young v. Cole*, 3 Bing. N. C. 724; *Child v. Morley*, 8 T. R. 610; *Bowlby v. Bell*, 3 C. B. 284; *Simpson v. Rand*, 1 Ex. 688. As to indemnifying one's broker against the costs of an action brought against him, see *Brown v. Hall*, 7 C. B. N. S. 503.

(*k*) 10 A. & E. 27.

(*l*) 1 Ex. 425. Compare this with *Bowlby v. Bell*, 3 C. B. 284.

(*m*) 7 C. B. 886. See, as to the evidence to be adduced by a broker who seeks to recover a call paid by him, *McEwen v. Woods*, 2 Car. & K. 330, and 11 Q. B. 13.

(*n*) 2 C. B. N. S. 175. See, *loc.*

Bk. III. Chap. 4.
Sect. 6.

a broker, to buy some Royal British Bank shares for him. The defendant accordingly bought the shares, which were to be paid for on a future day. Before that day arrived, the bank stopped payment, and the defendant refused to take or pay for the shares. The plaintiff thereupon paid for them in compliance with the rules of the Stock Exchange; and he was held entitled to recover the money so paid from the defendant.

Pollock v.
Stables.

In *Pollock v. Stables* (o), the plaintiff, in pursuance of the defendant's instructions, bought shares for him which the defendant neglected to take up. The broker who sold them, consequently re-sold them, and thereby a loss was sustained. The plaintiff, who was also a broker, made good this loss, as he was compellable to do by the rules of the Stock Exchange, and he was held entitled to recover the amount he had paid from the defendant.

Lacey v. Hill.

In *Lacey v. Hill* (p), brokers bought stock for a customer, who suddenly died insolvent; they having paid for the stock were held entitled to re-sell it and to prove against his estate for the loss they sustained.

Broker not
entitled to
indemnity for
his own default.
Duncan v. Hill.

But a broker is not entitled to indemnity from his employer in respect of loss arising from his own default. Thus in *Duncan v. Hill* (q), the plaintiffs, who were brokers on the Stock Exchange, were instructed by the defendant to buy shares for a certain account, and afterwards to continue it. This was done; but before the final settling-day arrived the brokers were declared defaulters, and according to the rules of the Stock Exchange all their transactions were peremptorily closed. The brokers were held entitled to be repaid moneys paid by them in order to keep open the account at the defendant's request, but not those further sums which had become payable by reason of their own insolvency (r).

Stray v. Russell, 1 E. & E. 888;
Chapman v. Shepherd, L. R. 2 C. P.
228; *Biederman v. Stone*, ib. 504.
The last two cases show that the
broker's right is not affected by
§ 153 of the Companies act, 1862.
See, further, as to the right of pur-
chasing brokers to indemnity from
their employers, *Mollett v. Robinson*,

L. R. 7 H. L. 802; 7 C. P. 84, and
5 C. P. 646.

(o) 12 Q. B. 765.

(p) *Lacey v. Hill*, *Scrimgeour's*
claim, 8 Ch. 921. See ib., *Crowley's*
claim, 18 Eq. 182.

(q) L. R. 8 Ex. 242, reversing S.
C. 6 Ex. 255.

(r) Compare *Hurtas v. Ribbons*, 22

Again, a broker who contracts to buy unnumbered shares in a joint-stock bank, contrary to 39 Viet. c. 29, has no claim against his employer if he refuses to accept the shares, unless indeed he authorised a purchase contrary to the act (s). Bk. III. Chap. 4.
Sect. 6.

The cases above referred to establish as a general doctrine that what a broker, employed in buying and selling shares for another person, is compelled by the rules of the Stock Exchange to pay, in consequence of the non-performance by his employer of the contract entered into on his behalf, is recoverable from him by the broker. The principle of the decisions in question does not however extend further than this, viz., that brokers are impliedly authorised by those who employ them, to do what is usual and customary amongst brokers in matters such as those they are employed about. The cases which have been noticed do not show that persons who employ members of the Stock Exchange are affected by the rules of the Exchange without reference to the question of what is customary amongst its members; and in truth, to non-members, such rules are only important so far as they evidence usage. This is shown by the case of *Westropp v. Solomon* (t). There, the defendant employed the plaintiff, a broker, to sell ten scrip certificates, which the plaintiff did. It afterwards appeared that these certificates were forgeries, although neither the plaintiff nor the defendant had any suspicion that such was the case. The committee of the Stock Exchange made a rule to the effect that the purchasers of the spurious scrip should have a right to demand from the sellers not only repayment of the purchase-money, but also payment of an additional fixed sum. In compliance with this rule, the plaintiff repaid to the purchaser the money received from him, and also the additional sum fixed by the rule; but it was held, that the plaintiff was only entitled to recover from the defendant the money which the purchaser himself could have recovered at law; namely the amount paid by him with interest; and it was held, that

Rules of Stock
Exchange as dis-
tinguished from
usage of brokers.

After-made
rules.
Westropp v.
Solomon.

Q. B. D. 254, where the principal ratified the closing of the account; and *Lacey v. Hill*, *Crowley's claim*, 18 Eq. 182, where the brokers became defaulters solely by reason of the previous default of their principal; see

Ex parte Panmure, 24 Ch. D. 367.

(s) *Ante*, p. 489.

(t) 8 C. B. 345. See, also, *Sweeting v. Pearce*, 7 C. B. N. S. 449, and 9 ib. 534.

Bk. III. Chap. 4. the rule, having been made after the sale, formed no part of
 Sect. 6. that usage of brokers by which the defendant was bound.

Brokers' charges. Accounts sent in by sharebrokers to their employers may be shown not to have included charges which ought to have been included; and this is true even where the persons to whom such accounts are sent have dealt with other people upon the faith of the accounts being full and correct (*u*).

Illegal purchases and sales by brokers. A broker employed to buy or sell shares in an illegal company, or in a company which by law is not in a position to issue shares, cannot recover from his employer either any commission on the purchase or sale, or any money expended for him on account of such shares (*x*).

(*u*) *Dails v. Lloyd*, 12 Q. B. 531.

(*x*) *Josephs v. Pebrer*, 3 B. & C. 639; *Ex parte Neilson*, 3 De G. M. & G. 556. See, further, as to illegal sales through brokers, *Buck v. Buck*,

1 Camp. 547; and *Bousfield v. Wilson*, 16 M. & W. 185, both of which have been noticed already. See *ante*, p. 140.

CHAPTER V.

OF THE SURRENDER OF SHARES.

1. *General Observations.*

THE right of a shareholder to retire from a company of which he is a member, by surrendering his shares to the company, depends upon the acts of Parliament, charter, or regulations or customs which govern the company in question. Where there is nothing enabling a shareholder to retire by surrendering his shares, the ordinary partnership rule applies, and no surrender can be made except with the consent of all the shareholders (a). If such a method of withdrawing from the company is authorised by its constitution, a surrender by a shareholder of his shares will of course be valid, if all the formalities which may be necessary are duly complied with; and where the power to surrender exists, the due observance of all necessary formalities will be presumed in favour of a shareholder who has in fact *bonâ fide* retired from the company, and whose shares have been cancelled or otherwise disposed of by the company (b).

The right of a shareholder to retire by surrendering his shares, is not one of those matters as to which a majority of members binds a minority, or as to which directors have any implied authority to represent the company. Both principle and authority are clearly opposed to any such doctrine (c).

Bk. III. Chap. 5.
Retirement by
surrender.

Power of ma-
jority to bind
minority with
reference to the
relinquishment
of shares.

(a) See volume on Partnership, pp. 573 *et seq.* Retirement by transfer is quite another matter, and has been already referred to.

(b) See *Lane's case*, 1 De G. J. & Sm. 504; *Kipling v. Todd*, and *Kipling v. Allen*, 3 C. P. D. 350. The retirement must be complete, see *Barry v. Navan and King's County Rail. Co.*, 4 L. R. Ir. 68.

(c) *The Plate Glass, &c., Co. v. Sunley*, 8 E. & B. 47, is not inconsistent with this nor with the cases referred to in the text; in that case the demurrer admitted that the company had accepted the surrender of the shares then in question. See as to special resolutions under the Companies act, 1862, *infra*, p. 526.

Bk. III. Chap. 5. Nor if directors have power to accept a surrender of shares can they delegate this power to a manager (*d*). At the same time if shares have been surrendered with the knowledge of all the shareholders under circumstances fully disclosed to them all, and such surrender has not been questioned for a considerable period, the company will be precluded from afterwards disputing the validity of the surrender (*e*). The following are leading authorities upon this subject:—

Morgan's case. *Morgan's case* (*f*). The company's deed authorised the directors to buy up, out of certain specified funds of the company, any shares which might be offered for sale. An extraordinary general meeting resolved that if any shareholder should be desirous of withdrawing from the company, the directors should be at liberty to purchase his shares upon certain specified terms. A shareholder acted upon this resolution, complied with the terms, and sold his shares to the company. But it was held that the resolution was not binding on the company; and that the shareholder in question was properly made a contributory, although nearly five years had elapsed since his withdrawal.

Stanhope's case. *Stanhope's case* (*g*). The directors had power generally to act as might appear to them best for the interest of the company. A dispute arose amongst them, and one of them retired, and his shares were surrendered and cancelled. It was held that his retirement was unauthorised, and he was put on

(*d*) *Cartmell's case*, 9 Ch. 691.

(*e*) As in *Brotherhood's case*, 31 Beav. 365, and 4 De G. F. & J. 566; noticed *infra*, pp. 519 and 522, and *Hunt's case*, 32 Beav. 387. Implied notice to the directors of the company through the books of the company is not enough. *Hallmark's case*, 9 Ch. D. 329; *Denham & Co.*, 25 Ch. D. 752; *Cartmell's case*, 9 Ch. 691, where the directors had power to accept surrenders. See, as to estoppel by conduct, *ante*, p. 47 *et seq.*

(*f*) 1 De G. & S. 750, and 1 Mac. & G. 225. *Richmond's Executors' case*, 3 De G. & Sm. 96, and *Larves'*

case, 1 De G. M. & G. 421, were similar decisions with respect to other shareholders in the same company. Compare *Kent v. Jackson*, 14 Beav. 367, and 2 De G. M. & G. 49.

(*g*) 3 De G. & S. 198. See, too, *Esparto Trading Co.*, 12 Ch. D. 191; *Daniell's case*, 22 Beav. 43, affirmed 3 Jur. N. S. 803; *Walter's case*, 3 De G. & S. 244; *Holt's case*, 1 Sim. N. S. 389; and compare *Cockburn's case*, 4 De G. & S. 177, and *Busk's case*, 3 ib. 267; and observe the larger powers of the directors in the first, and the adoption of their acts in the last, of these two cases.

the list of contributories ten years after his shares had been Bk. III. Chap. 5. cancelled.

Munt's case (h). The directors of a company, disagreeing as *Munt's case.* to the mode of managing its affairs, and being divided into two parties, it was resolved that one of the two parties should retire, and that the other should take the management of the company and relieve the first from their liabilities. The directors composing one of the two parties did accordingly retire, and relinquish their shares in favour of the company; but it was held that their retirement was altogether unauthorised and invalid, and that they were contributories on the winding up of the company.

The principles laid down in these cases were very much considered in the course of winding up the *Agriculturist Cattle Insurance Company.* Agriculturist Cattle Insurance Company. The company was formed in 1845. In 1848 it had got into difficulties, and several shareholders wished to retire. This they could not do consistently with the company's deed of settlement. An arrangement, however, was made in November, 1848, under resolutions passed at a meeting of shareholders specially convened for the purpose, to the effect that a call of 4*l.* per share should be made, and that those shareholders who wished to retire should, on a particular day, pay part only of the call, and that their shares should be forfeited for non-payment of the rest. Under this arrangement many persons retired at once; many, however, remained, and of those some retired afterwards under various arrangements made between themselves and the directors. In 1861 the company was ordered to be wound up, and in the course of such winding up it was held—1. That having regard to the publicity and *bona fides* of the arrangement come to in November, 1848, and to the time which had since elapsed, the validity of the retirement of those shareholders who withdrew in pursuance of that arrangement could not be disputed, and that those persons therefore were not liable to be placed on the list of contributories (*i*). Brotherhood's case. 2. That those persons who retired Smallcombe's case. Spackman's case.

(*h*) 22 Beav. 55. See, too, *Bennett's case*, 18 Beav. 339, and 5 De G. M. & G. 284; *Richmond's case*, and *Painter's case*, 4 K. & J. 305. (*i*) *Evans v. Smallcombe*, L. R. 3 H. L. 249; *Brotherhood's case*, 31 Beav. 365, affirmed 4 De G. F. & J. 566.

Bk. III. Chap. 5.
Houldsworth's
case.

afterwards by arrangement with the directors, but without the knowledge of the other shareholders, were to be treated as shareholders still, and were liable to be placed on the list, although twelve years had elapsed since their retirement and the winding-up order (*k*).

Moreover, where persons have only agreed to take shares, and have not become actual shareholders, the directors have no implied power to release them from their agreement (*l*). Nevertheless, an express power to accept a surrender of shares, or to rescind and abandon contracts, has been held to apply to contracts to take shares and to authorise a release of a person from his agreement to become a member (*m*).

Directors have
no power to buy
out shareholders.

The foregoing decisions sufficiently establish the doctrine that in the absence of a special authority enabling them so to do, directors have no power to bind the company by buying each other out; nor by buying out shareholders; nor by accepting the surrender or relinquishment of shares to the company (*n*). Moreover, if the directors of a company misapply its funds by buying up shares in the company, they are compellable to make good to the company the money so expended, with interest (*o*).

Retirement of
shareholders
compared with
refusal to accept
shares.

It is necessary, however, to distinguish the retirement of a shareholder from the refusal of a person to be a shareholder in

(*k*) *Spackman v. Evans*, L. R. 3 H. L. 171; *Houldsworth v. Evans*, ib. 263; *Stanhope's case*, 1 Ch. 161; *Stewart's case*, ib. 511. See, on these cases, the note *infra*, pp. 522 and 523.

(*l*) *Hull's case*, 5 Ch. 707; *Adams' case*, 13 Eq. 474.

(*m*) *Snell's case*, 5 Ch. 22; *Thomas' case*, 13 Eq. 437; and compare *Kipling v. Todd*, 3 C. P. D. 350, *infra*, 525, where the Court presumed a surrender of shares which directors had under a special act.

(*n*) See, further, *Trevor v. Whitworth*, 12 App. Ca. 409, and the criticisms therein on *Dronfield Silkstone Coal Co.*, 17 Ch. D. 76; *London*

and Provincial Coal Co., 5 Ch. D. 525; *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43; *Harris v. North Devon Rail. Co.*, 20 Beav. 384; *Walker's case*, 2 Jur. N. S. 1216, L. J.; *Playfair v. Birmingham, Bristol, &c., Co.*, 1 Ra. Ca. 640; *Hodgkinson v. National Live Stock Insur. Co.*, 26 Beav. 473, and 4 De G. & J. 422; *Burt v. British Nation Life Assur. Assoc.*, 4 De G. & J. 158; *Paul and Beresford's case*, 10 Jur. N. S. 692, M. R.

(*o*) *Evans v. Coventry*, 8 De G. M. & G. 835. See decree, par. 4, varying pars. 5 and 6 of the decree in the court below. See *ante*, p. 371.

a concern which he never agreed to join (*p*); and it has very properly been held that the principle of the above decisions does not apply to the case of a person who, having taken shares in a company formed for given objects, relinquishes such shares and retires from the company, upon a change being made in those objects without his consent (*q*). So, if it is doubtful whether a person ever was a shareholder or not, an agreement releasing him from all liability, if any, may be validly made, so as to bind the company (*r*); and an allotment of shares made pursuant to an invalid resolution may be properly cancelled at all events before the shares are registered in the name of the allottee (*s*). But a general power to compromise does not authorise an agreement to allow a shareholder to retire when there is no dispute as to his membership, and where there is no power to buy or accept a surrender of shares (*t*).

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Compromise
with doubtful
shareholder.

It is further necessary to distinguish the retirement of a shareholder by relinquishing his shares to the company, from his retirement by transferring his shares to some or one of the directors of the company upon their own individual account. For whilst, in the absence of special authority, it is not competent for directors to accept on behalf of a company the surrender of shares held in the company, it is as competent for the directors of a company, as for anybody else, to accept shares in the company from such shareholders as may be willing to transfer them in the ordinary way. Consequently, an agreement between the directors and some of the shareholders of a company to the effect that the latter shall relinquish their shares and transfer them to the directors, is not *ultra vires*, or

Surrender of
shares to com-
pany compared
with a transfer
of them to the
directors.

(*p*) See *Pim's case*, 3 De G. & S. 11, and 1 Mac. & G. 291; *Henessy's case*, 2 Mac. & G. 201, and 3 De G. & S. 191, as to placing shares in a person's name without authority. See *ante*, p. 19 *et seq.*

(*q*) *Meyer's case*, 16 Beav. 383.

(*r*) *Bath's case*, 8 Ch. D. 334; *Lord Belhaven's case*, 3 De G. J. & Sm. 41; *Dixon's case*, L. R. 5 H. L. 606, reversing 5 Ch. 79. See *Wright's case*, 7 Ch. 55, reversing S. C. 12 Eq. 331; *Fox's case*, 5 Eq. 118.

(*s*) *Barnett's case*, 18 Eq. 507.

(*t*) See L. R. 3 H. L. 188, 231; *Adams' case*, 13 Eq. 474; *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43; *Dixon's case*, 5 Ch. 79, was decided on the principle that there can be no compromise where there is no dispute; and although the House of Lords reversed the decision, see L. R. 5 H. L. 606, the principle is unquestionable. Comp. *Wright's case*, 7 Ch. 55.

Bk. III. Chap. 5. in any way illegal, if the agreement is with the directors as individuals, and not with them as representing the company (*u*). Upon the same principle, if a shareholder transfers his shares to a director or to an ordinary individual, without notice that the director is acting on behalf of the company, the transferor does effectually retire from the company; although had he known that he was in fact surrendering his shares to the company, the surrender would have been invalid (*x*).

Moreover, directors who individually agree to accept a surrender of shares and to indemnify the surrenderor against calls, are personally bound by their agreement, whether it is, as regards the company, *ultra vires* or not (*y*).

NOTE ON SMALLCOMBE'S CASE, SPACKMAN'S CASE, AND HOULDSWORTH'S CASE, REFERRED TO ABOVE, P. 519.

Smallcombe retired in strict accordance with the arrangement come to in 1848.

Houldsworth retired pursuant to the same arrangement, with this exception, that he did not retire within the time fixed thereby, but shortly afterwards; the time having been extended by the directors.

Spackman retired pursuant to another agreement altogether, come to between him and the directors for compromising litigation between him and the company.

The House of Lords held,—

1. That the arrangement of 1848 was one by which a majority of shareholders could not bind a minority.
2. That, nevertheless, the minority might be precluded from disputing it.
3. That *all* the shareholders must be treated as having had notice of it, and that as they had allowed it to be carried out, and had not disputed its validity for many years, they were *all* precluded from disputing it.
4. That consequently *Smallcombe* was not a contributory (*z*).
5. That the agreement with *Houldsworth* differed in an essential particular from the arrangement of 1848, and was one which the directors had no power to enter into.
6. That *all* the shareholders could not be treated as having had sufficient notice of the agreement with him to preclude them from disputing it, even after the lapse of many years.

(*u*) *Haddon v. Ayers*, 1 E. & E. S. 777; *Ex parte Bagge*, 13 Beav. 118. See, too, *Jessopp's case*, 2 De G. & J. 638. In *Curtnell's case*, 9 G. & J. 638. In *Curtnell's case*, 9 S. 777; *Ex parte Bagge*, 13 Beav. 162; *Nicols' case*, 3 De G. & J. 387.
 (y) *Barker v. Allan*, 5 H. & N. 61.
 (z) *Brotherhood's case*, 31 Beav. 691, the directors never assented to the transfer made to them. 365, affirmed 4 De G. F. & J. 566, was like *Smallcombe's*.
 (x) See *Hollway's case*, 1 De G. &

7. That consequently *Houldsworth* or, he being dead, his executors were Ek. III. Chap. 5. contributories.

8. That the agreement with *Spackman* was one which the directors had no power to make.

9. That *all* the shareholders could not be treated as having had sufficient notice of it to preclude them from disputing it, even after the lapse of many years.

10. That he therefore was also a contributory (*u*).

The Lords were by no means unanimous in their decision, and Lord St. Leonards, in a judgment which the writer ventures to think ought to have prevailed with the House, gave his opinion, that in all three cases the company ought to be held precluded from disputing transactions so long passed as those in question, and all of which were perfectly *bona fide*. The same view was taken by Lord Romilly when the cases were before him (see 1 Ch. 163). As the decisions stand, however, they are extremely difficult to reconcile on satisfactory grounds; for the notice which the shareholders had in *Houldsworth's* and *Spackman's* cases was little if at all less full than the notice they had in *Smallcombe's* case. Some general principles of value, however, can be extracted from these three cases. They show—

1. That a company will be precluded from disputing the validity of transactions sanctioned by a general meeting, but not binding on absentees, if such transactions are *bona fide*, and such as all the shareholders, if *sui juris*, could sanction, and if it can be inferred that all the shareholders were informed of them, and if no steps have been taken for a considerable time to impeach them.

2. That information on the part of all the shareholders, sufficient for the purpose in question, must be inferred from notices sent to them all, in the usual way, telling them what has been done; but not from reports, &c., not distinctly giving them this information.

3. That powers of compromise and powers of forfeiture must be *bona fide* exercised for the purposes for which they are conferred, and that attempts to make them available for other purposes will not succeed.

This view of their joint effect is supported by *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43, where the Court of Common Pleas held that a company had ratified a purchase of shares which the directors had no power to make.

2. Surrender in particular companies.

It is necessary now to advert to the right to retire by surrender of shares in the various classes of companies which exist in this country.

The rules of building societies invariably provide for the withdrawal of their unadvanced members, and the terms on ^{Building societies.}

(*u*) *Stanhope's* case, 1 Ch. 161, was like *Spackman's*.

Bk. III. Chap. 5. which they can retire depend entirely on the rules (*b*); these rules cannot be altered to the prejudice of any member without his consent. Thus, where the rules enabled unadvanced members to withdraw the sum at their credit in the society's books, it was held that so long as the society was not in liquidation, any unadvanced member was entitled to withdraw the amount at his credit in the books, although the assets of the company had become depreciated, and a majority of the members had passed a resolution to the effect that 7*s.* 6*d.* per pound should be deducted from the amounts at the credit of the members, and be carried to a suspense account (*c*).

Cost-book companies. The right of a shareholder in a cost-book mining company to retire from the company upon the relinquishment of his shares, and payment of what may be due from him to the company, is established by custom, and is therefore imported into the contract by which the members of such companies are mutually bound (*d*); and where it was proved to be the practice of a cost-book company to allow shareholders to retire upon any terms agreed upon at general meetings, it was held that a shareholder who had been allowed at a general meeting to surrender his shares without paying the arrears of calls upon them, had ceased to be a shareholder (*e*). The surrender must be by notice in writing to the purser (*f*), and must be delivered at least six weeks before a resolution is passed or an order made to wind up the company (*g*).

Usual terms of retirement. The usual terms on which a member is entitled to retire from a cost-book company are, that if the company is insolvent, the retiring member pays his share of the deficiency, as if the company were being wound up, but if the company is solvent he is entitled to receive his share of the surplus left, on deducting the liabilities from the value of the assets. In ascertaining

(*b*) See *Tosh v. North British Build. Soc.*, 11 App. Ca. 489; *Walton v. Edge*, 10 ib. 33; *Brownlie v. Russell*, 8 ib. 235; *Sheffield and S. York. Perm. Build. Soc.*, 22 Q. B. D. 470.

(*c*) *Auld v. Glasgow, &c., Build. Soc.*, 12 App. Ca. 197.

(*d*) See, as to this, *infra*, and *Ex parte Palmer*, 7 Ch. 286; *Fenn's case*,

4 De G. M. & G. 285, and 1 Sm. & G. 26; *Bodmin United Mines*, 23 Beav. 370; *Birch's case*, 2 De G. & J. 10; *Lofthouse's case*, ib. 69; *Northey v. Johnson*, 19 L. T. 104.

(*e*) *Bodmin United Mines*, 23 Beav. 370.

(*f*) 32 & 33 Vict. c. 19, §§ 21-23.

(*g*) 50 & 51 Vict. c. 43, § 22.

these amounts, the solvency or insolvency of the remaining shareholders had formerly to be taken into account, and the assets valued on the footing of the company being a going concern (*h*). Now, the valuation of the assets is to be made upon the basis that the continuing shareholders had also relinquished their shares (*i*). The terms of retirement may be varied by agreement, which may be implied from the course of practice in the company, but such an agreement is not nearly so readily implied in the case of large companies as in the case of ordinary partnerships (*k*).

The Companies clauses consolidation act, 1845, contains no provision authorising the surrender of shares. But by the Companies clauses act, 1863 (*l*) (which applies to all companies which have a special act of Parliament incorporating that act), it is enacted (§ 9) that “the company may from time to time accept, on such terms as they think fit, surrenders of any shares which have not been fully paid up;” and (§ 10) that “the company shall not pay or refund to any shareholder any sum of money for or in respect of the cancellation or surrender of any share.”

In *Kipling v. Todd* and *Kipling v. Allan* (*m*), *Todd* and *Allan* were nominated in a company’s special act as directors, and their qualification was the possession of 50 shares each. *Todd* resigned his directorship, and never acted as director, *Allan* did for a short time, and then resigned. Neither of them ever had any shares allotted to them, nor ever had any registered in his name. Moreover, all the company’s shares were allotted to other people. Under these circumstances, a surrender by *Todd* and *Allan* of their shares, and an issue of them by the company to other persons were presumed; and *Todd* and *Allan* were held not liable to creditors of the company whose debts had accrued after their resignations.

Neither the Companies act, 1862, nor the regulations in Table A. to that act, authorise the retirement of a member by

Companies act,
1862.

(*h*) *Frank Mills Mining Co.*, 23 Ch. D. 52.

Ch. D. 52, and cases in note (*d*). (*l*) 26 & 27 Vict. c. 118.

(*i*) 50 & 51 Vict. c. 43, § 21. See (*m*) 3 C. P. D. 350. Compare the section. *Portal v. Emmens*, 1 C. P. D. 201 &

(*k*) *Frank Mills Mining Co.*, 23 664.

Bk. III. Chap. 5. surrendering his shares to the company; and the effect of a surrender of shares, unless it be in exchange for others, is to diminish the capital of the company. Nevertheless, it has been held that the holder of unpaid-up shares in a company registered with limited liability, can surrender his shares without first paying them up in full if the articles as originally framed or as altered by special resolution (*n*) authorise such a surrender (*o*). The power to surrender has been regarded as open to no more objection on the ground that it reduces the capital than a power to forfeit (*p*), the legality of which is unquestioned. (See Table A. and the next chapter.) A power to forfeit, however, is only operative where a shareholder cannot or will not pay up his calls, and is far less open to abuse in order to reduce capital than a power to surrender.

The right of a member of these companies to retire by surrendering his shares, has been recently very much discussed, and some doubt on the subject has been expressed (*q*); but the decisions above referred to have not been overruled, and the power when properly conferred and exercised, may therefore be treated as *intra vires*.

It is, however, now settled that a company governed by the Companies act, 1862, cannot lawfully apply its funds in buying up its own shares, even if empowered so to do by its original articles (*r*), or by special resolution (*s*), or even by its memorandum of association. This last point has not been actually decided, but is practically determined by the decision of the House of Lords in *Trevor v. Whitworth*, and the judgment of Lord

Company buying
its own shares.
Trevor v.
Whitworth.

(*n*) *Teasdale's case*, 9 Ch. 54, where, however, the effect of all the resolutions taken together was to increase the unpaid-up capital. See as to this case, *Trevor v. Whitworth*, and *Hope v. International Financial Soc.*, cited *infra*.

(*o*) *Ibid.*; *Marshall v. Glamorgan Iron Co.*, 7 Eq. 129; and see *Wright's case*, 12 Eq. 336, note; *Snell's case*, 5 Ch. 22.

(*p*) *Dronfield Silkstone Coal Co.*, 17 Ch. D. 76, which, however, was

disapproved, and practically overruled by the House of Lords in *Trevor v. Whitworth*, *infra*.

(*q*) See the next two notes.

(*r*) *Trevor v. Whitworth*, 12 App. Ca. 409. *Dronfield Silkstone Coal Co.*, 17 Ch. D. 76, *contra*, must be considered as overruled.

(*s*) *Hope v. International Financial Society*, 4 Ch. D. 327, which compare with *Teasdale's case*, *ante*, note (*n*).

Maenaghten is clear upon the point (t). The consequences of Bk. III. Chap. 5. this are very serious to persons selling their shares in such companies to the companies themselves, or surrendering their shares to the companies for value paid by the companies. The transaction being *ultra vires*, it will follow that any money paid by the company for the shares can be recovered back; that the directors paying it and the shareholders receiving it, will be liable for it, and that the surrender itself will be invalid unless indeed the transaction can be upheld in part, and set aside in part, which may be possible in some cases, but practically in very few.

(t) See *Trevor v. Whitworth*, 12 App. Ca. 409, pp. 432 *et seq.*

CHAPTER VI.

OF THE FORFEITURE OF SHARES.

Bk. III. Chap. 6.

Right of company to forfeit shares.

COMPANIES have no power to forfeit the shares of their members, or of subscribers who have not yet become members, unless such power is specially conferred upon them (*a*). A clause in a company's articles enabling the directors to forfeit the shares of any member who shall take any legal proceedings against the company is invalid (*b*).

The right to forfeit shares is frequently arrogated in cases where a shareholder will not pay to the company what is due to it from him in respect of his shares: and it is not uncommonly assumed that a right to forfeit in such a case is possessed as a matter of course by directors. But this opinion is erroneous; for, as already stated, a right to forfeit exists only when specially conferred; and even a majority of shareholders cannot confer it unless empowered so to do by the company's act, charter, deed of settlement, or regulations (*c*). But if there is power to forfeit for non-payment of calls, that power may be extended to non-payment of additional capital which may be authorised to be raised (*d*).

(*a*) *Hart v. Clarke*, 6 De G. M. & G. 232, and 6 H. L. C. 633; *Norman v. Mitchell*, 5 De G. M. & G. 648; *Barton's case*, 4 Drew. 535, and 4 De G. & J. 46. As to companies partly English and partly foreign, see *Sudlow v. Dutch Rhenish Rail. Co.*, 21 Beav. 43. As to the right of corporations to disenfranchise and expel members for reasonable cause, see *Osgood v. Nelson*, L. R. 5 H. L. 636; Grant on Corporations, 262-269. As to expulsion from a club, see *Hopkinson v. Marquis of Exeter*, 5 Eq. 63; *Fisher*

v. Keane, 11 Ch. D. 353; *Labouchere v. Earl of W'arncliffe*, 13 Ch. D. 346; *Darwins v. Antrobus*, 17 Ch. D. 615; and from a trade association, *Strick v. Swansea Tin Plate Co.*, 36 Ch. D. 558; *Rigby v. Connol*, 14 Ch. D. 482.

(*b*) *Hope v. International Financial Society*, 4 Ch. D. 327.

(*c*) *Barton's case*, 4 Drew. 535, affirmed on appeal, 4 De G. & J. 46. As to the Companies act, 1862, see *infra*.

(*d*) See *Kelk's case*, 9 Eq. 107.

By the Stannaries act, 1869, shares in cost-book mining companies can be forfeited for non-payment of calls (*a*). Bk. III. Chap. 6.

The only other general legislative enactment now in force (*b*), which expressly confers on companies the power of forfeiting the shares of their members, is the Companies' clauses consolidation act. The Companies act of 1862 does not itself contain any provisions on this subject, but the Table A. to that act does, as will be seen presently (*c*). Forfeiture of shares in cost-book companies. Statutes authorising forfeiture of shares.

As to companies governed by the Companies' clauses consolidation act, it is provided by 8 & 9 Vict. c. 16, §§ 29-35, that if any shareholder fail to pay any call payable by him, the directors, at any time after the expiration of two months from the day appointed for the payment of a call, may declare the share in respect of which such call was payable forfeited, whether the call has been sued for or not. But before declaring any share forfeited, the directors must give notice of their intention to do so, twenty-one days at least before making a declaration of forfeiture. After a share has been declared forfeited, it may be sold for payment of the calls in arrear; but before it is so sold, the declaration of its forfeiture must be confirmed, and its sale must be ordered at a general meeting held not sooner than two months after the day on which notice of intention to forfeit was given. If the money arising from the sale of a forfeited share is more than sufficient to pay the arrears of calls with interest, and the expenses of sale, the surplus is to be paid to the defaulting shareholder; and if before a share is sold he pays what is due upon it and also the expenses, if any, incurred for the purpose of selling it, then he is entitled Forfeiture of shares in companies governed by 8 & 9 Vict. c. 16.

(*a*) 32 & 33 Vict. c. 19, § 16. See, before this act, *Hart v. Clarke*, 5 De G. M. & G. 232, and 6 H. L. C. 633.

(*b*) The 7 & 8 Vict. c. 113, § 37, provided for forfeiture, but the 7 & 8 Vict. c. 110, did not. Companies governed by this last act usually possessed the right of forfeiting shares under their deed of settlement. A clause in the deed that the shares of subscribers who would not execute it might be forfeited,

was valid; *Stewart v. Anglo-Californian Co.*, 18 Q. B. 736; *Beresford's case*, 2 Mac. & G. 197, and 3 De G. & S. 175; *Baileys case*, 15 Jur. 29; but if there was no such clause, no forfeiture could be effected; *Barton's case*, 4 Drew. 535, and on appeal, 4 De G. & J. 46.

(*c*) The acts of 1856-58 also left the subject of forfeiture to be dealt with by the regulations of each company.

Bk. III. Chap. 6.

Forfeiting and
suing for calls.

to have the share restored to him. The act in question expressly declares that shares may be forfeited for non-payment of calls, whether those calls have been sued for or not. The right to forfeit and the right to sue may consequently both be exercised together: the remedies are cumulative, not alternative (*d*).

Cancellation of
forfeited shares.

If the company has a special act also incorporating the Companies' clauses act, 1863, the shares when forfeited may be cancelled if they cannot be sold (*e*). But this can only be done by a general meeting, held at least two months after notice of the forfeiture (*f*), and the shares may be redeemed by payment of what is due in respect of them before they have been cancelled (*g*). Even such cancellation, however, does not release the shareholder from his liability to pay what may be due from him at the time of cancellation (*h*); although if he is afterwards sued in respect of what is so due, he must be credited with the value of his shares at that time (*i*). However, by the consent in writing of the shareholder and the sanction of a general meeting, shares which have been forfeited or on which money is due may be cancelled, so as to release the holder from all liabilities (*k*); but no money must be paid by the company for the cancellation of any share (*l*). New shares may be issued in lieu of cancelled shares (*m*).

Companies
governed by the
act of 1862.

As to companies governed by the Companies act, 1862, it is provided by Table A., that shares may be forfeited for non-payment of calls (No. 17); and even if power to forfeit is not given by the original articles, it may be given by special resolution under § 50 of the act (*n*). But a power to forfeit the shares of a person if he sues the company or the directors is *brutum fulmen* (*o*). In order legally to forfeit a share, under

(*d*) *Great Northern Rail. Co. v. Kennedy*, 4 Ex. 417; *Inglis v. Great Northern Rail. Co.*, 1 Macq. 112. In *Edinburgh, Leith, &c., Rail. Co. v. Hebblewhite*, 6 M. & W. 707; *Giles v. Hutt*, 3 Ex. 18; *London and Brighton Rail. Co. v. Fairclough*, 2 Man. & Gr. 674, there was only an option to sue or to forfeit.

(*e*) 26 & 27 Vict. c. 118, § 4.

(*f*) *Ibid*.

(*g*) *Ib.* § 7.

(*h*) *Ib.* § 6.

(*i*) *Ib.* § 7.

(*k*) *Ib.* § 8.

(*l*) *Ib.* § 10.

(*m*) *Ib.* § 11.

(*n*) See *Teasdale's case*, 9 Ch. 54, and *Kell's case*, and *Pahlen's case*, 9 Eq. 107.

(*o*) See *Hope v. International Financial Society*, 4 Ch. D. 327.

the regulations of this table, it is necessary, first to serve the defaulting member, personally or by post (see Nos. 95—97), with a notice (No. 17); and secondly, to pass a resolution of the directors forfeiting his shares (No. 19). Bk. III. Chap. 6.

The notice must

1. Require the defaulting member to pay the call in arrear, with interest and any expenses that may have accrued by reason of its non-payment (No. 17) (*p*);

2. Name a further day on or before which the unpaid calls with the interest and expenses are to be paid (No. 18);

3. State the place where the payment is to be made, such place being either the company's registered office or some other place at which the calls are usually made payable, *e.g.*, at the company's bankers (No. 18);

4. State that, in the event of non-payment at or before the time and at the place appointed, the shares in respect of which the call was made will be liable to be forfeited (No. 18).

If the requisitions of this notice are not complied with, the shares in respect of which it was given, may be forfeited, by a resolution of the directors, at any time before payment of what is due in respect of such shares (No. 19).

Any member whose shares have been forfeited is liable to pay all calls due upon them at the time of their forfeiture (No. 21).

Forfeited shares are the property of the company, and may be disposed of as the members at a general meeting think fit (No. 20). Forfeited shares.

In order to enable such shares to be reissued, and to protect a purchaser from the risk of having his title defeated by some irregularity in the forfeiture, it is provided that a statutory declaration in writing that the call in respect of a share was made and notice thereof given, and that default in payment of the call was made, and that the forfeiture of the share was made by a resolution of the directors to that effect, shall be sufficient evidence of the facts therein stated as against all persons entitled to such share; and such declaration, and the

(*p*) Interest can only be claimed from the time when the call ought to be paid not from the date of the call, *Johnson v. Lyttle's Iron Agency*, 5 Ch. D. 687.

Bk. III. Chap. 6. receipt of the company for the price of such share, shall constitute a good title thereto (No. 22).

Exercise of the right to forfeit.

A right to forfeit shares must, in order to be effectually exercised, be pursued with the greatest exactness (*q*); it must be exercised by the proper parties, *i.e.*, by directors properly appointed (*r*), and by the requisite number of them (*s*), and in the proper manner and for proper cause. The right must be exercised *bonâ fide* for the purpose for which it was conferred. The power to forfeit is a trust, the execution of which will be narrowly scanned by the court (*t*). It cannot, for example, be exercised surreptitiously, for the purpose of expelling a shareholder (*t*); nor by connivance, for the purpose of assisting him in getting rid of shares and retiring from the company, in fraud of the other shareholders. A court will not sanction or recognise as valid a forfeiture made *malâ fide* for any such purpose.

Forfeiture to enable a shareholder to retire.

The invalidity of a forfeiture made for the purpose of enabling a shareholder to retire when he is not entitled so to do, is well shown by the decision in *Richmond's case*, and *Painter's case* (*u*). There a director of a company proposed that he and his co-directors should take a number of shares as trustees for the company, and he signed the deed for 2000 shares, and he was registered as the owner thereof. None of the other directors, however, followed his example. About

(*q*) See, as to the insufficiency of notices, &c., *Johnson v. Lytle's Iron Agency*, 5 Ch. D. 687; *Watson v. Eales*, 23 Beav. 294; *Van Diemen's Land Co. v. Cockerell*, 1 C. B. N. S. 732, affirming *Cockerell v. Van Diemen's Land Co.*, 18 C. B. 454; *Edinburgh, Leith, &c., Rail. Co. v. Hebblewhite*, 6 M. & W. 707; *London and Brighton Rail. Co. v. Fairclough*, 2 Man. & Gr. 674. Compare *Graham v. Van Diemen's Land Co.*, 1 H. & N. 541.

(*r*) *Garden Gully, &c., Co. v. M'Lister*, 1 App. Ca. 39, where the appointment of the directors was invalid.

(*s*) *Bottomley's case*, 16 Ch. D. 681, where the number of directors was insufficient. Compare *Lyster's case*,

4 Eq. 233, *infra*, note (*a*).

(*t*) *Blisset v. Daniel*, 10 Ha. 483; *Harris v. North Devon Rail. Co.*, 20 Beav. 384; *Stubbs v. Lister*, 1 Y. & C. C. C. 81. See, also, *Stewart's case*, 1 Ch. 511; and *Sweeny v. Smith*, 7 Eq. 324, where the plaintiff had sent a cheque for his calls.

(*u*) 4 K. & J. 305. See, also, *Esparto Trading Co.*, 12 Ch. D. 191; *Hall's case*, 5 Ch. 707; *Gower's case*, 6 Eq. 77; *Spackman v. Evans*, L. R. 3 H. L. 171; *Stanhope's case*, 1 Ch. 161; *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43; *Harris v. North Devon Rail. Co.*, 20 Beav. 384; *Preston v. Grand Collier Dock Co.*, 11 Sim. 327.

two years afterwards he ceased to be a director; and a year Bk. III. Chap. 6. after that, finding the company to be the reverse of prosperous, he desired to have his 2000 shares cancelled. To enable the directors to cancel them, he suggested that a call should be made on his shares, and that they should be forfeited under the powers contained in the company's deed. This suggestion was acted on; a call was made, and his shares were forfeited for non-payment thereof. But it was held, that the directors had no power to release a shareholder from his obligations by enabling him to retire at the expense of the company; that the shares had not been *bonâ fide* forfeited for the benefit of the company, and that the forfeiture was therefore invalid.

Clauses in deeds of settlement, &c., which declare that on What amounts to a forfeiture. non-payment of calls, &c., shares shall become absolutely forfeited, do not enable shareholders to get rid of their shares by refusing to pay their calls. Such clauses are inserted for the benefit of the company, and there is no forfeiture until a forfeiture is declared (*x*).

Moreover, a declared intention to forfeit not carried into effect (*y*), or not duly confirmed, is no forfeiture at all (*z*). Still, if there is power to forfeit, and a declared intention to forfeit, and the shares intended to be forfeited are treated by the company and the shareholder as forfeited, the company will be precluded from afterwards insisting that no forfeiture ever took place (*a*). This doctrine, however, cannot apply where the forfeiture is altogether *ultra vires*; and there are cases in which, after the lapse of many years, persons whose shares had been forfeited in order to enable them to retire, were nevertheless held to be contributories (*b*).

The effect of the forfeiture of a share depends entirely upon Effect of forfeiture. whether the forfeiture is valid or not. If it is valid, the share-

(*x*) See *Moore v. Rawlins*, 6 C. B. N. S. 289.

(*y*) *Bigg's case*, 1 Eq. 309.

(*z*) See *Birmingham, Bristol, &c., Rail. Co. v. Locke*, 1 Q. B. 256; *Edinburgh, Leith, &c., Rail. Co. v. Hobbblewhite*, 6 M. & W. 707; *London and Brighton Rail. Co. v. Fairclough*, 2 Man. & Gr. 674.

(*a*) *Ex parte Woollaston*, 4 De G. & J. 437; *Knight's case*, 2 Ch. 321, where a resolution to forfeit was presumed; *Lyster's case*, 4 Eq. 233, where the forfeiture was by two directors out of six. See, under the head Contributories, in bk. iv., c. 1, § 10, B. (3).

(*b*) See *ante*, p. 519.

Bk. III. Chap. 6. holder ceases, by the forfeiture of his shares, to be a member of the company; and although he may be liable to be sued for the calls (*e*) for the non-payment of which his shares have been forfeited, he is not liable to subsequent calls nor to be made a contributory as a present member on the winding-up of the company (*d*). But if a forfeiture is invalid, and if the company is not estopped from showing the invalidity (*e*), then the shareholder does not cease to be a member of the company, and he still remains liable to calls (*f*), and to be made a contributory on the winding-up of the company (*g*). Whether the invalidity of a declaration of forfeiture affords a defence to an action by the injured shareholder against the company for damages occasioned by its wrongful act, is a question on which decisions conflict (*h*). But if a member has been in fact wrongfully expelled, and been damnified, it is not easy to see why an action should not lie. Be this, however, as it may, the invalidity of a forfeiture affords no reason why the court should not interfere to protect or restore a shareholder to that position from which he is in fact excluded. In *Hart v. Clarke* (*i*), a shareholder in a cost-book mining company, whose shares had been improperly forfeited, was, after the lapse of a considerable length of time, restored to his rights as a shareholder; in *Norman v. Mitchell* (*k*), and in *Watson v. Eales* (*l*),

Relief in such cases.

(*e*) Interest on such calls was held not recoverable in *Stocken's case*, 5 Eq. 6, and 3 Ch. 412.

(*d*) See *infra*, under the head Contributories, in book iv., c. 1, § 10. He may be a contributory as a past member, *Bridger's case*, 4 Ch. 266; *Creyke's case*, 5 Ch. 63.

(*e*) See *ante*, p. 48 *et seq.*

(*f*) See *Birmingham, Bristol, &c., Rail. Co. v. Locke*, 1 Q. B. 256; *Edinburgh, Leith, &c., Rail. Co. v. Hebblerhite*, 6 M. & W. 707; *London and Brighton Rail. Co. v. Fairclough*, 2 Man. & Gr. 674.

(*g*) *Barton's case*, 4 Drew. 535, and 4 De G. & J. 46; *Richmond's case*, and *Painter's case*, 4 K. & J. 305, and the cases cited, *ante*, p. 532, note (*u*).

(*h*) See *Catchpole v. Ambergate Rail. Co.*, 1 E. & B. 111, and compare the cases in the next note. If a company has no power to forfeit, a forfeiture cannot be imputed to it, and the action for damages ought to be against its directors, if it can be sustained at all.

(*i*) 6 De G. M. & G. 232, and 6 H. L. C. 633. See, also, *Sweeney v. Smith*, 7 Eq. 324, where the shareholder had tendered his call; *Garden Gully, &c., Co. v. M'Lister*, 1 App. Ca. 39; where the defence failed, and *Wood v. Wood*, L. R. 9 Ex. 190, where it succeeded. The former case does not appear to have been noticed.

(*k*) 5 De G. M. & G. 648.

(*l*) 23 Beav. 294.

an injunction was granted to restrain the carrying into effect of declarations of forfeiture recently made; and in *Stubbs v. Lister* (*m*), a forfeiture of shares was set aside on the ground that the directors who were bound to credit the shareholder with the utmost value of the shares, had credited him with a value set upon them by themselves, and which value was less than the current market price of shares in the company at the time the forfeiture was declared. In this case the shares were a security for money owing by their owner to the company, and were forfeited for non-payment of that money.

It may further be observed, that although a court will not relieve a person whose shares have been duly forfeited (*n*), it will interfere to prevent a forfeiture pending a dispute between a company and a shareholder upon payment by him into court of what may be due from him in respect of the shares intended to be forfeited (*o*), and will take care that the shareholder has credit for whatever the shares may or, if properly sold, might have fetched (*p*).

The effect of acquiescence in a forfeiture, and of delay in seeking relief, will be examined hereafter. See Chap. IX., § 3 (*q*).

(*m*) 1 Y. & C. C. C. 81.

(*n*) *Sparks v. Liverpool Water-works Co.*, 13 Ves. 428.

(*o*) See *Naylor v. South Devon Rail. Co.*, 1 De G. & S. 32.

(*p*) See *Stubbs v. Lister*, 1 Y. & C. C. C. 81.

(*q*) The most recent decision on this point is *Rule v. Jewell*, 18 Ch. D. 660.

CHAPTER VII.

OF THE EFFECT OF THE DEATH OF A SHAREHOLDER.

Bk. III. Chap. 7. THE consequences of the death of a member of a company
 Sect. 1. will be most conveniently pointed out in the course of an
 examination of the position of the company, and of the executors of the deceased member—

1. As between themselves ;
 2. As regards the creditors of the company ; and
 3. As regards the separate creditors and legatees of the deceased.
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SECTION I.—CONSEQUENCES AS REGARDS THE COMPANY AND
 THE EXECUTORS OF THE DECEASED.

Executors of
 shareholders.

The position of the executors or administrators of a deceased shareholder relatively to the company is as follows :—

1. They are entitled, as against the company, to the shares of the deceased, and to be paid by the company whatever is payable by it in respect of such shares at the time of his death ; and also whatever becomes payable in respect of those shares whilst they form part of his estate.

Liability to
 calls, &c.

2. The assets of the deceased are liable to make good whatever is at the time of his decease payable by him to the company ; and also whatever afterwards becomes payable by his representatives by virtue of the contract into which he entered. Consequently, if a person becomes a shareholder in a company and then dies, and afterwards, and whilst his shares are part of his estate, a call is made by the company on its shareholders,

his assets will be liable to the payment of such call (*a*). More-
 over a call, made by a company in pursuance of its act, charter, or deed of settlement, constitutes a specialty debt (*b*); and all calls made under the winding-up provisions of the Companies act, 1862, are also specialty debts (*c*). But specialty debts are no longer entitled to priority of payment over simple contract debts (*d*); and even before the law was altered in this respect, executors who paid the simple contract debts of their testator before a call was made, were allowed those payments as against the company seeking to make them liable for a *deceasavit* (*e*); and no part of the testator's assets could, as against his simple contract creditors, be set apart for the payment of calls which had not been made (*f*).

Bk. III. Chap. 7.
Sect. 1.

3. It follows from the foregoing observations that, when a company is being wound up, the executors of a deceased shareholder are liable to be made contributories as executors in respect of his shares so long as they remain untransferred. From this again it follows, that the executors of a deceased shareholder are entitled to petition for an order to wind up the company, although they may not be themselves shareholders therein. This subject will be alluded to hereafter (*g*).

Liability to be made contributories.

4. In most companies, executors have, as between themselves and the company in which their testator was a shareholder, a right to become shareholders in his stead (*h*). But if

Necessity for executors to become shareholders.

(*a*) See, in equity, *Fyler v. Fyler*, 2 Ra. Ca. 813; *Blakeley's case*, 13 Beav. 133, and 3 Mac. & G. 726; *Heward v. Wheatley*, 3 De G. M. & G. 628, and at law, *Wills v. Murray*, 4 Ex. 843. Compare *Weald of Kent Canal Co. v. Robinson*, 5 Taunt. 801.

(*b*) *Cork and Brandon Rail. Co. v. Goode*, 13 C. B. 826. In *Morris v. Sudler*, Ir. L. R. 6 Eq. 580, a covenant by a deceased shareholder with an officer of the company to pay what should be demanded of him, was held not to create a specialty debt in respect of moneys due from his estate, but not demanded in his lifetime. Calls made

under a Colonial act are simple contract debts only, see *Welland Rail. Co. v. Blake*, 6 H. & N. 415.

(*c*) The Companies act, 1862, § 16. It was not so under the older winding-up acts, see *Robinson's Executors' case*, 6 De G. M. & G. 572.

(*d*) 32 & 33 Vict. c. 46.

(*e*) *Henderson v. Gilchrist*, 17 Jur. 570.

(*f*) *Wentworth v. Chervell*, 3 Jur. N. S. 805. As to the legatees and next of kin, see *infra*, p. 540 *et seq.*

(*g*) See *infra*, bk. iv. c. 1, § 3.

(*h*) A clause in the articles of association giving the company power to decline to register a trans-

Bk. III. Chap. 7. an executor does become a shareholder, his liability, as well to
 Sect. 1. — the company as to its creditors, is a personal liability; and such liability is in no way qualified or limited by the circumstance that as between himself and those who are beneficially entitled to the testator's assets, the executor is not the owner of the shares standing in his name (*i*). Executors, therefore, should not become shareholders if they can avoid doing so; and generally it will be found that they can transfer their testator's shares without first becoming shareholders themselves; and where this is the case, an assent by them to become shareholders will not be presumed, even if their names have been put on the company's register (*k*). Whether, however, executors can or cannot dispose of their testator's shares without themselves becoming shareholders, and the manner in which it is to be done, depend, in each case, upon the constitution of the company in which the shares are held.

By the Companies act, 1862, provision is expressly made for transfers by executors, although they may not themselves be members (*l*).

The transfer by executors of shares in companies, governed by the Companies' clauses consolidation act, is also specially provided for (*m*); but by this act the executors must apparently be themselves registered as shareholders before they can transfer (*n*).

Shares held by several persons jointly.

When a share in a company is held by several persons jointly and one of them dies, the legal title to that share devolves on the survivors, whatever may be the case as to the equitable title (*o*). If the holders are partners, and the share is partner-

fer does not apply as between a

testator and his executor. See *Bentham Mills Spinning Co.*, 11 Ch. D. 900; compare *Ex parte Harrison*, 26 Ch. D. 522, and 28 Ch. D. 363.

(*i*) See *Duff's Executor's case*, 32 Ch. D. 301; *Spence's case*, 17 Beav. 203; *Fenwick's case*, 1 De G. & S. 557; *Armstrong v. Burnet*, 20 Beav. 424.

(*k*) See *Buchan's case*, 4 App. Ca. 549, 583, where the executors were

on the register.

(*l*) 25 & 26 Vict. c. 89, § 24, and see Table A., Nos. 12—16. The Table B. to the Companies act, 1856, contained similar provisions.

(*m*) 8 & 9 Vict. c. 16, §§ 18, 19, 20.

(*n*) Compare §§ 3, 14, 18.

(*o*) See acc. *Hill's case*, 20 Eq. 595, where the survivor alone was put on the list of contributories. (Qu. whether the executors can be put on as past members.

ship property, the equitable interest of the deceased will not survive; but if the holders are not partners, the question of survivorship or non-survivorship will depend upon those principles which would be applicable under similar circumstances to other property; and the fact that the regulations of the company contain a clause to the effect that no benefit of survivorship shall take place amongst the shareholders will be of little, if any, consequence. For example: shares purchased by A., in the names of himself and B., *primâ facie* belong in equity to A.; but if A. dies before B., the legal interest in them devolves on B.; and if the evidence rebuts the presumption which *primâ facie* exists in A.'s favour, B. will be entitled to the shares both at law and in equity, although the company's deed may contain such a clause as that just mentioned (*p*). If, however, B. is only a trustee for A., and A. dies, and then B. dies, and the company is wound up, B.'s executor will be liable to be put upon the list of contributories, and he will be entitled to indemnity out of A.'s estate, and to sue for such indemnity before being actually settled on the list (*q*).

Bk. III. Chap. 7.
Sect. 2.

SECTION II.—CONSEQUENCES OF DEATH AS REGARDS THE CREDITORS OF THE COMPANY.

With respect to the right of a creditor of a company to proceed against the executors of a deceased shareholder, a distinction must be taken between unincorporated and incorporated companies; for whilst the assets of a deceased shareholder in an unincorporated company are *primâ facie* liable in equity (although not at law) to the debts of the company contracted before his decease (*r*), the assets of a deceased member of a body corporate are, *primâ facie*, not liable to the payment of the debts thereof either at law or in equity. But as regards both classes of companies, the position of executors in fact

Liability of
estate of de-
ceased share-
holder.

(*p*) *Garrick v. Taylor*, 4 De G. F. & J. 159, affirming S. C. 29 Beav. 79. (*q*) *Hobbs v. Wayet*, 36 Ch. D. 256.
(*r*) See Partn., 594 *et seq.*

Bk. III. Chap. 7. depends less on general principles than on particular statutes,
 Sect. 3. — the provisions of which must therefore not be overlooked. Thus, although banking companies governed by 7 Geo. 4, c. 46, are not corporate bodies, and although creditors of such companies are, it seems, entitled to obtain payment of their debts out of the assets of a deceased shareholder, still the creditors' rights are so far modified by the acts in question, that, whether they are creditors by specialty or by simple contract, the lapse of three years after the death of a shareholder bars their claims against his executors (*s*); and even within that period the executors are only liable to pay such debts as the surviving shareholders are unable to discharge (*t*). Several cases are also to be found in which executors, not being themselves shareholders, have been held not liable to creditors (*u*). Similar observations apply to actions for calls.

The liability of executors to be proceeded against by *sci. fa.* or its modern substitute has been already noticed (Book II., c. 7, § 3): their liabilities as contributories will be referred to hereafter in Book IV., c. 1, § 10.

SECTION III.—AS REGARDS THE SEPARATE CREDITORS AND LEGATEES OF THE DECEASED.

Legacies of
 shares in com-
 panies.

Shares in companies are property for all purposes of administration. They are assets for the payment of debts; they can be disposed of by will; and if not disposed of they must be dealt with like other personal estate, and be distributed amongst the statutory next-of-kin of their deceased owner.

(*s*) See *Barker v. Buttriss*, 7 Beav. 134.

(*t*) *Heward v. Wheatley, Ex parte Wilson*, 5 De G. & S. 552. Compare *Re Walton's Estate*, 23 Beav. 480.

(*u*) *Ness v. Armstrong*, 4 Ex. 21, where the executors had received dividends; *Powis v. Butler*, 3 C. B. N. S. 645, and 4 ib. 469, where

the deceased's name was kept on the register of shareholders; *Poole v. Knott*, 7 W. R. 527, where the deceased had died before the creditor had obtained judgment against the company. The doubt expressed in *Ricketts v. Bowhay*, 3 C. B. 889, is removed by the decision in *Ness v. Armstrong*, 4 Ex. 21; and the case of *Ness v. Bertram*, 4 Ex. 191,

They are legal and not equitable assets (*x*); they pass under a bequest of personal estate (*y*); and if the certificates are kept at a bank the shares will pass under a bequest of property at that bank (*z*).

Shares, however, will not ordinarily pass under a bequest of moneys, bonds, or securities (*a*). But under special circumstances they will pass even under a bequest of money, as in *Knight v. Knight* (*b*), where share certificates were in an envelope indorsed "to be considered as money and given to A.B." A bequest of shares will ordinarily pass stock (*c*), but not debentures (*d*).

Where a person entitled to various kinds of shares in a company bequeaths some of them without saying which in particular, the legatee can select which he pleases (*e*).

A legacy of shares in a company is not necessarily adeemed by the conversion of such shares into stock (*f*), or into annuities (*g*); nor by the amalgamation of that company with another (*h*). But a bequest of shares in an unincorporated banking company governed by 7 Geo. 4, c. 46, was held to fail by reason of the subsequent registration of the company with limited liability, and with an altered capital differently divided (*i*).

A legatee of shares may, of course, decline to accept them, and he may do so although he accepts other property under the same will (*k*); unless there is only one gift, in which case he must accept or decline the whole (*l*).

turned entirely on a point of pleading.

(*x*) *Cook v. Gregson*, 3 Drew. 547.

(*y*) *Cudman v. Cudman*, 13 Eq. 470, canal shares.

(*z*) *Desinge v. Beare*, 37 Ch. D. 481.

(*a*) *Hulleston v. Gouldsbury*, 10 Beav. 547; *Ogle v. Knipe*, 8 Eq. 434; *Collins v. Collins*, 12 Eq. 455.

(*b*) 2 Giff. 616.

(*c*) *Morrice v. Aylmer*, 10 Ch. 148, and L. R. 7 H. L. 717; *Trinder v. Trinder*, 1 Eq. 695.

(*d*) *Dillon v. Arkins*, 17 L. R. Ir. 636.

(*e*) *Millard v. Bailey*, 1 Eq. 378.

(*f*) *Oakes v. Oakes*, 9 Ha. 666.

See on this case the cases in note (*e*); and compare *Re Gibson*, 2 Eq. 669; *Re Lane*, 14 Ch. D. 856, a case of debentures.

(*g*) *Bronsdon v. Winter*, 1 Amb. 57; *Partridge v. Partridge*, 9 Mod. 269; Cas. t. Tal. 226.

(*h*) See *Phillips v. Turner*, 17 Beav. 194.

(*i*) *Dresser v. Gray*, 36 Ch. D. 205. N.B. The head-note misdescribes the company.

(*k*) *Long v. Kent*, 6 N. R. 354.

(*l*) See *Guthrie v. Walrond*, 22 Ch. D. 573, and the cases there cited.

Bk. III. Chap. 7.
Sect. 3.

Absolute
legacies.

Where a share in a company is bequeathed to a person absolutely, the executors should transfer it to the legatee as soon as possible, in order that the liability of the testator's estate in respect of it may be put an end to (*m*). If the legatee is not *sui juris*, and the share cannot be transferred into his name, the position of the executors becomes embarrassing. If, however, they do nothing with the share, but simply take the dividends as executors, they will not render themselves personally liable to creditors (*n*); nor will they be liable to be made contributories, otherwise than in their representative capacity (*o*). But it may happen that, unless the executors transfer the shares into the names of themselves or some other persons, the shares will become forfeitable; and in that case (the legatee of the share being still supposed to be not *sui juris*) the executors should, for their own protection, apply for the direction of the Court.

Legacies for
life.

Where shares are bequeathed to one person for life with remainder to another, they ought nevertheless to be sold unless it is clearly the testator's intention that they shall be retained *in specie* (*p*). If they are intended to be enjoyed *in specie*, the position of the executors again becomes embarrassing: for if they transfer the shares into the name of the tenant for life, there is nothing to prevent him from selling them for his own use; and in case of a sale of the shares by him, the remainderman would naturally seek to make the executors responsible for their loss. If, on the other hand, the executors procure the shares to be transferred into their own names as trustees for the legatees, a personal liability in respect of the shares will be incurred by the executors, and that liability will not be limited by the amount of the assets of the testator. Unless, therefore, the executors can retain the shares without transferring them, they should, for their own safety, apply for the direction of the Court.

(*m*) See *Keene's Executors' case*, 3 De G. M. & G. 272.

(*n*) *Ness v. Armstrong*, 4 Ex. 21.

(*o*) This subject will be adverted to hereafter when treating of Contributories, bk. iv., c. 1, § 10.

(*p*) See *Blann v. Bell*, 2 De G. M. & G. 775; *Thornton v. Ellis*, 15 Beav. 193; *Crowe v. Crisford*, 17 ib. 507; *Wightwick v. Lord*, 6 H. L. C. 217.

Where shares are bequeathed to one person for life, with remainder to another, and are transferred into the name of the tenant for life, they will, on his death, be transferable into the name of the remainderman without further payment of probate duty (*q*). Such shares, in fact, form no part of the tenant for life's estate, and are covered by the duty payable in respect of the estate of the original testator.

Bk. III. Chap. 7.
Sect. 3.
Probate duty.

Where shares are bequeathed, not specifically, to one person for life, and after his death to another, the money yielded by them before sale will not necessarily belong to the tenant for life; for, according to the case of *Dimes v. Scott* (*r*), the tenant for life is only entitled to the income which would have been obtained if the shares had been sold and the produce invested in consols, at the end of a year from the testator's death: the income thus ascertained being, however, paid from the date of the death. This rule applies where the testator's residuary estate consists of shares when he dies. But it has been held that the rule does not apply where the executors themselves make an unauthorised investment; and that in such a case the tenant for life is entitled to the income actually yielded by the investment, and the remainderman is not entitled to more than a restoration of the original capital (*s*).

Income before
sale.
Dimes v. Scott.

When the legacy is specific, the rule in *Dimes v. Scott* does not apply, the legatee taking whatever the shares may yield (*t*). So where the shares, although not specifically bequeathed, are directed by the will not to be sold for a certain time, what they yield during that time will belong to the tenant for life (*u*).

It appears to be now settled, that when shares are specifically bequeathed, and the will contains no special directions to the contrary, all calls made upon the shares in the testator's lifetime must be borne by his general personal estate; whilst all those made after his death must be borne by the legatee

Payment of
calls.

(*q*) *Hennell v. Strong*, 25 L. J. Ch. 407.

(*r*) 4 Russ. 195, and see *Fearn v. Young*, 9 Ves. 549.

(*s*) See *Stroud v. Gwyer*, 28 Beav. 130.

(*t*) *Infra*.

(*u*) See *Green v. Britten*, 1 De G. J. & Sm. 649. Where the sale is postponed by the Court for the benefit of infants, see *Lambert v. Rendle*, 3 N. R. 247.

Bk. III. Chap. 7. taking the shares (*x*). There are, indeed, cases which show that
Sect. 3.

calls made after the testator's death are payable out of his general estate, and not by the specific legatee (*y*); but these cases are not to be relied upon, except where the payment of the calls would have been a condition precedent to the completion of the testator's own title to the shares if he himself had lived (*z*), and the calls are made before the specific legatee is, by the terms of the will, to have the shares (*u*).

In indemnity fund
to meet calls.

Where shares are specifically bequeathed, and calls upon them are payable out of a testator's residuary estate, a fund ought to be set apart for the indemnity of the specific legatee (*b*); but, where the assets of the deceased are insufficient for the payment of his debts, no fund to meet future calls ought to be set apart to the prejudice of even simple contract creditors (*c*).

A legatee of shares on which the company has a general lien, is not liable to contribute with the devisee of land mortgaged to the company by the testator towards the payment off of the mortgage debt (*d*).

Rights to
profits, &c.

A specific legatee of a share in a company is entitled to all ordinary dividends declared after the testator's death (*e*); unless although declared after his death they were earned and ought to have been declared before (*f*). But dividends de-

(*x*) See *Re Bor*, 1 Hem. & M. 552, and *Day v. Day*, 1 Dr. & Sm. 261, where all the previous cases are reviewed. See also, *Bevan v. Waterhouse*, 3 Ch. D. 752, as to a direction to pay calls out of income and not out of capital.

(*y*) *Blount v. Hipkins*, 7 Sim. 51; *Clive v. Clive*, Kay, 600; *Jacques v. Chambers*, 4 Ra. Ca. 499, correcting S. C., 2 Coll. 435; *Wright v. Warren*, 4 De G. & S. 367.

(*z*) As to this qualification, see *Armstrong v. Burnet*, 20 Beav. 424; *Addams v. Ferick*, 26 ib. 384; and *Day v. Day*, *ubi supra*.

(*u*) *Re Bor*, 1 Hem. & M. 522, where the testator's residuary estate, including the shares, was bequeathed to A. for life, and after his death

the shares were specifically bequeathed to B., and the calls were made in A.'s lifetime.

(*b*) *Jacques v. Chambers*, 4 Ra. Ca. 499.

(*c*) *Wentworth v. Chevell*, 3 Jur. N. S. 805. See, too, *Read v. Blunt*, 5 Sim. 567, and compare *Atkinson v. Grey*, 1 Sm. & G. 577. See *ante*, p. 537.

(*d*) See *Dunlop v. Dunlop*, 21 Ch. D. 583, noticed *ante*, p. 457.

(*e*) *Jacques v. Chambers*, 2 Coll. 435; *Wright v. Warren*, 4 De G. & S. 367; *Browne v. Collins*, 12 Eq. 586; *Ibbotson v. Elam*, 1 Eq. 188.

(*f*) *Browne v. Collins*, 12 Eq. 586. But see *Ibbotson v. Elam*, 1 Eq. 188.

clared before a testator's death (*g*), or declared afterwards when they were earned and ought to have been declared before (*h*), *primâ facie* form part of his general estate, and do not pass to the specific legatee of the share: and the same rule applies to dividends declared before his death, but the actual payment of which is postponed until afterwards (*i*). Losses must not be thrown on capital so as to benefit a tenant for life at the expense of the remainderman (*k*).

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Sect. 3.

Few questions have given rise to more difficulty and diversity of opinion than the proper mode of treating bonuses and other extraordinary payments made in respect of shares held for life. At one time it was considered that all payments in respect of accumulations of profits were to be treated as between tenant for life and remaindermen as capital and not as income; and it was not by any means clear that the mode in which the company treated them afforded the true solution of the difficulty (*l*).

Bonuses, &c.

This subject, however, has been at last thoroughly discussed in the House of Lords in *Bouch v. Sproule* (*m*), where all the previous authorities were reviewed. The principles there laid down are as follows, viz.:—

Bouch v. Sproule

1. If a company has no power to increase its capital, but accumulates profits, uses them as capital, and afterwards divides them amongst the shareholders, the amount payable in respect of shares held for life must be treated as capital (*n*).

(*g*) See the next two notes.

(*h*) *Browne v. Collins*, 12 Eq. 586.

(*i*) *De Gendre v. Kent*, 4 Eq. 283; *Lock v. Venables*, 27 Beav. 598; *Wright v. Tuckett*, 1 J. & H. 266. Compare *Clive v. Clive*, Kay, 600, which turned on the special wording of the company's deed of settlement.

(*k*) See *Upton v. Brown*, 26 Ch. D. 588; *Gow v. Forster*, ib. 672.

(*l*) Compare *I. Hopkins' trust*, 18 Eq. 696; *Plumbe v. Neild*, 6 Jur. N. S. 529; *Price v. Anderson*, 15 Sim. 473; *Preston v. Melville*, 16 ib. 163; and *Barchay v. Wainwright*, 14 Ves. 66, in which the payments were held to be income, with *H. Straker*

v. Wilson, 6 Ch. 503; *Barton's trust*, 5 Eq. 238; *Ward v. Combe*, 7 Sim. 634; *Witts v. Steere*, 13 Ves. 363; *Paris v. Paris*, 10 Ves. 185; and *Brander v. Brander*, 4 Ves. 800, in which the payments were held to be capital. See, also, *Cuming v. Boswell*, 2 Jur. N. S. 1005, where the House of Lords held, that upon the true construction of a Scotch deed, bonuses belonged to an infant's estate, and not to the person who, on his death under 21, became entitled to the stocks which yielded them.

(*m*) 12 App. Ca. 385, reversing S. C. 29 Ch. D. 635.

(*n*) *Irring v. Houstoun*, 4 Paton

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2. If a company can lawfully increase its capital, and it does so by capitalising and distributing its accumulated profits, then what is distributed in respect of shares held for life must be treated as capital, whether what is distributed is cash or new shares (*o*).

3. If a company having power to treat accumulated profits as an increase of capital, or otherwise, divides accumulated profits amongst its shareholders as profits (or without capitalising them or treating them as capital) what is distributed in respect of shares held for life will belong to the tenant for life as income (*p*).

It had been previously decided that if a company having power to increase its capital chooses not to divide its profits as income, but to capitalise them, the sum payable to a legatee of shares for life must be treated by him as capital (*q*).

Maclaren v.
Stainton.

On the other hand, if, as in *Maclaren v. Stainton* (*r*) a bonus arising from money paid to a company under a compromise with one of its own shareholders is divided as income, the sum payable will belong to a specific legatee of shares and not to the residuary legatee, and to a legatee of shares for life and not to the remainderman.

Loss of income
by tenant for
life.

Where part of the profits accruing during the life of the tenant for life are capitalised by the company, he has no right to have the loss of income, which he thereby sustains, made good by the remainderman (*s*).

Apportionment
of interest and
dividends.

Interest on a debt accrues *de die in diem*, and is apportionable at common law; and profits and dividends, including bonuses (*t*), are now apportionable under the act 33 & 34 Vict. c. 35, which applies to all cases arising between a tenant for life and remainderman after the act came into operation,

Sc. App. 521, a former decision of the House of Lords, and one which has often been felt to create a difficulty.

(*o*) This was the point decided in *Bouch v. Sproule*.

(*p*) This point did not arise in *Bouch v. Sproule*, but is warranted by it.

(*q*) *Barton's trust*, 5 Eq. 238. See, also, *Straker v. Wilson*, 6 Ch. 503.

(*r*) 3 De G. F. & J. 202, reversing 27 Beav. 460.

(*s*) See *Stroud v. Gwyer*, 28 Beav. 130.

(*t*) *Carr v. Griffiths*, 12 Ch. D. 655.

although the will under which the parties claim came into operation before that time (*n*). If, therefore, a testator bequeaths debentures to one person for life, and afterwards to another, and dies shortly before the current interest on the debentures is payable, so much only of that interest as accrued after the death of the testator will belong to the tenant for life (*x*). And it is apprehended that now if there is a specific bequest of shares in a company, and the testator dies a few days before a dividend upon them is declared, there will be a similar apportionment of the dividend (*y*).

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Other circumstances being the same, the price of shares in dividend-paying companies naturally rises as a dividend day approaches; in fact, the price includes a proportionate part of the accruing dividend; nevertheless, as between a tenant for life and a remainderman the price realised by a sale of shares is all treated as *corpus*, without reference to the time when a sale is made (*z*); and it is conceived that the statute 33 & 34 Vict. c. 35, has not altered the law in this respect.

Where shares are bequeathed to executors upon trust for sale as soon as conveniently may be after the testator's death, they should sell them within a year after his death: and in a case where they were kept unsold for many years and the company was ultimately wound up, the estate of a deceased executor who survived the testator only thirteen months was held liable for the loss sustained by not having sold them within the year (*a*). Where, however, the executors honestly

Liability of
executors for
not selling
shares.

(*n*) *Lawrence v. Lawrence*, 26 Ch. D. 795.

(*x*) See *Rogers' Trusts*, 1 Dr. & Sm. 338.

(*y*) *Carr v. Griffiths*, *ubi sup.*; *Pollock v. Pollock*, 18 Eq. 329, correcting *Whitehead v. Whitehead*, 16 Eq. 528. In *Jones v. Ogle*, 14 Eq. 419, affirmed on appeal, 8 Ch. 192, there was no apportionment, but there not only the shares but the dividends on them were specifically bequeathed. Compare *Re Clarke*, 18 Ch. D. 160. See, before the act, *Macwell's Trusts*, 1 Hem. & M. 610; *Bates v. MacKinley*, 31 Beav. 280; *Oliver v. Oliver*,

Kay, 600; *Hartley v. Allen*, 4 Jur. N. S. 500.

(*z*) *Scholefield v. Redfern*, 2 Dr. & Sm. 182. See, also, *Fremantle v. Whitbread*, 1 Eq. 266.

(*a*) *Grayburn v. Clarkson*, 3 Ch. 605; *Sculthorpe v. Tipper*, 13 Eq. 232. See, also, *The Heirs Hiddingh v. De Villiers Denysen*, 12 App. Ca. 624, an appeal from the Cape, where executors who had delayed the conversion of shares were held liable for their value ascertained at a reasonable time after the death of the testator, which in that case was fixed at six months.

Ek. III, Chap. 7.
Sect. 3. in the exercise of their own judgment postpone the sale for a short time longer than a year, they will not be compelled to make good loss arising from the postponement (*b*); and if a testator gives his executors an absolute discretion to postpone the sale and conversion they will not, in the absence of *mala fides*, be held liable for any loss sustained by non-conversion, even of shares in an unlimited company (*c*).

(*b*) *Marsden v. Kent*, 5 Ch. D. 598. (*c*) *Re Norrington*, 13 Ch. D. 654.

CHAPTER VIII.

OF THE EFFECT OF THE BANKRUPTCY OF A SHAREHOLDER.

THE law of bankruptcy so far as it relates to partners will be found in the volume on partnership. So much of it as relates to shareholders and is peculiar to them is alone referred to in the present treatise. Bk. III. Chap. 8.

Every shareholder who is *sui juris*, whether a trader or not, is liable to become bankrupt (*a*). A married woman holding shares for her separate use can however only become bankrupt if she carries on a trade separately from her husband, and she is only subject to the bankrupt laws in respect of her separate estate (*b*). Whether holding shares in a trading company is carrying on trade within the meaning of the Married Woman's Property act, 1882 (*c*), has not yet been decided. But merely holding shares in an incorporated company can hardly be carrying on a trade (*d*). Whether holding shares in an unincorporated company can amount to "carrying on trade separately from her husband" is more doubtful; but unless a married woman not only holds shares in a company, but also takes an active part in carrying on its business separately from her husband, she cannot, it is conceived, be made bankrupt under the clause in question. The older authorities, to the effect that persons holding shares in trading companies were themselves traders within the meaning of the old Bankruptcy acts (*e*), have little bearing on this question.

Any company empowered to sue and be sued by a public

(*a*) See as to infants and lunatics, Partn., p. 624, note (*n*).

(*b*) 45 & 46 Vict. c. 75, § 1, cl. 5.
Ex parte Coulson, 20 Q. B. D. 249.

(*c*) *Ib*.

(*d*) In this case the trade is car-

ried on by the corporation not by the members of it.

(*e*) *Smith v. Cannon*, 2 E. & B. 35, and the cases there referred to. See as to mining companies, *Ex parte Schomberg*, 10 Ch. 172.

Bk. III. Chap. 8. officer (*f*) or a corporation (*g*), *e.g.* a registered company (*h*), may be the petitioning creditor; and a company being wound up under the Companies act, 1862, can obtain an adjudication against one of its own shareholders in respect of calls (*i*).

An incorporated company can act in bankruptcy by any of its officers authorised so to do under its corporate seal (*k*); and an unincorporated company having no public officer can act by any of its members authorised so to act (*l*).

It is presumed that a company empowered to sue and be sued by a public officer can act by him although there is no general enactment or rule expressly to this effect (*m*).

The petitioning creditor's debt must amount to 50*l.*, payable immediately or at some certain future time (*n*). A call made under the winding-up provisions of the Companies act, 1862, is expressly declared to be a debt accruing when the call is made (*o*).

The doctrine that on the bankruptcy of one member of a firm the whole firm is dissolved is not applicable to companies with transferable shares (*p*).

Shares vest in trustee.

Upon the bankruptcy of a shareholder all his property, including his shares, vests first in the official receiver, and afterwards when a trustee is appointed in the trustee (*q*); but subject to disclaimer, as will be seen presently. Shares held by the bankrupt as trustee do not pass to his trustee in bank-

(*f*) Bank. rules, 1886, r. 258. As to the mode of describing him, see *Ex parte Torkington*, 9 Ch. 298.

(*g*) 46 & 47 Vict. c. 52, § 168, "Person." *Ex parte Collins*, De Gex, 381; *Ex parte Sneyds*, 1 Moll. 261.

(*h*) *Re Calthrop*, 3 Ch. 252.

(*i*) See 25 & 26 Vict. c. 89, §§ 75, 95; *Ex parte Winterbottom*, 18 Q. B. D. 446; *Ex parte Hall*, Mon. & Ch. 365; *Ex parte Calthrop*, 3 Ch. 252. Under the former acts the official manager could not be a petitioner; *Williams v. Harding*, L. R. 1 H. L. 9.

(*k*) *Ib.*, § 148.

(*l*) See *ib.* and Bank. rules, 1886, r. 258. The section uses the word firm, and the statement in the text is supposed to be the meaning.

(*m*) See § 148 and rule 258; *Re Caldecott*, 2 M. D. & D. 368, affirming *Ex parte Davidson*, 1 M. D. & D. 648.

(*n*) 46 & 47 Vict. c. 52, § 6.

(*o*) See Comp. Act, 1862, § 75; *Ex parte Canwell*, 4 De G. J. & S. 539. See as to calls made under the Winding-up acts, 1848-49, *Williams v. Harding*, L. R. 1 H. L. 9.

(*p*) See *Ex parte Broadbent*, 1 Mont. & A. 638; *Bentley v. Bates*, 4 Y. & C. Ex. 190, as to mining partnerships.

(*q*) 46 & 47 Vict. c. 52, §§ 43, 44, 54. See as to the old law and the vesting of onerous property, *Copeland v. Stephens*, 1 B. & A. 593.

ruptcy (*r*); and shares which are in the order and disposition of the bankrupt, but in which other persons have an interest by way of mortgage or otherwise do not now pass to his trustee under the reputed ownership clause (*s*); the trustee, in short, is only entitled to the interest of the bankrupt in the shares, and if they are subject to a lien either in favour of the company (*t*), or of any third party (*u*), the trustee's right to the shares is subject to the same lien.

It must not, however, be supposed that the effect of vesting a bankrupt's property, including his shares, in his trustee, is to make the trustee a shareholder, *i.e.* a member of the company in which the shares are held (*x*). In order to become a shareholder the trustee must do whatever may be necessary by the regulations of the company to render himself a member thereof. The vesting of the bankrupt's property in the trustee entitles the trustee, but does not oblige him, to become a member. His right to become a member can be exercised even after the lapse of a considerable time, if nothing has been done either by him or the company depriving him of such right (*y*).

Speaking generally a trustee of a bankrupt shareholder may take one or other of the following courses, *viz.* :—

1. He may cause the shares to be transferred into his own name (or do whatever else is necessary) and thereby become himself a member of the company in respect of them. The regulations of the company may possibly not entitle him to take this course; but this is rarely if ever the case. A clause empowering directors to decline to register a transfer to a

(*r*) *Ib.*, s. 44 (1), and see *Pinkett v. Wright*, 2 Ha. 120; *Joy v. Campbell*, 1 Sc. & Lef. 328.

(*s*) *Ib.*, § 44 (3); *Colonial Bank v. Whinney*, 11 App. Ca. 426, reversing S. C., 30 Ch. D. 261. The older authorities collected in former editions are omitted as no longer useful.

(*t*) See *Child v. Hudson's Bay Co.*, 2 P. W. 207; *Ex parte Cooper*, 2 M. D. & D. 1. See, too, *Pinkett v. Wright*, 2 Ha. 120, where, however, it was held that a banking company had no lien on the shares of a customer who had overdrawn his

account. See, too, *Melioracchi v. Royal Ec. Co.*, 1 Eq. Ca. Ab. 9.

(*u*) See *Ex parte Dobson*, 2 M. D. & D. 685; *Ex parte Moss*, 3 De G. & S. 599.

(*x*) See *South Staffordshire Rail. Co. v. Burnside*, 5 Ex. 129, and the next note.

(*y*) *Graham v. Van Diemen's Land Co.*, 11 Ex. 101, where five years had elapsed. Compare *Lon. and Provincial Tel. Co.*, 9 Eq. 653; *Lavrence v. Knowles*, 5 Bing. N. C. 399, where the right was lost. As to disclaimer, see *infra*.

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Trustee not a shareholder.

Registration in name of trustee.

Bk. III. Chap. 8. person disapproved by them or indebted to the company does not apply to a trustee claiming the shares under the Bankruptcy act (z). But the trustee has no right to be registered as owner if the bankrupt has executed a transfer to another person who has such right (a); and even the consent of such person will not entitle the trustee to be registered so long as the transfer already executed remains in force (b).

If the trustee elects to take the shares and to be registered in respect of them he becomes himself a shareholder to all intents and purposes; and it is very seldom therefore that he takes this course.

Sale by the trustee.

2. The trustee may, without himself becoming a shareholder, sell or dispose of the bankrupt's shares. A provision to this effect is usually inserted in a company's regulations (c); but whether there is or is not such a clause in them, the Bankruptcy act, 1883, authorises the trustee to take this course (d).

Shares left by name of bankrupt.

So long as the shares are retained in the bankrupt's name unsold the trustee incurs no personal liability to the company in respect of them. On the other hand, not being himself a shareholder, notices of meetings, of calls, and of forfeiture of shares, will not be sent to him but to the bankrupt. Consequently, if a call is made and not paid, and the company has power to forfeit shares for the non-payment of calls, the trustee's title may be defeated by a forfeiture of which he has not received notice (e). So he may lose his right to them by a transfer to a *bonâ fide* purchaser for value without notice. This was decided in a case where the assignee did nothing for five years. In the meantime the bankrupt died; his widow and executrix became registered in respect of his shares, and she afterwards sold them and the purchaser was registered. The assignee then claimed them, but the V.-C. James held that the purchaser had acquired a good legal title to them (f).

(z) *Bentham Mills Spinning Co.*,
11 Ch. D. 900.

(a) *Ex parte Harrison*, 28 Ch. Div.
363.

(b) *Ibid.*

(c) The Companies act, 1862, Table
A., contains such a provision; see
art. 14.

(d) 46 & 47 Vict. c. 52, § 50 (cl. 3).

(e) *Graham v. Van Diemen's Land
Co.*, 1 H. & N. 541.

(f) See *London and Provincial
Tel. Co.*, 9 Eq. 653. The purchaser
had at any rate the better title in
equity to be registered, and being
registered, the assignee could not

3. The trustee may disclaim the shares. The provision in the Bankruptcy act, 1883, relating to the disclaimer of onerous property differs in many important respects from those contained in former acts of bankruptcy, and decisions on them must not be relied upon as applicable to the law as it now stands (*g*).

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Disclaimer.
Bank. act, 1883,
§ 55.

The following is the substance of the present enactment relating to the disclaimer of shares :—

1. The trustee may disclaim them by writing signed by him at any time within three months after the first appointment of a trustee ; or within two months after he first became aware of their existence (*h*) ;

2. He may disclaim them, although he may have tried to sell them, or has taken possession of them, or exercised any act of ownership in relation to them (*i*) ;

3. The disclaimer determines as from its date the rights, interests, and liabilities of the bankrupt and of his property in respect of the shares (*k*) ;

4. It also discharges the trustee from all personal liability in respect of them as from the date when they vested in him (*l*) ;

5. But except so far as necessary for the purpose of releasing the bankrupt and the trustee, the disclaimer does not affect the rights or liabilities of any other person (*m*) :

6. The trustee cannot disclaim if an application in writing has been made to him by any person interested in the shares requiring him to decide whether he will disclaim or not, and he has for twenty-eight days (or such extended time as may be allowed by the court) declined or neglected to give notice whether he disclaims or not (*n*) ;

7. The court may make an order vesting the shares in any

disturb him by having the register rectified, which was what he sought.

(*g*) See for the present law 46 & 47 Vict. c. 52, § 55. The section was much discussed with reference to cases in *Ex parte the Clothworkers' Co.*, 21 Q. B. D. 475. The older cases are *Ex parte Budden*, 12 Ch. D. 288 ; *Ex parte Walton*, 17 ib. 746 ; *Levi v. Ayers*, 3 App. Ca 842 ;

Hill v. E. & W. In. Docks Co., 9 App. Ca. 448.

(*h*) § 55, cl. 1. See *Wilson v. Wallcut*, 5 Ex. D. 155, as to signature by an agent.

(*i*) Ibid.

(*k*) § 55, cl. 2.

(*l*) Ib.

(*m*) Ib.

(*n*) Ib., cl. 4.

Bk. III, Chap. 8. person or trustee for any person entitled to them or to compensation for any liability in respect of the shares not discharged by the act (*o*);

8. Any person injured by the disclaimer is deemed to be a creditor of the bankrupt to the extent of the injury, and may prove the same accordingly against the bankrupt estate (*p*).

The short effect of a disclaimer of shares appears, therefore, to be as follows:—1, the bankrupt and the trustee are discharged from all future liability in respect of them; 2, they have no further right or interest in them; 3, the company can apparently apply for an order vesting the shares in itself or some trustee for itself (*q*); 4, the company can prove against the bankrupt's estate for any damage it may sustain by the disclaimer. If the shares are subject to any mortgage or equitable charge the bankrupt and his trustee will be released from all liability in respect of the shares; but the mortgage or charge will not be affected; and the person entitled thereto will apparently be entitled to an order vesting the shares in himself free from redemption. Whether the company can compel him to take the shares or allow the company to have them, and in the latter case to take them free from the mortgage or charge, are questions not yet settled by decision (*r*).

Proof of debts.

Under the Bankruptcy act, 1883, § 37, every conceivable debt or money demand, liquidated or unliquidated, present or future, vested or contingent, can be proved with two exceptions, viz., (1) demands for unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust; and (2) demands which in the opinion of the court are incapable of being fairly estimated (*s*).

A transferor of shares to a bankrupt can now prove in respect of his right of indemnity (*t*) by his transferee, although the transfer may not have been perfected.

Proof by unincorporated companies.

An ordinary partnership cannot prove against the separate

(*o*) § 55, cl. 6, much abridged.

(*p*) *Ib.*, cl. 7. See *Ex parte Davis*, 3 Ch. D. 463.

(*q*) This will not be clear until it is decided. See *Ex parte The Clothworkers Co.*, 21 Q. B. D. 475.

(*r*) See the case last referred to,

and observe that § 55 contains special provisions applicable to leases but not to shares.

(*s*) See as to these, *Hardy v. Fothergill*, 13 App. Ca. 351.

(*t*) *Holmes v. Symons*, 13 Eq. 66, shows that this formerly was not so.

estate of one of its members, except under special circumstances; for to allow such a proof would be inconsistent with the general principle that a person cannot prove against his own estate in competition with his own creditors (*u*). The application of this principle to unincorporated companies seeking to prove against a bankrupt shareholder in competition with his other creditors has given rise to some difficulty. The question, however, now seldom arises. It is now settled that the rule does not apply to proofs by banking companies empowered to sue by public officers by the act 7 Geo. 4, c. 46 (*x*); nor to proofs by liquidators of unincorporated companies being wound up (*y*). The difficulty cannot arise in the case of incorporated companies; but it may arise where the proving company is merely a large partnership not empowered to sue by a public officer, and not being wound up. No case has been met with in which proof by a cost-book mining company has been discussed; but the purser can sue a member for calls, and as to them would probably be considered a public officer (*z*).

Calls on shares made before adjudication are, and always have been, provable like other debts; and it is immaterial whether such calls are made by directors whilst a company is carrying on business, or by liquidators when a company is being wound up (*a*). But with respect to calls made after adjudication, the authorities were not a little embarrassing. Calls made by directors after adjudication were not provable under the Bankruptcy act of 1849, it being wholly uncertain at the time of adjudication whether they would ever be made or not; they were consequently neither debts payable presently or at a future time, nor were they debts payable on a contingency within the meaning of that act (*b*). Neither did the Bankruptcy act of 1861 make such calls provable (*c*). The same reasons

(*u*) See Partn. 737 *et seq.*

(*x*) *Re Caldecott*, 2 M. D. & D. 368, affirming *Ex parte Davidson*, 1 ib. 648.

(*y*) *Ex parte Ball*, 10 Ch. 48.

(*z*) As to the purser, see *ante*, pp. 265, 427.

(*a*) As in *Ex parte Brown*, 3 De G. & Sm. 590.

(*b*) *South Staffordshire Rail. Co. v. Burnside*, 5 Ex. 129; *Wylam's Steam Fuel Co. v. Street*, 10 ib. 849; *Re J. H.*, Ir. Rep. 3 Eq. 245. See, also, *General Discount Co. v. Stokes*, 17 C. B. N. S. 765.

(*c*) See 24 & 25 Vict. c. 134, §§ 150 *et seq.*

Bk. III. Chap. 8. were as applicable to calls made under the Winding-up acts as to other calls; but the decisions respecting such calls were not uniform (*d*).

Companies act,
1862, § 75.

The difficulties arising from the conflict of these decisions were intended to be removed by § 75 of the Companies act, 1862. But this section itself gave rise to further difficulties; and it was ultimately decided, 1, that the liability of a contributory to calls made in a winding-up under that act commenced when he became a member (*e*); 2, that if the winding-up preceded his bankruptcy, all future calls might be proved against his estate (*f*); 3, but where he was adjudicated bankrupt before the winding-up, calls made in the winding-up could not be proved at all (*g*); and consequently in this case the bankrupt remained liable for all calls made while he continued a shareholder.

Present law.

The Bankruptcy act, 1868, abolished these unnecessary distinctions (*h*); and the present Bankruptcy act, 1883, is similar to it. Under this act, when a shareholder becomes bankrupt, all calls in arrear are provable as debts, and his liability to future calls may be estimated and proved as well when the company is being wound up as when it is not (*i*). If the shares are neither disclaimed nor sold by the trustee, but are allowed to remain in the name of the bankrupt, and he obtains his discharge, it seems that he will nevertheless be freed from calls in respect of them, as his liability to them was capable of proof (*k*).

(*d*) See, on the one hand, *General Discount Co. v. Stokes*, 17 C. B. N. S. 765, and on the other, *Parbury's case*, 3 De G. F. & J. 80, and *Ex parte Nicholas*, 2 De G. M. & G. 271. See, also, *Chapple's case*, 5 De G. & Sm. 400; *Greenshield's case*, ib. 599.

(*e*) *Ex parte Canwell*, 4 De G. J. & S. 539. See, also, *Williams v. Harding*, L. R. 1 H. L. 9.

(*f*) *Ex parte Pickering*, 4 Ch. 58; *Mitchell's case*, 5 Ch. 400; *McEwen's case*, 6 Ch. 582; where the bankrupt was a past member; *Ex parte Marshall*, 7 Ch. 324; *Financial Cor-*

poration v. Lawrence, L. R. 4 C. P. 731, and the cases in the next note. *Holmes v. Symons*, 13 Eq. 66, is not opposed to these.

(*g*) *Martin's Patent Anchor Co. v. Morton*, L. R. 3 Q. B. 306; *Hastie's case*, 7 Eq. 3, and 4 Ch. 274; *Ex parte King*, 3 Ch. 10. It was left doubtful whether in this case they could be proved if made before the bankrupt's estate was distributed, or if the assignee took the shares. See L. J. Giffard's judgment, 4 Ch. 278.

(*h*) See §§ 23, 24, 31.

(*i*) See §§ 37, 55.

(*k*) *Mercantile Mutual Marine Ins.*

A company entitled to a lien on a bankrupt's shares for Bk. III. Chap. 8. calls is a secured creditor, and cannot therefore prove without giving up its lien (*l*).

The ordinary rules as to set-off and mutual credit apply to Set-off. bankrupt shareholders. As regards companies which are being wound up, the Companies act, 1862, provides in effect that debts due to a contributory from a limited company which is being wound up cannot be set off by him against calls made upon him (*m*). But it has nevertheless been decided that if the liquidator proves for a call against the estate of a bankrupt contributory to whom the company is indebted, the mutual credit clause applies, and a set-off must be allowed (*n*).

The combined effect of the sections of the Bankruptcy act, Summary. 1883, relating to the vesting and disposition of property (§§ 43, 44, 50, 54), disclaimer (§ 55), and the proof of debts (§ 37), seems to be as follows:—

1. That the legal right to a bankrupt's shares vests in his trustee;

2. That the shares do not vest in the trustee so as to make him a shareholder in place of the bankrupt;

3. That the trustee can, without the concurrence of the bankrupt, sell and transfer or otherwise dispose of his shares for the benefit of his estate;

4. That this right can only be exercised by the trustee, subject to the same conditions as regards consents, payment of calls in arrear, and the like, as the bankrupt himself would have had to comply with if he had been the transferor;

5. That if the shares cannot be disposed of beneficially for the estate, they may be disclaimed by the trustee, and so be got rid of altogether;

6. That inasmuch as under § 37 all calls due and to become due can be proved, the bankrupt when discharged will be free from liability in respect of the shares, whatever the trustee may do with them;

Ass., 25 Ch. D. 415. Compare *Furdoonjee's case*, 3 Ch. D. 264, which arose under an Indian insolvency act.

(*l*) See *Re Jennings*, 1 Ir. Ch. 236 & 654.

(*m*) 25 & 26 Vict. c. 89, §§ 101 & 38, cl. 7. See *infra*, bk. iv., c. 1, § 11 (5).

(*n*) *Re Duckworth*, 2 Ch. 578; *Caralli and Haggard's claim*, 4 Ch. 174; *Ex parte Strang*, 5 Ch. 492.

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7. That practically even calls in arrear will not be proved if the company has a lien on the shares, and they are worth more than the amount due in respect of them : for the company will then retain the shares and realise them if not redeemed ;

8. That practically calls not in arrear will not be proved if the shares are transferred by the trustee ; for the company will look to the transferee for all future calls (*o*) ;

9. That future calls will be proved if the trustee disclaims or does nothing ; the amount of injury sustained by the disclaimer being estimated under § 55 at the amount of the debt which but for the disclaimer would be provable under § 37 (*p*).

The liability of trustees in bankruptcy to be made contributories will be considered hereafter (see Book IV. c. 1, § 10).

(*o*) But it is apprehended that not intended.

future calls can be proved in this case. If they cannot the bankrupt may still be liable in some cases as a past member, which evidently is

(*p*) The calls can be proved if the trustee does nothing. See *Ex parte Davis*, 3 Ch. D. 463.

CHAPTER IX.

OF ACTIONS BETWEEN COMPANIES AND THEIR MEMBERS, AND
BETWEEN THE MEMBERS THEMSELVES.*General Observations.*

The mutual rights and obligations of shareholders and directors having been examined, it is proposed in the next place to consider the means by which those rights and obligations can be enforced. Bk. III. Chap. 9.

In the volume on Partnership, it was pointed out that an unincorporated firm or company could not at common law sue one of its members, nor could he sue it (*a*), and that this inconvenience could not be avoided by an agreement amongst the members that some officer, *e.g.*, the secretary or treasurer of the company, should sue and be sued on its behalf (*b*). The consequences of these doctrines were very serious to unincorporated companies of many members. Companies which were neither incorporated nor empowered to sue their own shareholders by public officers, frequently found it extremely difficult to compel the payment of money due to them from such shareholders by any direct proceeding against them. This difficulty often led to the crooked expedient of "putting a creditor on a shareholder;" that is to say, of compelling a shareholder to pay what he owed to the company by inducing some creditor of the company to single him out and sue him for the company's debt

Putting a creditor on a shareholder.

(a) Partn. 456 *et seq.*

(b) See *Evans v. Hooper*, 1 Q. B. D. 45; *Corner v. Maxwell-Irwin, Jr.*, 10 C. L. 354; *Gray v. Pearson*, L. R. 5 C. P. 568, the case of a mutual marine insurance society; *Hybart v. Parker*, 4 C. B. N. S. 209,

the case of a cost-book mining company. By 32 & 33 Vict. c. 19, § 13, calls may now be sued for by the purser. As to bills payable to the holder of an office for the time being, see 45 & 46 Vict. c. 61, § 7, cl. 2.

Bk. III. Chap. 9. at the costs of the company. This expedient was usually found to answer the purpose, inasmuch as the shareholder could only resist the creditor's action by pleading the non-joinder of the other shareholders in abatement; and this it was almost always impossible to do with effect. Rather therefore than allow the creditor to obtain judgment, the unfortunate shareholder made terms with the directors. It is obvious that the grossest oppression might be exercised in this manner, and whatever might be said in defence of putting a creditor on an obstinate shareholder who would not pay, and could not be otherwise made to pay, what he justly owed to the company, nothing could possibly be said in its favour in any other case. Fortunately, courts of equity would always interfere in such cases, and both restrain proceedings by the creditor and compel those who "put him on," to deal fairly with the person sued. Whatever the rights of the creditor might have been, if he had been suing *bonâ fide* (c), he was not regarded in cases of the present description as having any greater rights than those whose tool he was (d). If the shareholder sued was entitled to have the accounts of the company taken, and to have its assets applied in payment of its debts, the court would make a decree accordingly (e), if the necessary parties were before the court (f). But a court of equity would only interfere to protect the shareholder on the terms of his doing what was just towards the company; and would, if there was reason to believe that he ought to pay what the company sought to make him pay, require him to pay that sum into court (g).

Interference
of a court of
equity in such
a case.

The mere fact, moreover, that a shareholder in a company is being sued by a creditor at the instance of the company, is not

(c) If he was so suing, the court would not interfere, *Green v. Nixon*, 23 Beav. 530; *Beck v. Dean*, 3 Jur. N. S. 14.

(d) See *Taylor v. Hughes*, 2 Jo. & Lat. 24; *Shortridge v. Bosanquet*, 16 Beav. 84, and *Bargate v. Shortridge*, 5 H. L. C. 297; *Horn v. Kilkenny, &c., Rail. Co.*, 1 K. & J. 399. See, also, *Woodhams v. Anglo-Australian Co.*, 2 De G. J. & Sm.

162.

(e) *Fernihough v. Leader*, 4 Ra. Ca. 373, and *Lewis v. Billing*, ib. 414.

(f) See *Sibley v. Minton*, 27 L. J. Ch. 53.

(g) See *Cutts v. Riddell*, 1 De G. & S. 226; *Sibley v. Minton*, 27 L. J. Ch. 53. This last was the case of a cost-book mining company, a shareholder in which would not pay his calls.

sufficient to induce a court to make an order for winding up Bk. III. Chap. 9.
the company (*h*).

The inconveniences arising from the state of the law above Effect of incor-
alluded to, were effectually removed by incorporating the com- poration.
pany; for a member of a body corporate might always sue or
be sued by it just as if he were not a member; and whether
the body corporate was a company having gain for its object or
not, is and always was immaterial with reference to its capacity
of suing and being sued.

The institution of a public officer to sue and be sued on Effect of ena-
behalf of the members of an unincorporated company, is not bling company
necessarily so efficacious for the purposes now under discus- to sue and be
sion as the incorporation of the company. For the public sued by a
officer may be so constituted as to represent the members as public officer.
individuals, and only to represent them all, and not all less
some or one of them. If in such a case he sues one of the
members of the company which he represents, he in fact either
represents the member sued as well as all the other members,
or nobody at all, and in either case his action will be im-
proper (*i*). In most modern acts of Parliament, however, care
has been taken to avoid this objection, and to render the
public officer the representative of the company as distinct
from the individuals composing it; and where this is done,
legal proceedings between the public officer and those individuals
or any of them, are theoretically as unobjectionable as are legal
proceedings between incorporated companies and their share-
holders. The tendency in modern times, moreover, is to regard
companies empowered to sue and be sued more in the light of
corporate bodies than formerly, and to treat public officers as
the representatives of collective wholes rather than as the
representatives of members individually (*k*).

The general effect of the Judicature acts, so far as they Effect of the
relate to legal proceedings by companies, has been already in- Judicature
acts.

(*h*) See *infra*, book iv. ch. 1, § 4, 473; *Hughes v. Thorpe*, 5 M. & W.
and *Ex parte Wyld*, 1 Mac. & G. 1; 656; *Seddon v. Connell*, 10 Sim. 58.
Ex parte Lacton, 1 K. & J. 204; See, too, *per* Lord Eldon in *Van*
Ex parte Watson, 3 De G. & S. 253; *Sandau v. Moore*, 1 Russ. 460 and
Ex parte Wise, 1 Drew. 465. 472.

(*i*) See *Hichens v. Congreve*, 4 Russ.
562; *MacMahon v. Upton*, 2 Sim.

(*k*) See *infra*, p. 564.

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vestigated (Bk. ii., c. 7) ; and it was then seen that an unincorporated company can now sue and be sued in its mercantile name ; and that where parties are numerous and have a common interest, some of them may sue and be sued on behalf of all in respect thereof. Further, there is now the same facility in arranging parties to actions in all divisions of the High Court as there was formerly in arranging parties to suits in equity ; and the fact that an account has to be taken in order to ascertain what is due from one party to another is no longer any reason why an action by one against another should fail ; at most, such a circumstance may render it expedient to transfer the action from one division of the High Court to the other at some stage of the action.

Actions by and
against the
company.

It has not yet been decided whether an action in the name of an unincorporated company can be maintained by or against one of its own members ; but the writer sees no difficulty in principle in supporting such an action ; the company being regarded for the purposes of the action as one collective whole (*l*). This, however, is comparatively an unimportant matter ; for if an action in that form cannot be maintained, it is plain that one or more members can sue the others whenever there are legal or equitable rights to be enforced or adjusted.

Actions by or
against some
on behalf of
others.

With respect to actions by or against some members of companies on behalf of themselves and others, it must be borne in mind that suits in this form have long been familiar in courts of equity, and certain rules respecting them have been settled which are not interfered with by the Judicature acts. The rules will be fully investigated presently.

SECTION I.—OF THE PARTIES TO SUE AND BE SUED.

1. *Actions by and against incorporated companies.*

Actions between
incorporated
companies and
their members.

An incorporated company can only sue and be sued in its corporate name ; and this rule applies as much to actions by and against its own members as to actions by and against

(*l*) Such actions are common in Scotland.

other persons. Accordingly it has been held that a registered joint-stock company can support an action against one of its own shareholders for damages for a libel on the company published by him (*m*). A shareholder of an incorporated company may be a creditor of or debtor to the company, just as if he were not a member of it. It follows from this, that he may not only sue it, but having obtained judgment against it, he may execute that judgment against his co-shareholders, if they are liable to be proceeded against in that way by ordinary creditors. Moreover, a court will not interfere at the instance of the shareholders proceeded against, and stay execution against them, either on the ground that the plaintiff is himself a member of the company, and bound therefore to contribute to his own payment, or upon the ground that the rights of the parties cannot be ascertained without taking the accounts of the company. In the case supposed the plaintiff is a creditor of the company, and not the less so for being a shareholder in it; and to deprive him of his rights as a creditor would be to defeat one of the objects for which the company, as such, has any existence (*n*). But one shareholder will not be allowed to buy up and put in force against a co-shareholder a debt of the company, if the object of the execution creditor is to obtain by means of that debt payment of other monies to which he is not justly entitled (*o*).

An action to recover property of a company, or to make its directors answerable for the misapplication of its funds, ought to be brought in the name of the company (*p*), and the directors cannot require all the persons liable to indemnify them to be made parties (*q*).

The cases in which some of the members of an incorporated company can sue or be sued on behalf of themselves and others will be considered presently (pp. 570 and 572).

(*m*) *Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 H. & N. 87.

(*n*) See *Rheam v. Smith*, 2 Ph. 726; *Hardinge v. Webster*, 1 Dr. & Sm. 101.

(*o*) *Woodhams v. Anglo-Australian, &c., Co.*, 2 De G. J. & Sm. 162.

(*p*) *Gray v. Lewis*, 8 Ch. 1035; *Duckett v. Gover*, 6 Ch. D. 82; *Russell v. Wakefield Waterworks Co.*, 20 Eq. 474.

(*q*) *Wye Valley Rail. Co. v. Hawes*, 16 Ch. D. 489.

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2. *Of actions by and against public officers.*

Representation
of parties by
public officers.

Upon the ground that the public officer of a company only represents all the shareholders, and not any one or more of them as against the others (*r*), it was twice held by Lord Eldon, that a suit for the dissolution of a company empowered to sue and be sued by its secretary, was defective for want of parties, although the suit was instituted by one shareholder on behalf of himself and others, against the secretary and the directors of the company (*s*). In tracing the history of joint-stock companies in the celebrated case of *Van Sandau v. Moore*, Lord Eldon prominently alluded to the inability of a public officer to represent the company in suits between its members (*t*), and this doctrine was carried out to its full extent by the late Vice-Chancellor Shadwell (*u*), who held (*x*), that neither the act of 7 Geo. 4, c. 46, nor the subsequent act of 1 & 2 Vict. c. 96, empowered the public officer to represent all the members of the company except one, in a suit between him and them as members. But notwithstanding these authorities an action may be instituted by the public officer of a company against some of its members, if the question in dispute is one between the company as a collective whole, on the one side, and those individual members on the other; and it has accordingly been held that, under the Joint-stock banking act, 7 Geo. 4, c. 46, it is competent for a public officer of a company governed by that act, to sue the directors of the company for the purpose of making them account for breaches of trust and mismanagement; and in such an action none of the shareholders need be parties, although the company has ceased to carry on business, except for the purpose of winding up its affairs (*y*). The public officer is the proper person to sue a shareholder for calls made payable to him by the company (*z*).

Action for calls.

(*r*) See *ante*, pp. 266 and 561.

(*s*) *Davis v. Fisk*, cited in You. 425; and *Van Sandau v. Moore*, 1 Russ. 441.

(*t*) See 1 Russ. 460 and 472, and *Hichens v. Congreve*, 4 Russ. 562.

(*u*) In *MacMahon v. Upton*, 2 Sim. 473; *Seddon v. Connell*, 10 Sim.

58; *Abraham v. Hannay*, 13 Sim. 581.

(*v*) In *Seddon v. Connell*, 10 Sim. 58.

(*y*) *Harrison v. Brown*, 5 De G. & Sm. 728.

(*z*) See as to banking companies governed by 7 Geo. 4, c. 46; *Chap-*

The Statutes act, 1869, expressly authorises the pursuer of Bk. III. Chap. 9. Sect. 1. a cost-book mining company to sue a shareholder for calls, although the act does not authorise such a company to sue and Action by pursuer. be sued generally by its pursuer (a).

3. *Of actions by one member on behalf of himself and others.*

Actions by one member of a class of persons on behalf of himself and all others of that class, have long been familiar in courts of equity (b). Actions in this form are permissible when their object is to obtain relief to which the whole class is entitled, and when the members of the class are so numerous that they cannot all be made parties by name (c).

Thus, for the purpose of rescinding an agreement illegally entered into by the directors of an incorporated company, or for the purpose of restraining them from doing that which is illegal, an action may be instituted by one shareholder on behalf of himself and all the others, except the defendants, against those directors (d). Actions to restrain directors from improper acts.

Again in *Apperley v. Page* (e), it was held that a suit could be sustained by some shareholders of a provisionally registered railway company on behalf of themselves and all the other shareholders except the defendants, against the directors, for Apperley v. Page.

man v. Milrain, 5 Ex. 61, removing the doubt expressed in *Hughes v. Thorpe*, 5 M. & W. 656. See, too, *Ex parte Hall*, 3 Deac. 405. As to other companies, see *Lawrence v. Wynn*, 5 M. & W. 355; *Skinner v. Lambert*, 4 Man. & Gr. 477; *Wills v. Sutherland*, 4 Ex. 211, affirmed in error, 5 Ex. 715, in each of which an action for calls by a public officer was successful. See, too, *Smith v. Goldsworthy*, 4 Q. B. 430; *Reddish v. Pinnock*, 10 Ex. 213.

(a) 32 & 33 Vict. c. 19, § 13.

(b) See *Walworth v. Holt*, 4 M. & Cr. 619.

(c) Twenty used to be the minimum. See *Harrison v. Stewardson*,

2 Ha. 530. But see *Fripp v. Chard Rail. Co.*, 11 Ha. 258. See now Ord. xvi., r. 9.

(d) *Gray v. Chaplin*, 2 Sim. & Stu. 267, reversed on appeal, on the ground of delay and acquiescence, 2 Russ. 126.

(e) 1 Ph. 779. See, also, *Butt v. Monteaux*, 1 K. & J. 98; *Sheppard v. Orenford*, ib. 491; *Cramer v. Bird*, 6 Eq. 143; *Wilson v. Stanhope*, 2 Coll. 629; *Harvey v. Collett*, 15 Sim. 332; *Cooper v. Webb*, ib. 454; *Clements v. Bowes*, 17 Sim. 167, and 1 Drew. 684; *Richardson v. Hastings*, 7 Beav. 323; *Sibson v. Edgeworth*, 2 De G. & S. 73. Compare *Williams v. Salmond*, 2 K. & J. 463.

Bk. III. Chap. 9. the purpose of having the assets of the company realised and
 Sect. 1. applied in payment of its debts, and for the distribution of the
 surplus amongst the shareholders.

This form of action, moreover, is constantly adopted where numerous partners seek to make their managers account for secret benefits and advantages obtained by them in breach of the good faith owing to those whose affairs they conduct (*f*); or to rescind contracts into which the partnership has been induced to enter by false and fraudulent representations (*g*). So in the case of mutual insurance societies and friendly societies one member may sue the trustees or committee and one of each class of members as representing all the other members, where the object of the action is to obtain payment of what is due to the plaintiff (*h*).

Actions by one
 shareholder on
 his own behalf.

Moreover where it is permissible, on the principles above explained, for one person to sue on behalf of himself and others, he ought so to sue or his action will be defective for want of parties. But there are exceptions to this; for it seems settled that any one shareholder can maintain an action against a company to restrain the company from doing an act that is illegal or *ultra vires* (*i*); and if a plaintiff sues alone when he ought to sue on behalf of himself and others, an amendment would probably be allowed.

Where the plaintiff does not seek redress in respect of any injury or injustice to himself and others, *i.e.* where he seeks redress in respect of some injury or injustice to himself, he not only can sue in his own name alone but he ought so to sue. For example a shareholder may sue on his own behalf only to restrain the improper rejection of his vote (*k*), his wrongful

(*f*) *Chancey v. May*, Prec. in Ch. 592; *Hichens v. Congreve*, 4 Russ. 562; *Taylor v. Salmon*, 4 M. & Cr. 134; *Beck v. Kantorowicz*, 3 K. & J. 237.

(*g*) See *Small v. Attwood*, You. 407, and *infra*, p. 568.

(*h*) See *Pare v. Clegg*, 29 Beav. 589; *Bromley v. Williams*, 32 ib. 177; *Harrey v. Beckwith*, 2 Hem. &

M. 429.

(*i*) See *Hoole v. Great Western Rail. Co.*, 3 Ch. 262. *Russell v. Wakefield Waterworks Co.*, 20 Eq. 474 at p. 481. *Simpson v. Westminster Palace Hotel Co.*, 8 H. L. C. 712.

(*k*) *Powder v. Lushington*, 6 Ch. D. 70; *Moffatt v. Farquhar*, 7 Ch. D. 591.

exclusion from acting as director (*l*), or a refusal to allow him to inspect the company's register (*m*). Bk. III. Chap. 9.
Sect. 1.

In order that an action may be sustainable by one or more persons on behalf of themselves and others, it is essential that the interests of the plaintiffs on the record, and of those others whom they assume to represent, should be, in a judicial point of view, identical, and be proved to be so by the plaintiffs (*n*). Consequently a shareholder in a company who has sold his shares, and has no longer any interest in the company, cannot sustain an action on behalf of himself and the other shareholders for an account of the dealings and transactions of the company or of its directors, and to have its assets applied in discharge of its liabilities. For, whether he is or is not still under liabilities from which he is entitled to be freed, he has no right, having sold all his interest in the company, to assume to represent those with whom he has no longer anything to do (*o*). Upon the same principle it has been said that a shareholder who is a mere trustee, having no beneficial interest in the company, is not a proper person to sue on behalf of himself and other shareholders (*p*). Identity of
interests.

Neither can an action by one shareholder on behalf of himself and others be maintained by a person who does not honestly represent the interests of his co-shareholder, but who is the nominee of a rival company (*q*). Plaintiff a
nominee of a
rival company. A bill by such a

(*l*) *Pulbrook v. Richmond Consolidated Mining Co.*, 9 Ch. D. 610; *Munster v. Cammell Co.*, 21 Ch. D. 183; and see *Harben v. Phillips*, 23 Ch. D. 14; *Browne v. La Trinidad*, 37 Ch. D. 1.

(*m*) *Mutter v. Eastern and Midlands Rail. Co.*, 38 Ch. D. 92; *Holland v. Dickson*, 37 Ch. D. 669.

(*n*) See the cases as to calls, *infra*, p. 573, and *Ward v. Sittingbourne and Sheerness Rail. Co.*, 9 Ch. 488; *Clay v. Rufford*, 8 Ha. 281; *Williams v. Salmond*, 2 K. & J. 463; *Sibson v. Edgworth*, 2 De G. & S. 73; in which case the defendant pleaded that the interests of the plaintiff and those he assumed to represent, were not identical. See, also,

Thomas v. Hobler, 4 De G. F. & J. 199; which shows that if the plaintiff makes an alternative case, neither alternative must be opposed to the interests of those whom he assumes to represent.

(*o*) *Doyle v. Muntz*, 5 Ha. 509.

(*p*) *Ibid. sed quære.*

(*q*) *Forrest v. Manchester, &c., Rail. Co.*, 4 De G. F. & J. 126. See, also, *Hare v. London and North Western Rail. Co.*, 1 J. & H. 252, and *Thomas v. Hobler*, 4 De G. F. & J. 199. The rule does not apply to a nominee of a rival company, who does not assume to represent others, *Mutter v. Eastern and Midlands Rail. Co.*, 38 Ch. D. 92.

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Sect. 1.

plaintiff has even been taken off the file (*r*). But the mere circumstance that the plaintiff has bought a share recently to enable himself to bring an action, does not warrant the Court in dismissing it (*s*).

Joint right of
action.

It was at one time considered that a suit by one person on behalf of himself and others was not sustainable unless the injury of which he complained was such as to give him and them a right to sue jointly; and that where persons having no previous connection with each other had been induced to subscribe to a loan or for shares in a company by fraud, a suit by one of them on behalf of himself and others to obtain a return of their subscriptions could not be sustained (*t*). But later cases have gone further and allowed such actions on the ground that the subscribers to a company have such a community of interest in the funds subscribed as to entitle them all to sue for their return (*u*). Practically this point is not now of much importance, owing to the modern rule as to misjoinder of plaintiffs (*x*).

Actions for
recovery of
subscriptions
in cases of
fraud.

Further observa-
tions on actions
by some on
behalf.

An action by one or more persons on behalf of themselves and others, may be instituted without the consent of such others (*y*); and even against their consent if the object of the action is to prevent or obtain redress in respect of an illegal act (*z*). But an action by one or more on behalf, &c., is the action of those who are named on the record as plaintiffs, and whatever is a defence as against them is a defence to the action, whatever might have been the case if other persons had been plaintiffs on the record (*a*).

(*r*) *Robson v. Dodds*, 8 Eq. 301.

(*s*) *Bloam v. Metropolitan Rail. Co.*, 3 Ch. 337; *Seaton v. Grant*, 2 Ch. 459. See further, on this subject, *Orr v. Glasgow, &c., Rail. Co.*, 3 McQu. 799; *Rogers v. Oxford, &c., Rail. Co.*, 2 De G. & J. 662.

(*t*) *Jones v. García del Río*, Turn. & Russ. 297; *Croskey v. Bank of Wales*, 4 Giff. 314. See, also, *Hallows v. Fernie*, 3 Ch. 467.

(*u*) See *Beeching v. Lloyd*, 3 Drew. 227, which, although prior to *Croskey v. Bank of Wales*, was not cited in

it. See, also, *Moseley v. Cressey's Co.*, 1 Eq. 405, a suit for the return of deposits.

(*x*) See *infra*, next page.

(*y*) *Burt v. British Nation Assur. Co.*, 5 Jur. N. S. 555, affirmed on appeal, 4 De G. & J. 158; *Williams v. Salmond*, 2 K. & J. 463.

(*z*) *White v. Carmarthen Rail. Co.*, 1 Hem. & M. 786. See, also, *Bloam v. Metropolitan Rail. Co.*, 3 Ch. 337. Compare *Lund v. Blanchard*, 4 Ha. 299.

(*a*) *Burt v. British Nation Insur.*

Formerly, if a bill was filed by some on behalf of themselves and others, and it turned out that any of the persons thus included as plaintiffs had no right to sue, or had interests conflicting with that of the plaintiffs on the record, the bill was dismissed (*b*); but now the Court has power to grant relief and to modify its decree according to the special circumstance of the case, and for that purpose to direct amendments, and to treat any one or more of the plaintiffs as if he or they was or were a defendant or defendants to the action, and the remaining plaintiff or plaintiffs was or were the only plaintiff or plaintiffs on the record (*c*). Accordingly, if an action is brought by one shareholder on behalf of himself and others, and it appears that the interest of some of the persons thus represented is different from that of the plaintiff, the action may nevertheless be sustained (*d*).

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Sect. 1.
Misjoinder of
plaintiffs.

When an action is brought by some shareholders on behalf of themselves and others, it should appear in the statement of claim (1), that the plaintiffs are shareholders (*c*); and (2), that they are suing on behalf of themselves and others. If this last does not appear, the action will be treated as that of the ostensible plaintiffs alone (*f*).

Frame of action
by some on
behalf, &c.

Where an action is instituted by one member of a company on behalf of himself and others for the protection of the funds of the company and the action is successful, the plaintiffs are only entitled to their costs as between party and party, although in one sense the funds out of which those costs are to be paid belong to the plaintiffs themselves (*g*).

Costs.

Co., *ubi supra*, where the plaintiff was held barred by his own acquiescence in the matters complained of. See, too, *Searth v. Chadwick*, 14 Jur. 300, where the defendants got rid of the suit by paying the plaintiff all that he was entitled to.

(*b*) In *Spittal v. Smith*, Taml. 45; the bill was dismissed as to some of the plaintiffs only.

(*c*) See Ord. xvi. r. 11.

(*d*) *Watson v. Carr*, 17 Ch. D. 19;

Hallows v. Fernie, 3 Ch. 467; *Jones v. Rose*, 4 Ha. 52. See, too, *Clements v. Bowes*, 1 Drew. 684; *Sturge v. The Eastern Union Rail. Co.*, 7 De G. M. & G. 180, 181.

(*e*) *Banks v. Parker*, 16 Sim. 176; *Walburn v. Ingilby*, 1 M. & K. 61.

(*f*) *Baldwin v. Lawrence*, 2 Sim. & Stu. 18; *Cooper v. Porris*, 3 De G. & S. 688.

(*g*) *Morgan v. Great Eastern Rail. Co.*, 1 Hem. & M. 560.

Pl. III. Chap. 9. Accounts taken in an action by one shareholder on behalf
 — Sect. 1. — of himself and others bind all of them (*h*).

Appeal. No member of a class which purports to be represented by the plaintiff can appeal against an order made in the plaintiff's favour; his proper course if dissatisfied with the order is to make an application to the Court below to be added as a defendant to the action and then to apply to get rid of the order or to obtain the conduct of the action (*i*). If the decision of the Court of first instance is against the plaintiff, it would seem that any member of the class represented by him may obtain leave to appeal on an *ex parte* application to the Court of Appeal (*k*).

Where company
 is incorporated.

Where a company is incorporated, and its directors or some shareholders have done or are doing that which other shareholders desire to bring an action to redress or prevent, the following rules are to be observed:—

1. If the matter complained of is one which gives a right of action to the company as a collective whole, the company ought to sue in its corporate name, and an action by one member on behalf of himself and others is improper (*l*): but leave may be given to add the company as a co-plaintiff (*m*).

2. Again, if the complaint relates to some matter of internal management as to which a majority is competent to decide, the action should be brought by the majority in the name of the company (*n*).

3. But if those who have the management of the affairs of the company will not bring an action in its name when the shareholders require it, having a right so to do, or if directors or shareholders have done or are about to do that which is wrong, even if sanctioned by a majority, then an action by some of the members on behalf of themselves and others, or in the latter case by a member suing alone (*o*), may be sustained,

(*h*) See *Singleton v. Selwyn*, 9 Jur. N. S. 1149.

(*i*) *Watson v. Cave* (No. 1), 17 Ch. D. 19, and see *Wilson v. Church*, 9 Ch. D. 552.

(*k*) *Markham v. Markham*, 16 Ch. D. 1.

(*l*) *Gray v. Lewis*, 8 Ch. 1035;

Russell v. Wakefield Waterworks Co., 20 Eq. 474.

(*m*) *Duckett v. Gover*, 6 Ch. D. 82.

(*n*) *MacDougall v. Gardiner*, 1 Ch. D. 13; *Mozley v. Alston*, 1 Ph. 790;

Foss v. Harbottle, 2 Ha. 461.

(*o*) *Simpson v. Westminster Palace Hotel Co.*, 8 H. L. C. 712; *Russell v.*

for otherwise the dissentients would be without redress (*p*). And a clause in the articles of association imposing any penalty on a shareholder for bringing such an action against the company is void (*q*). In suits thus constituted, courts of equity have compelled directors to account for monies improperly applied (*r*); have declared resolutions fraudulent and void (*s*); have restrained the carrying out of agreements under the seal of the company (*t*); restrained the application of the funds of a company to unauthorised purposes (*u*), *e.g.*, defraying the expense of applications to Parliament (*x*); restrained a company from purchasing its own shares (*y*); restrained the construction of part of a railway instead of the whole of it (*z*); restrained the improper declaration of dividends (*a*); set aside an improper forfeiture of shares (*b*); restrained the transfer of the business of one company to another company (*c*); set aside agreements for such transfer (*d*); set aside fraudulent pur-

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Wakefield Waterworks Co., 20 Eq. 474 at p. 481; *Hoole v. Great Western Railway Co.*, 3 Ch. 262.

(*p*) See the last three notes, *Mason v. Harris*, 11 Ch. D. 97, and the cases *infra*.

(*q*) *Hope v. International Financial Society*, 4 Ch. D. 327.

(*r*) *Bryson v. Warwick Canal Co.*, 4 De G. M. & G. 711.

(*s*) *Preston v. Grand Collier Dock Co.*, 11 Sim. 327.

(*t*) *Mauvell v. Midland Great Western (Ireland) Rail. Co.*, 1 Hem. & M. 130.

(*u*) *Guinness v. Land Corporation of Ireland*, 22 Ch. D. 349; *Smith v. Duke of Manchester*, 24 Ch. D. 611; *Tomkinson v. South Eastern Rail. Co.*, 35 Ch. D. 675; *Studdert v. Grosvenor*, 33 Ch. D. 528; *Colman v. Eastern Counties Rail. Co.*, 10 Beav. 1; *Salomons v. Loring*, 12 Beav. 339 and 377; *Munt v. Shrewsbury and Chester Rail. Co.*, 13 Beav. 1; *Bayshaw v. Eastern Union Rail. Co.*, 7 Ha. 114, and 2 Mac. & G. 389; *Simpson v. Denison*, 10 Ha. 51; *Vance v. East Lancas. Rail. Co.*, 3 K. & J. 50.

(*x*) See the last two cases, and *Lyde v. East. Bengal Rail. Co.*, 36 Beav. 10.

(*y*) *Hope v. International Financial Society*, 4 Ch. D. 327.

(*z*) *Cohen v. Wilkinson*, 12 Beav. 125, and 1 Mac. & G. 481; *Hodgson v. Poris*, 12 Beav. 392 and 529, and 1 De G. M. & G. 6.

(*a*) *Bloeman v. Metropolitan Rail. Co.*, 3 Ch. 337; *Hoole v. Great Western Rail. Co.*, ib. 262; *Dunrile v. Birkenhead, &c., Rail. Co.*, 12 Beav. 444; *Carlisle v. South-Eastern Rail. Co.*, 1 Mac. & G. 689; *Henry v. Great Northern Rail. Co.*, 4 K. & J. 1, and 1 De G. & J. 606. As to actions to restrain the payment of dividends actually declared, see *infra*, p. 574.

(*b*) *Sweeny v. Smith*, 7 Eq. 324.

(*c*) *Beman v. Rufford*, 1 Sim. N. S. 550; *Charlton v. Newcastle and Carlisle Rail. Co.*, 5 Jur. N. S. 1096; *Hare v. London and N.-W. Rail. Co.*, 1 J. & H. 252, which shows that the company which has agreed to take the business ought to be a party.

(*d*) *Clinch v. Financial Corp.*, 5 Eq. 450, and 4 Ch. 117.

Bk. III. Chap. 9. Sect. 1. chases (*e*), restrained loans to directors (*f*); restrained a division of assets amongst a majority of members to the exclusion of the rest (*g*).

An action by one member on behalf of himself and others may even be maintainable, where an action with like objects would fail if instituted by the company in its corporate capacity; *e.g.*, where the complaint is of fraud imputable to the company as a body, but not imputable to the members individually (*h*).

Company and directors proper parties in such cases.

In such cases as the foregoing, the company, as such, is a proper party, because it is the company, as such, which is sought to be affected by the judgment of the Court (*i*); and the directors individually are proper parties, because they are the persons to be affected in the first instance, and some judgment against them personally is also usually necessary. If, however, a judgment against the company is all that is required, there is no necessity to make the directors parties individually (*k*).

Actions by some on behalf to control a majority.

The cases above referred to show that it is competent for one shareholder to institute an action on behalf of himself and co-shareholders, for the purpose of obtaining relief in respect of illegal acts done or contemplated by directors; moreover, an action in this form is sustainable to prevent or set aside a transaction which is a fraud by a majority on a minority (*l*); but courts will not interfere in actions so constituted, if the relief sought is in respect of acts the legality or illegality of which depends on the voice of a majority of the shareholders, who are not themselves chargeable with fraud (*m*). If such last-mentioned acts are sanctioned by the majority, the Court

(*e*) *Atwool v. Merryweather*, 5 Eq. 464, note.

(*f*) *Bluck v. Mallaluc*, 27 Beav. 398.

(*g*) *Menier v. Hooper's Telegraph Co.*, 9 Ch. 350.

(*h*) See the observations of Lord Cottenham in *Vigers v. Pike*, 8 Cl. & Fin. 647, 648.

(*i*) See *Bagshaw v. The Eastern Union Rail. Co.*, 7 Ha. 114.

(*k*) *Winch v. Birkenhead, &c., Rail. Co.*, 5 De G. & Sm. 562, an

action to restrain a company from in effect transferring its business.

(*l*) *Atwool v. Merryweather*, 5 Eq. 464 note; *Menier v. Hooper's Telegraph Co.*, 9 Ch. 350; *Mason v. Harris*, Ch. D. 97.

(*m*) See the next section, and *Russell v. Walsfield Waterworks Co.*, 20 Eq. 474; *Browne v. The Monmouthshire Rail. and Canal Co.*, 13 Beav. 32; *Stevens v. The South Devon Rail. Co.*, 9 Ha. 313.

cannot interfere at all, and if they are not so sanctioned, the majority should themselves apply to the Court, and institute proceedings in the name of the company (*n*). If it is thought necessary to bring an action before the views of the majority are known, or if the majority are too indifferent to take any proceedings to enforce obedience to their own resolutions, the proper course to be taken by those who determine to appeal to the Court is to take upon themselves the responsibility of bringing an action in the name of the company. Such an action will not be stayed unless it appears that the majority disapprove it (*o*); if, however, the majority disapprove the action they should apply to the Court to strike out the name of the company as plaintiffs (*p*).

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Sect. 1.

Using name of
company.

Moreover, if there are conflicting interests, care must be taken to have each separate interest substantially represented by some person who is a party to the action (*q*). Therefore, where there is a dispute about a call which some shareholders have paid and others have not, those who have not paid cannot sustain an action on behalf of themselves and those who have paid, against the directors, trustees, and secretary of the company, for a general account of the partnership debts and assets, and to have the property of the concern applied in discharge of its liabilities. To an action with such objects, some at least of the class of shareholders who have paid the call ought to be made parties (*r*). Again, with respect to

Conflicting
interests.

Actions to
restrain calls.

(*n*) *MacDougall v. Gardiner*, 1 Ch. D. 13; *Moxley v. Alston*, 1 Ph. 790.

(*o*) *The Exeter and Crediton Rail. Co. v. Buller*, 5 Ra. Ca. 211, where the bill was filed in the name of the company, although the defendants had possession of the seal. See, also, *East Pant Du, &c. Mining Co. v. Merryweather*, 2 Hem. & M. 254; *Atwood v. Merryweather*, 5 Eq. 464 note; *Pender v. Lushington*, 6 Ch. D. 70; *Harben v. Phillips*, 23 ib. 14; *Imperial Hydropathic Hotel Co. v. Hampson*, ib. 1.

(*p*) *Silber Light Co. v. Silber*, 12 Ch. D. 717, where leave was given

to amend and make the company defendants.

(*q*) *Cramer v. Bird*, 6 Eq. 143; *Hoole v. Great Western Rail. Co.*, 2 Ch. 262; *Fraser v. Cooper, Hall & Co.*, 21 Ch. D. 718 (an action by a bondholder on behalf of himself and other bondholders).

(*r*) See *Richardson v. Larpent*, 2 Y. & C. C. C. 507; *Locell v. Andrew*, 15 Sm. 581; *Sharpe v. Day*, 1 Ph. 771; *Lund v. Blanshard*, 4 Ha. 9. If the plaintiff does not know who they are, see *Hodgkinson v. National Live Stock Insurance Co.*, 26 Beav. 473, and *De G. & J.* 422.

Bk. III. Chap. 9.
Sect. 2.

Actions to
restrain pay-
ment of divi-
dends.

actions to restrain the improper payment of a dividend, it is to be remembered that the declaration of a dividend confers on each shareholder a legal title to his share of it; and, consequently, even although the dividend may have been improperly declared, payment of it will not be restrained in an action by one shareholder against the company and its directors only. On these grounds, in *Carlisle v. South-Eastern Railway Company*, an injunction to restrain the payment of a dividend already declared was refused, although an injunction to restrain the future declaration of dividends, except out of profits, was granted (s).

SECTION II.—OF THE RULE THAT THE COURT WILL NOT INTERFERE
IN MATTERS OF INTERNAL REGULATION.

Internal ma-
nagement of
companies.

Where an application is made to a Court to assist one or more shareholders against others or against the managing body, the first matter to be considered is, whether the rights which the complainants seek to enforce do or do not depend on the views which may be taken by the majority of the shareholders (t). The Court will interfere to prevent the violation of rights which do not depend on the views of other shareholders (u); but, as a general rule, the Court will not interfere between members of companies for the purpose of enforcing alleged rights arising out of matters which are properly the subject of internal regulation. It will not interfere to control a majority, unless it sees that the majority has been or is doing, or is about to do, that which it is illegal even for a majority to do; and it follows from this, that the Court will not interfere in matters properly the subject of internal management until all reasonable attempts have been made to take the sense of the general body of members on the matters

(s) *Carlisle v. South Eastern Rail. Co.*, 1 Mac. & G. 689. See, also, *Fawcett v. Laurie*, 1 Dr. & Sm. 192. Compare *Hoole v. Great Western Rail. Co.*, 3 Ch. 262, where one of the defendants was held sufficiently

to represent others in the same interest.

(t) As to the powers of majorities, see *ante*, bk. iii. ch. 1, § 4.

(u) See *infra*, p. 579, &c., and the instances on p. 571.

in question; nor even then unless it is called upon to interfere to give effect to the will of the majority against a factious minority.

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Sect. 2.

The leading decisions on this subject are *Carlen v. Drury*, *Foss v. Harbottle*, and *Mozley v. Alston*, which will serve to illustrate the application of the principle in question, as well to unincorporated as to incorporated companies.

In *Carlen v. Drury* (x), a large number of persons were partners in a concern called *The Bankside Brewery*, and six of them on behalf of themselves and co-partners, filed a bill against the managers and others, alleging circumstances of gross mismanagement and neglect on the part of the managers, and praying for an account, a dissolution, and a receiver. It appeared that by the company's deed of settlement, the managers might be removed at any general meeting; that general meetings were to be held at Lady-day and Michaelmas, or within a month after, at such place as the managers should appoint; that a committee of twelve persons should be annually elected for auditing accounts, and advising the managers; that if the managers should misbehave themselves, this committee, or any seven of them, should have the power of calling a special general meeting of shareholders to report thereon; and that no dissolution should be made without the consent of a majority of three-fourths of the shareholders at a general meeting. A motion for an injunction and a receiver was refused with costs, the Court not being satisfied that the means of redress provided by the parties themselves in the articles were not effectual, and being of opinion that the plaintiffs had a remedy in their own hands to which they had not resorted. From the judgment of Lord Eldon, it appears that the Court would, if necessary, have compelled the managers to call meetings; that in a case of delinquency clearly made out the Court would have acted without hesitation; but that there must have been a positive necessity for the interference of the Court arising from the refusal or neglect of the committee to act; and that the Court would not interfere before the parties

Complaints
against remov-
able directors.
Carlen v.
Drury.

(x) 1 V. & B. 154. See, also, *mont v. Meredith*, 3 V. & B. 180; *Waters v. Taylor*, 15 Ves. 10; *Ellison Miles v. Thomas*, 9 Sim. 606. *v. Bignold*, 2 Jac. & W. 503; *Beau-*

Bk. III. Chap. 9. had tried that jurisdiction which the articles had themselves
Sect. 2. provided.

Alleged fraud
and misconduct.
Foss v. Har-
bottle.

In *Foss v. Harbottle (y)*, two members of an incorporated company, called *The Victoria Park Company*, filed a bill against the directors and others, charging them with a variety of fraudulent and illegal acts, whereby the property of the company was misapplied, aliened, and wasted, and praying that the defendants might make good to the company the losses sustained by the acts complained of, and that a receiver might be appointed to apply the property of the company in discharge of its liabilities, and to secure the surplus. The general result of the act incorporating the company was (in the opinion of the Court) to make the directors the governing body, subject to the superior control of the proprietors, who, when assembled in general meeting, had power to originate proceedings for any purpose within the scope of the company's powers, as well as to control the directors in any acts which they might have originated. The Court was of opinion that the acts of the defendants complained of were of such a nature as to be capable of confirmation by a majority of the members of the company; that it did not appear that any attempt had been made to bring those acts before a general meeting of the shareholders; and that under those circumstances, the Court could not interfere at the suit of a minority, whatever it might have been induced to do if proper means had been resorted to and found ineffectual to set the general body of shareholders in motion.

Directors impro-
perly appointed.
Mozley v.
Alston.

In *Mozley v. Alston (z)*, a bill was filed by two shareholders of a railway company against the company and its directors, alleging that the latter had been illegally appointed; that they had possession of the seal of the corporation; and that they were about to use it for various improper purposes. The bill prayed that the directors who were defendants might be restrained from acting as directors, and be ordered to place

(y) 2 Ha. 461. Compare *Atwool v. Merryweather*, 5 Eq. 464 n., which was also a case of fraud, but a majority of the shareholders excluding the defendants supported the bill.

(z) 1 Ph. 790. Compare *Atwool v. Merryweather*, 5 Eq. 464, note, where the votes of the defendant turned the scale, and the suit succeeded.

the seal, and the books and documents of the company, under the control of its lawful directors. It appeared from the statements of the bill that a majority of the shareholders agreed with the plaintiffs in their view of the illegality of the defendants' appointment, and the Court held that, if that were so, there was nothing to prevent the company from filing a bill in its corporate character to remedy the alleged evils; and that as the plaintiffs showed no reason to justify them alone in applying to the Court for redress, they were not entitled to its assistance.

These cases have been followed by a variety of others (a). One of the most characteristic of this class is perhaps *Bailey v. The Birkenhead, Lancashire, and Cheshire Junction Railway Company* (b), where a bill was filed by one of a set of shareholders in an amalgamated company, alleging that an unfair and unnecessary call had been made upon that set, and seeking to restrain proceedings to enforce payment of the call. Lord Langdale thought that the case could only be considered as an attempt to induce the Court to interfere in the internal management of the affairs of a company, and to take upon itself to determine a question which might and ought to be determined by the shareholders themselves at general meetings.

So, in the Scotch case of *Orr v. Glasgow, &c., Railway Company* (c), a suit was instituted against a railway company and its directors, seeking redress on the ground that the directors were also directors of a rival company, and were acting in the interests of that company to the prejudice of the shareholders in the first company. The specific relief sought was, that certain calls might be set aside, and that monies already paid, for calls previously made, might be returned;

(a) See, in addition to those mentioned in the text, *Edwards v. The Shrewsbury and Birmingham Rail. Co.*, 2 De G. & Sm. 537; *Yetts v. The Norfolk Rail. Co.*, 3 ib. 293; *Kent v. Jackson*, 14 Beav. 367, and 2 De G. M. & G. 49; *Inderwick v. Snell*, 2 Mac. & G. 216; and the cases dealing with disputes between members of a club. See *Fisher v. Keane*, 11 Ch. D. 353; *Labouchere v. Wharnclyffe*, 13 ib. 346; *Duckins v. Antrobus*, 17 ib. 615.

(b) 12 Beav. 433.

(c) 3 MacQu. 799. Compare *Hodgkinson v. National Live Stock Insurance Co.*, 26 Beav. 473, and 4 De G. & J. 422, where, however, relief was sought in respect of other matters than the call.

Bk. III. Chap. 9. but the suit was dismissed, on the ground that although the
Sect. 2. acts of the directors were beyond their powers, it was competent to the shareholders to ratify and adopt those acts, and the suit was not instituted for the protection of the majority of shareholders.

MacDougall v.
Gardiner.

Again, in *MacDougall v. Gardiner* (*d*), the Court was asked to restrain directors from carrying out certain arrangements without submitting them to the shareholders and to compel the directors to call a meeting. The shareholders had themselves power to call a meeting, and it did not appear that a majority of the shareholders could not control the directors without the assistance of the Court, which was therefore refused.

Other instances will be referred to hereafter when treating of injunctions.

Course to be
taken by
minority.

In such cases as these, those who complain of the managing body should, before appealing to the Court, endeavour to bring their grievances before their fellow shareholders, and ascertain what the views of the majority are (*e*). The Court will not prevent the holding of a meeting simply because the notice convening it may invite it to exceed its powers (*f*). If the majority disapprove the conduct complained of, they can sue in the name of the company, and so obtain redress (*g*); or if the defendants prevent that course by turning the scale of votes, an action by one shareholder on behalf of himself and others may be supported (*h*). If, however, the majority, acting *bonâ fide*, agree with and sanction the course adopted or proposed

(*d*) 10 Ch. 606, and 1 Ch. D. 13. The decision of V.-C. Malins, in 20 Eq. 383, was reversed, and the previous decisions of the same judge in *Featherstone v. Cooke*, 16 Eq. 298, and *Trade Auxiliary Co. v. Vickers*, *ib.*, can hardly be relied upon.

(*e*) See the foregoing cases.

(*f*) *Isle of Wight Rail. Co. v. Tauthordin*, 25 Ch. D. 320. Compare *Jackson v. Munster Bank*, 13 L. R. Ir. 118.

(*g*) See the observations in *Foss*

v. Harbottle, and *Mozley v. Alston*, and *MacDougall v. Gardiner*, 1 Ch. D. 13, above referred to. As to using the name of the company at the risk of a stay of proceedings, see *ante*, p. 573.

(*h*) See *Atwool v. Merryweather*, 5 Eq. 464, where a bill by one shareholder on behalf of himself and others, was ultimately successful; although a bill by the company had been taken off the file.

to be adopted by the managing body, *and if that course is not illegal if approved by the majority*, the Court clearly cannot interfere. But if that course will be a fraud on the minority, or illegal, although sanctioned by the majority of shareholders, then, even if it is approved by all of them except one, the Court will interfere at the suit of that single dissentient shareholder, and protect him and his interests: and in such a case it is not essential that he should appeal to the other shareholders before applying to the Court (*i*).

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As an illustration of the proposition that the majority cannot be interfered with if they are not doing what it is illegal for them to do, reference may be made to the case of *Lord v. The Governor and Company of Copper Miners in England* (*k*), where a shareholder in an incorporated mining company filed a bill to restrain the governing body from vesting the property of the company in trustees for the benefit of its creditors. Lord Cottenham (reversing the decision of V.-C. Knight Bruce) allowed a demurrer to the bill, on the ground that it was competent for a majority of shareholders to sanction such a proceeding, and that it appeared that in fact they had sanctioned it.

Majority not interfered with if they are not doing what is illegal.

Lord v. Copper Miners' Company.

The important principle that one out of any number of shareholders is entitled to the protection of the court against the *illegal* acts of the others (*l*), although he stands alone, was emphatically declared and strictly carried out by Lord Eldon in *Natusch v. Irving* (*m*) and *Const v. Harris* (*n*), which were cases of unincorporated companies; but precisely the same principle applies to all companies, whether incorporated by act of Parliament, charter, letters patent, or registration.

Otherwise if it is doing what is illegal.

(*i*) See *Gregory v. Patchett*, 33 Beav. 595; *Atwool v. Merryweather*, 5 Eq. 464; *Mason v. Harris*, 11 Ch. D. 97; *Tomkinson v. South Eastern Rail. Co.*, 35 Ch. D. 675. The contrary receives some countenance from, but is not really warranted by, *Edwards v. Shrewsbury, &c., Rail. Co.*, 2 De G. & S. 537.

(*k*) 2 Ph. 740. See, too, *Gregory v. Patchett*, 33 Beav. 595; *Kent v.*

Jackson, 14 Beav. 367, and 2 De G. M. & G. 49; *The Exeter and Crediton Rail. Co. v. Buller*, 5 Rail. Ca. 219; *Inderwick v. Snell*, 2 Mac. & G. 216, where directors complained that they had been wrongfully removed.

(*l*) *i. e.*, illegal, although sanctioned by a majority.

(*m*) Gow. on Partn. App. 398.

(*n*) T. and R. 518, 519.

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Adley v. The
Whitstable
Company.

Preston v. Grand
Collier Dock
Company.

Beman v.
Rufford.

Action by
Attorney-
General.

Thus, in *Adley v. The Whitstable Company* (o), Lord Eldon restored a member of a company incorporated by act of Parliament, to rights from which he had been unlawfully excluded under colour of a bye-law of the company.

In *Preston v. The Grand Collier Dock Company* (p), the Vice-Chancellor of England overruled a demurrer to a bill, the object of which was to set aside an arrangement on the ground of fraud, and to compel certain shareholders to pay calls, although it had been in effect unanimously resolved at a special general meeting of the company that no calls should be made upon them. So in *Beman v. Rufford* (q), the Court, at the suit of a small minority of shareholders in a railway company, restrained what in effect would have been a transfer of the business of that company to another company, although the great majority of shareholders in the former were desirous that such transfer should be made. So the Court has interfered to prevent an improper payment of dividends (r); and to prevent a payment of dividends in shares (s); and to protect the preference shareholders in a company against the directors and other shareholders, who intended to make an illegal apportionment of dividends (t). Upon the same principle, the Court has over and over again interfered, at the instance of a minority of shareholders, to prevent an application of the funds of companies to purposes foreign to those to attain which alone such companies were formed (u).

If a company incorporated for a special purpose is exceeding its powers to the detriment of the public, an action by the Attorney-General will lie; as an illustration of this, reference may be made to *Attorney-General v. Great Northern Railway*

(o) 17 Ves. 315. and 19 ib. 304, and 1 Mer. 107, where a decree for an account of profits was made.

(p) 11 Sim. 327.

(q) 1 Sim. N. S. 550. See, too, *Winch v. The Birkenhead, &c., Rail. Co.*, 5 De G. & Sm. 562; *Salomons v. Laing*, 12 Beav. 377; *Clinch v. Financial Corporation*, 5 Eq. 450, and 4 Ch. 117.

(r) *Bloxam v. Metropolitan Rail. Co.*, 3 Ch. 337.

(s) *Hoole v. Great Western Rail. Co.*, 3 Ch. 262.

(t) *Henry v. Great Northern Rail. Co.*, 4 K. & J. 1, and 1 De G. & J. 606. See, too, *Carlisle v. The South-Eastern Rail. Co.*, 1 Mac. & G. 689, and on the rights of preference shareholders, *ante*, p. 435.

(u) See *infra*, under the head Injunction, where the cases will be found collected; and *ante*, p. 571.

Company (x), where a railway company was restrained from carrying on extensive dealings in coals. Bk. III. Chap. 9.
Sect. 2.

Where a fraud on a company is complained of by a minority only of its shareholders, considerable difficulty arises; for a transaction which is a fraud on the company may be repudiated or adopted by it at its option. Hence, if a majority of the shareholders not implicated in the fraud, *bonâ fide*, elect to ratify the transaction which they might, if they chose, repudiate, it seems that the Court will not interfere at the instance of the minority (*y*); but if the fraud is a fraud by the majority upon the minority the Court will protect such minority (*z*).

After the foregoing remarks, it scarcely requires to be mentioned that the Court will interfere to control a factious minority which impedes the execution of the lawful resolutions of the majority (*a*). Nor can *Mozley v. Alston (b)* be considered as inconsistent with this proposition; for, although in that case the Court certainly did refuse to interfere, it was not called upon to do so in a suit properly framed; and it is tolerably clear from the judgment, that if the majority had chosen to institute a suit in the name of the corporation, the Court would have acted very differently (*c*).

(*x*) 1 Dr. & Sm. 154. See, also, *Att.-Gen. v. Ely, Haddenham and Sutton Rail. Co.*, 4 Ch. 194; *Att.-Gen. v. Great Eastern Rail. Co.*, 11 Ch. D. 449, and 5 App. Ca. 473; *Att.-Gen. v. Shrewsbury (Kingsland) Bridge Co.*, 21 Ch. D. 752.

(*y*) See *Foss v. Harbottle* and *Mozley v. Alston*, *ubi supra*, and *per Wood, V.-C.*, in *Clinch v. Financial Corp.*, 5 Eq. 482.

(*z*) See *Atwood v. Merryweather*, 5 Eq. 464 *n.*; and the cases of illegality referred to above.

(*a*) See *The Exeter and Crediton Rail. Co. v. Buller*, 5 Rail. Ca. 211, in which the Court did so interfere.

See, too, *Fraser v. Whalley*, 2 Hem. & M. 10.

(*b*) 1 Ph. 790, and *ante*, p. 576.

(*c*) See, also, *MacDougall v. Gardiner*, 1 Ch. D. 13. In *Miles v. Thomas*, 9 Sim. 606, V.-C. Shadwell declined to restrain the sailing of a ship, although it would seem that the majority of the shareholders of the company to which the ship belonged, were opposed to her sailing on the voyage on which she was about to be sent. The report of this case is, however, obscure, not only as to the facts, but also as to the reasons for the judgment.

Frauds sanctioned by a majority

Faction minority.

Mozley v. Alston.

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SECTION III.—OF THE RULE THAT THE COURT WILL NOT INTERFERE
AT THE INSTANCE OF PERSONS WHO HAVE BEEN GUILTY OF
LACHES.

Laches a bar to
relief.

A plaintiff who seeks equitable, as distinguished from legal relief, will fail to obtain redress if he has delayed his application so long as to render it unjust to interfere on his behalf. His delay naturally induces others to suppose that he is content, and to act on that supposition; and if he has allowed them to engage in transactions and expose themselves to risks, in the belief that they will alone be the losers in the event of disaster, he will not be able to obtain any share of their gains in the event of success.

The application of these principles to shareholders, is well illustrated by those cases in which partners and shareholders, whose shares have been forfeited, have been refused relief on the ground of delay (*d*). The following cases further illustrate the application of the principles under other circumstances.

Setting aside
agreements.
Gray v. Chaplin.

In *Gray v. Chaplin* (*e*), the directors of a canal company made an agreement for letting tolls for ninety-nine years, which agreement was both *ultra vires* and detrimental to the interests of the public. After the agreement had been acted upon for forty-seven years without any complaint being made, a bill was filed by two shareholders on behalf of themselves and the other shareholders to set aside the agreement and for an account. A great majority of the shareholders disavowed the suit, but the Vice-Chancellor held that this was immaterial (*f*), and he made an order for a receiver. Upon appeal, however, from this order, Lord Eldon held, that the plaintiffs could not avail themselves of the interest which the public might have in the matters complained of; and that, whatever relief might be obtained by the Attorney-General on behalf of the public (*g*), the plaintiffs were precluded by their own laches and acqui-

(*d*) See Partn. 468—475, where the cases are collected. Compare *Clegg v. Edmondson*, 8 D. G. M. 787; *Rule v. Jewell*, 18 Ch. D. 660, where laches was a bar, with *Hart v. Clarke*, 6 Ho. Lo. Ca. 633; and *Clements v.*

Hall, 1 De G. & J. 173, where it was not. *Ante*, pp. 534 and 535.

(*e*) 2 Russ. 126.

(*f*) See 2 Sim. & Stu. 267, and 2 Russ. 132, note.

(*g*) See *ante*, p. 580.

escence from disturbing the possession of the lessee of the tolls, at all events before the hearing of the cause and in the absence of the Attorney-General to represent the public. The order for the receiver was accordingly discharged. What became of the suit afterwards does not appear, but Lord Eldon's judgment left the plaintiffs small hopes of obtaining a decree.

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In *Graham v. The Birkenhead, &c., Railway Company* (h), a suit was instituted by a shareholder in a company to restrain the completion of part only of the company's works. There had been several suits for the same purpose instituted by other shareholders, but for reasons to which it is not material to advert, those suits were never effectually prosecuted. It had been known for a considerable time that it was not intended by the directors to complete the company's works as originally contemplated, and that in fact there were not sufficient funds for that purpose. It was also well known that the directors had for some time been completing part of the works. It was held that those who disapproved of the application of the company's funds to that limited extent, ought to have taken proceedings to stop it at once; and that having regard to the laches of the plaintiff he was not entitled to relief.

Compelling
completion of
works.
*Graham v. Bir-
kenhead Railway
Company.*

In *Stupart v. Arrowsmith* (i), a suit was instituted by a shareholder in a company against its directors and others for the purpose of compelling them to restore funds of the company alleged to have been illegally applied in buying up shares (k), and for a general account. It appeared, however, that the alleged illegal purchase of shares had not taken place, that the directors had laid accounts before the shareholders showing the amount of the company's receipts and expenditure, and the balance to be divided; that these accounts had been adopted at a general meeting, and that payments had been made to some of the shareholders upon the footing of these accounts. The suit was not instituted until three years after the adoption of the accounts, at the meeting referred to,

Making good
breaches of
trust.
*Stupart v.
Arrowsmith.*

(h) 2 Mac. & G. 146, and 12 Beav. 460.

Patchett, 33 Beav. 595; *Scott v. Ison*, 34 Beav. 434.

(i) 3 Sm. & G. 176. See, too, *Kent v. Jackson*, 14 Beav. 367, and 2 De G. M. & G. 49; *Gregory v.*

(k) See, as to this, *Evans v. Coventry*, 8 De G. M. & G. 835, and other cases, *ante*, p. 371 *et seq.*

Bk. III. Chap. 9. and it was held that, under these circumstances, and no fraud
 Sect. 3. having been proved, the plaintiff was not entitled to the interference of the Court.

*Burt v. British
 Nation.*

In *Burt v. British Nation Assurance Association* (l) a suit by a director complaining of various improper acts done before he became a director, was dismissed on the ground that for two years he had had the means of knowing what had been done, and had sanctioned what he afterwards sought to impeach.

It has even been held that a person who acquires a share from a former shareholder is precluded from complaining of what his predecessor could not complain of himself (m). But this is very questionable (n).

Again, a person who seeks to rescind an agreement for fraud must bring his action within a reasonable time after he has discovered the fraud (o); and this rule applies to actions by companies to rescind contracts into which they have entered (p).

Application of
 foregoing prin-
 ciples in winding
 up companies.
 Brotherhood's
 case.
 Smallcombe's
 case.

With respect to companies, by far the most important decisions upon the subject of laches and acquiescence are those in which the foregoing principles were held to be applicable to questions arising in winding up companies; for it is now settled that if a person has retired from a company pursuant to an invalid agreement, which all the shareholders must be considered as having known, and which they have long suffered to remain unimpeached, such person cannot afterwards be placed on the list of contributories (q).

(l) 4 De G. & J. 158. See, also, *Peck v. Gurney*, 13 Eq. 79; *Hunter v. Stewart*, 4 De G. F. & J. 168.

(m) *Ffooks v. South-Western Rail. Co.*, 1 Sm. & G. 142; *Peck v. Gurney*, 13 Eq. 79.

(n) See *per* Fry, L. J., in *Ashbury v. Watson*, 30 Ch. D. at pp. 379 and 386.

(o) *Clough v. Lon. and N.-W. Rail. Co.*, L. R. 7 Ex. 26; *Sharpley v. Louth and East Coast Rail. Co.*, 2 Ch. D. 663. See *ante*, pp. 73, 85.

(p) *Erlanger v. New Sombrero*

Phosphate Co., 3 App. Ca. 1218, *ante*, 354, where a delay of 10 months was held not fatal. Compare the judgments of Lords Cairns and Blackburn on this point.

(q) *Brotherhood's case*, 31 Beav. 365, affirmed on appeal, 4 De G. F. & J. 566, and confirmed by *Evans v. Smallcombe*, L. R. 3 H. L. 249. See, as to these cases, *ante*, p. 519 *at seq.* See, also, *Hunt's case*, 32 Beav. 387; *Gregory v. Patchett*, 33 ib. 595.

SECTION IV.—OF PARTICULAR ACTIONS.

1. *Actions for specific performance.*

Shareholders and companies seldom sue each other for specific performance, except to enforce contracts to take shares and to obtain indemnity against liabilities.

An agreement to form a company is one the specific performance of which can hardly ever be decreed. Such an agreement may be perfectly valid and binding, but this is not sufficient to entitle one of the parties to it to a decree for specific performance by the other; for this purpose the agreement must not only be valid, but must also be one which a Court can compel performance of in all essential points; if this is practically impossible, an action for damages, and not for specific performance, is the proper remedy. In *Stocker v. Wedderburn (r)*, the plaintiff had obtained a patent, and it was agreed between him and the defendants that a company should be formed by them for the purpose of working the patent; that the plaintiff should assign the patent to the company, give his whole services to it for two years, do his best to improve his invention, and give the company the full benefit of all improvements. Owing to a doubt respecting the validity of the patent, the defendant refused to abide by the agreement, and thereupon the plaintiff filed a bill for specific performance, praying, amongst other things, that the defendants might be decreed to take such steps as might be necessary for the registration and incorporation of the company. To this bill the defendants demurred, and the demurrer was allowed with costs, on the ground that the agreement was one and entire, and that if a decree were made in the plaintiff's favour, the Court could neither compel him to perform his part nor restore the defendants to their original position in case he did not.

Where two companies, having power to amalgamate, have entered into a binding agreement so to do, specific performance of the agreement will be decreed, if its terms are such that a

Specific performance of agreement to form company.

Stocker v. Wedderburn.

(r) 3 K. & J. 393. See, too, *Maxwell v. Port Tennant Co.*, 24 Beav. 495, where, however, there was fraud.

Bk. III. Chap. 9. decree for specific performance can practically be enforced.
Sect. 4.

In the *Anglo-Australian Assurance Company v. British Provident Insurance Society* (s), an agreement by the defendant company to take the assets and liabilities of the plaintiff company, and to indemnify it against its liabilities, was specifically enforced.

Specific performance of agreements to take shares.

The question whether a court will decree the specific performance of an agreement to allot and accept shares in a company, has given rise to some difference of opinion. An ordinary contract for the sale of shares is one which the Court will decree to be specifically performed (t); and it is immaterial whether the vendor has or has not other shares which he does not sell, or, in other words, whether he and the purchaser will or will not become co-shareholders. But a contract for the sale of shares by one individual to another, is distinguishable in many respects from a contract for the allotment and acceptance of shares in a company, and Lord Romilly refused to decree specific performance of a contract of this kind, on the ground that the decree would be ineffectual, as the shares might be transferred immediately after the contract was performed (u). On principle, however, this view cannot be supported, and more recent decisions show that specific performance of such agreements will be enforced (x). It is true that the applicant for shares might sell and transfer his shares as soon as the decree was made, but the decree would nevertheless not be inoperative. If the applicant were the plaintiff, he could not be got rid of; whilst if he were the defendant, he could only retire from the company by transferring his shares to somebody else. The reason therefore which induces the Court to decline to decree specific performance of an agreement for an ordinary partnership at will, is scarcely applicable to such an agreement as that now under consideration. Moreover, nothing is more common than

(s) 3 Giff. 521, and on appeal, 4 De G. F. & J. 341.

(t) *Ante*, p. 499.

(u) *Sheffield Gas, &c., Co. v. Harrison*, 17 Beav. 294; *Bluck v. Mal-laloe*, 27 Beav. 398; *Columbine v. Chichester*, 2 Ph. 27. In this last

case there were circumstances to show that specific performance was impossible.

(x) *Odessa Tramways Co. v. Mendel*, 8 Ch. D. 235. See, also, the cases below, where specific performance was refused on other grounds.

for the promoters of a company to agree to sell property to the company in consideration of a certain number of paid-up shares, and it is certainly difficult to see why such a contract, if valid and binding on both parties, should not be enforced; indeed, there is authority for specific performance in such a case (*y*). Again, persons who have agreed to take shares in a company, are every day made contributories for the purpose of winding up; and they are so upon the ground that, although they are not actually shareholders, they have entered into an agreement to take shares which is binding upon them. Many of these cases are only intelligible upon the assumption that a contract for the allotment and acceptance of shares is one which a court ought to enforce.

In order, however, that specific performance of an agreement to take or deliver shares in a company may be decreed, it is necessary that the agreement should be concluded and binding (*z*), and be untainted by fraud (*a*), or unfairness (*b*), and be capable of being performed by the defendant (*c*), and not involve any breach of trust (*d*), or performance by either party of obligations the performance of which a court cannot practically enforce (*e*).

On this head, reference may be made to the instructive case of the *Odessa Tramways Co. v. Mendel* (*f*), where specific performance of an agreement to take shares was decreed, although the defendant alleged that the agreement was part of a scheme between himself and the directors to do that which was really *ultra vires* or a fraud on the shareholders. The scheme alleged was held to be separable, and the defendant

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Defences to
suits for specific
performance
of agreement
to take shares.

*Odessa Tram-
ways Co. v.
Mendel.*

(*y*) See *Fyfe v. Swabey*, 16 Jur. 49, M. R.

(*z*) Which it was not in *Oriental Steam Nav. Co. v. Briggs*, 4 De G. F. & J. 191.

(*a*) Which was not the case in *New Brunswick and Canada Rail. Co. v. Muggieridge*, 4 Drew. 686, and 1 Drew. & Sm. 363; or in *Maxwell v. Port Tennant Co.*, 24 Beav. 495.

(*b*) As to agreements between co-directors, see *Flanagan v. Great Western Rail. Co.*, 7 Eq. 116.

(*c*) *Ferguson v. Wilson*, 2 Ch. 77; *Columbine v. Chichester*, 2 Ph. 27. As to the impossibility of obtaining registration of transfers, *ante*, pp. 500, 507.

(*d*) Fry on Spec. Perf. p. 177, ed. 2, and see *Flanagan v. Great Western Rail. Co.*, 7 Eq. 116.

(*e*) *Flanagan v. Great Western Rail. Co.*, 7 Eq. 116; *Stocker v. Wedderburn*, 3 K. & J. 393, *ante*, p. 585.

(*f*) 8 Ch. D. 235.

Bk. III. Chap. 9. was not allowed to avail himself of his own fraud as a reason
Sect. 4. for not taking the shares he had agreed to take and pay for.

As regards impossibility of performance, it is to be observed that an agreement by A. that B. shall do something, can only be decreed to be specifically performed if the agreement, although in form by A., is in truth an agreement by B. himself, or if B. is bound to do that which it has been agreed he shall do. If B. is not bound, by the agreement or otherwise, to do what A. has agreed he B. shall do, no decree for specific performance can be made against either A. or B. (*g*). These observations apply to agreements made by promoters and others, to be performed by a company; if the company is not bound by the agreement, a decree cannot be made either against the company or against the individuals who entered into the agreement (*h*). If directors agree to allot shares, and the agreement is in point of law the agreement of the company, the directors individually can neither be compelled to perform it nor to compensate the plaintiff for its non-performance (*i*).

Agreements
with promoters
and directors.

Incomplete
gratuitous
transfers.

Although a court will decree specific performance of an agreement to sell shares, it will not interfere to compel the completion of a gratuitous and intended, but unperfected transaction. Thus, if a person voluntarily settles shares on others, but does not transfer them, or actually constitute himself a trustee of them, the persons intended to be benefited by the settlement do not acquire any equitable title to the shares enforceable against the settlor or his representatives (*k*).

Contracts for
indemnity.

The right of sellers of shares to be indemnified against calls and other liabilities has already been considered (Book III., c. 4, § 6), as has also the right of directors and others to be indemnified against liabilities incurred by them in conducting the affairs of their companies (Book III., c. 2, § 3). Those rights are enforced by action, which may or may not assume the form of an action for specific performance. It is unnecessary, however, further to allude to this subject (*l*).

(*g*) Damages can be obtained, see 806, L. J.; and 4 De G. F. & J. 264.
Foster v. Wheeler, 38 Ch. D. 130. See, also, *Namney v. Morgan*, 37 Ch.

(*h*) *Ellis v. Colman*, 25 Beav. 662. D. 346.

(*i*) *Ferguson v. Wilson*, 2 Ch. 77.

(*k*) *Milroy v. Lord*, 8 Jur. N. S.

(*l*) See, as to specific performance of contracts to indemnify, *Ranelagh*

As a general rule, only those persons who are, by themselves or their agents, parties to an agreement (or who represent them), can enforce it. An agreement between A. and B. cannot be enforced by C., although it may be for his benefit (*m*). But if the agreement creates a trust for C., he can enforce the trust, and so obtain the benefit of the agreement (*n*). The application of these principles to cases in which attempts have been made to enforce against companies contracts entered into before their formation, has been already alluded to (Bk. II., c. 1, § 2, and c. 2, § 3). Another illustration is afforded by *Bell v. Mexborough (o)*, where an unsuccessful attempt was made by a subscriber to an abortive railway company to compel two members of the provisional committee to perform an agreement to take shares and pay for them. The plaintiff was no party to this agreement, and he could not enforce it. His remedy, if any, was for misrepresentation, inducing him to take shares.

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Only parties to
agreement can
enforce it.

Bell v.
Mexborough

2. Rescission of contract and return of deposits.

The circumstances under which agreements to take shares can be rescinded and deposits paid on them be recovered, have been already examined (see Bk. I., c. 1, § 3, and c. 3).

With reference to actions to rescind contracts to take shares on the ground of misrepresentation, it is necessary to distinguish companies which are being wound up from companies which are not in that position.

After the winding-up of a company has commenced, it is too late for a shareholder to repudiate his shares on the ground of fraud; even although that fraud may in point of law be imputable to the company, and may have been discovered since the winding-up commenced. This was decided in *Oakes v. Tur-*

1. Companies
being wound up.

v. Hayes, 1 Vernon, 190; *Lloyd v.* Ch. D. 125.

Dimmack, 7 Ch. D. 398; *Hughes-Hallett v. Indian Mammoth Gold Mining Co.*, 22 Ch. D. 561; *Hobbs v. Wayet*, 36 Ch. D. 256. Fry Spec. Perf., Part VI., Chap. 10.

(*m*) *Colyeur v. Mulgrave*, 2 Keen, 81; *Empress Engineering Co.*, 16

(*n*) As in *Page v. Cor*, 10 Ha. 163; *Murray v. Flavell*, 25 Ch. D. 89. See, too, *Gregory v. Williams*, 3 Mer. 582; *Dale v. Hamilton*, 2 Ph. 266.

(*o*) 5 Ra. Ca. 149, and 10 Jur. 893, and 12 ib. 64, on appeal.

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quand (*p*), and is settled law, and is based upon the ground that such fraud affords no answer to the claims of the creditors of the company.

2. Companies
not being wound
up.

But where the company is not being wound up, the right of a person who has been induced by the fraud or misrepresentation of the company to take shares in it, to repudiate those shares and to be relieved from them is indisputable; provided, 1, the fraud or misrepresentation of which he complains is proved, and is sufficiently material; and 2, he has not deprived himself of his right of repudiation by his own laches, or by conduct inconsistent with such right (*q*).

Fraud must be
clearly proved.

The difficulty in practice is to prove the facts necessary to obtain relief. If there has been no positive misrepresentation and no concealment, making what is stated untrue (*r*), the circumstance that the plaintiff was in fact misled by what he was told and by documents furnished to him will not entitle him to be relieved from his contract. This is well illustrated by *Conybeare v. New Brunswick and Canada Railway Company* (*s*). The material facts of this difficult case were shortly as follows:—The company was formed for the purpose of purchasing and carrying on a railway belonging to the St. Andrew's and Quebec Railway Company, and of purchasing all the lands and property of that company, and all the rights of the holders of a certain class of shares (called A. shares) in it. The plaintiff applied for shares in the new company, and was informed by its secretary that the A. shares were entitled to a preferential dividend of 6l. per cent., and that the holder of every A. share was entitled to four acres of land. The secretary also stated that the new company had acquired some thousands of acres of land from the Colonial Government, and that all claims against the company were regularly liquidated

Conybeare v.
New Brunswick,
&c., Company.

(*p*) L. R. 2 H. L. 325; *Kent v. Freehold Land Co.*, 3 Ch. 493, reversing S. C. 4 Eq. 588.

(*q*) *Ante*, pp. 73 and 85.

(*r*) *Ante*, p. 70.

(*s*) 9 H. L. C. 711, reversing S. C., 1 De G. F. & J. 578, and affirming the decision of V.-C. Stuart in 6 Jur. N. S. 164. See, also, as to the necessity of clearly

proving the fraud relied upon, *Robson v. Earl of Devon*, *ante*, p. 78; *Kennedy v. Panama, &c., Mail Co.*, L. R. 2 Q. B. 580; *Smith v. Charlwick*, 9 App. Ca. 187, and 20 Ch. D. 70, which, however, was not an action for rescission; and as to giving particulars of fraud, *McCreight v. Stevens*, 1 Hurls. & Colt. 454.

every six weeks; and he gave the plaintiff reports from the directors, in which these and other matters, tending to show the prosperity of the company, were stated. The plaintiff was shown, and he examined the statutes of the Colonial Legislature, by which the lands were granted; and he took copies of all those statutes, except one, away with him. That one statute which had been produced to the plaintiff, but which was not amongst those he took away, showed that the title of the company to the lands depended on the completion of the railway by a certain time. The effect of the statute was correctly stated in the company's articles of association. The plaintiff took shares in the company on the faith of those documents and statements; but having afterwards discovered that the company was greatly in debt, that its affairs were far from prosperous, and its title to the lands was not absolute but liable to forfeiture, insisted on rescinding his contract.

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The Vice-Chancellor Stuart and the House of Lords were of opinion that no positive misrepresentation had been made, that no wilful concealment had been practised with reference to the title to the land, and that the plaintiff had not been induced to take the shares upon the faith of that title being indefeasible, and his bill was dismissed by the Lords with costs (*t*).

Upon the subject of the right to rescind a severable contract in part where it cannot be rescinded in toto the case of *Maturin v. Tredinnick* (*u*) is very important.

Rescission of
severable con-
tracts.
Maturin v.
Tredinnick.

There the plaintiff had been induced by the fraud of the defendant to purchase from him several shares in several mining companies. Before the plaintiff had discovered the fraud he sold some of the shares in one of the companies.

(*t*) The Lords Justices held that the plaintiff was entitled to relief upon the grounds that the title of the company to the land had been represented to him as indefeasible, that he had been put off inquiry by the statements so made to him, and that even if the acquisition of land was not the main inducement of the plaintiff in taking shares, it formed a material ingredient in the

purchase.

(*u*) 2 New Rep. 514, and 4 ib. 15. In this case the V.-C. is reported to have said that a sale of some shares in one of the companies would have afforded a defence to the suit as to the shares in the other companies. But quære how this is consistent with the relief actually given. See, further, *Curtis's case*, 6 Eq. 455.

Bk. III. Chap. 9. He afterwards filed a bill to rescind the contract as to all the
 Sect. 4. — remaining shares. Pending the suit one of the companies in which some of these shares were held, was ordered to be wound up; and the shares in one of the other companies were forfeited for non-payment of calls, but the defendant had full notice of the intended forfeiture. The Vice-Chancellor Wood held, (1,) that the sale of some of the shares before the bill was filed did not disentitle the plaintiff to rescind the contract as to the other shares; and, (2,) that neither the subsequent order to wind up one of the companies, nor the subsequent forfeiture of shares, afforded any defence to the suit.

Director selling
 his own shares
 as unallotted
 shares.

If a director of a company is applied to for unallotted shares, and he transfers to the applicant shares already allotted to himself, the transferee can repudiate the transfer, and recover back what he may have paid for the shares (*x*).

Fraud by seller
 of shares.

When a person has been induced by the fraud of some particular shareholder to purchase shares of him, the right of the person defrauded is to rescind the contract of sale, and to throw the shares back on the person from whom he took them, and to be indemnified by him against all losses sustained in consequence of having taken the shares (*y*). This is apparently the limit of the right of the person defrauded in such a case (*z*). If the shares have been actually transferred to him, he is not entitled to have the transfer treated as null and void as between himself and the company; nor to restrain the company from making calls upon him whilst he is a shareholder (*a*). He may be entitled to compel his vendor to accept a re-transfer of the shares, but even this right must, it is conceived, depend upon whether the company is

(*x*) *Blake v. Mowatt*, 21 Beav. 603.

(*y*) See *Stainbank v. Fernley*, 9 Sim. 556, and *Seddon v. Connell*, 10 Sim. 58 & 79, and *Maturin v. Tredinick*, 2 New Rep. 514, and 4 ib. 15 *ante*, p. 591.

(*z*) An action for damages will lie, see *ante*, p. 588, note (*g*), but this is not so complete a remedy.

(*a*) *Bloxam v. Metropolitan Cab*

Co., 4 New Rep. 51, is not opposed to this. For although the company was restrained from suing the plaintiff for calls, the plaintiff had not acquired any title to the shares, they having been transferred to him by a person who had himself no title. The transfer was therefore wholly void.

being wound up or not, and upon the power of the directors to refuse to register transfers. Bk. III, Chap. 2.
Sect. 4.

Actions for rescission of contract and for the return of deposits, can also be maintained under other circumstances besides fraud and misrepresentation as has been already pointed out (Bk. I., c. 1, §§ 2, 3).

Actions for the rescission of contracts with promoters have also been considered (Bk. III., c. 2, § 1).

The persons to be made parties to actions for rescission of contract must include the parties to the contract, but since the Judicature acts, other persons against whom the plaintiff may be entitled to relief may be joined. Parties to
actions for
rescission, &c.

A person who has been induced by the fraud of the defendant to purchase shares from him, is entitled to bring an action for a return of the purchase-money, and for an indemnity, and the only necessary party to such an action is the person who sold the shares (*b*). Shares purchased
on the faith of
false statements.

Where persons have been induced by fraud to subscribe to a bubble company, each one may institute an action on his own behalf against those who have fraudulently obtained his money, for a return thereof; and in such a case, it is not necessary that the other persons defrauded should be parties to the action, or be represented therein (*c*). An action by one of such persons on behalf of himself and others can, however, also be maintained in these cases (*d*). A member of a chartered company cannot, so long as the charter is not revoked, maintain an action to rescind his agreement to take shares on the ground that the charter was obtained by fraud and that the company was formed by fraud (*e*). Bubble com-
panies.

(*b*) See *Stainbank v. Fernley*, 9 Sim. 556; *Mare v. Malacley*, 1 M. & Cr. 559; *Turner v. Hill*, *Turner v. Tyacke*, *Turner v. Borlase*, 11 Sim. 1, 16, 17.

(*c*) *Colt v. Wollaston*, 2 P. W. 154; *Green v. Barrett*, 1 Sim. 45; *Blain v. Agar*, 2 Sim. 289; *Cridland v. De Mauley*, 1 De G. & S. 459.

(*d*) *Crosskey v. Bank of Wales*, 4 Giff. 314; *Cooper v. Webb*, 15 Sim. 451; *Wilson v. Stanhope*, 2 Coll. 629; *Apperley v. Page*, 1 Ph. 779; *Clements v. Bowes*, 17 Sim. 167, and 1 Drew. 684, where demurrers to such bills were overruled. See, too, *Sheppard v. Greenford*, 1 K. & J. 491, and *Butt v. Monteaux*, 1 K. & J. 98. Compare *Hallows v. Fernie*, 3 Ch. 467, and 3 Eq. 520.

(*e*) *Macbride v. Lindsay*, 9 Ha. 574.

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3. *Of account and discovery.*

The subject of account and discovery so far as it relates to partnerships and unincorporated companies will be found fully discussed in the author's work on Partnership (*f*).

Actions for an account may be maintained in order to have the assets of abortive companies properly applied (*g*); and in order to compel promoters and directors to make good moneys which on principles before explained are moneys of the company (*h*). But after a company is ordered to be wound up those questions which were formerly settled in a suit for a dissolution and account are now disposed of under the winding-up order, as will be seen hereafter in Book IV.

Opening
accounts.

As regards opening settled accounts it has been decided that when accounts have been laid before shareholders at a proper meeting, and have been accepted and adopted by them as correct, those accounts cannot be afterwards impeached, except on the ground of fraud or mistake, which must be proved by those who allege it (*i*). Moreover, an account may be a settled account although it may not have been audited as required by the rules of the company (*k*). In connection with this subject the power of a majority of shareholders to bind a minority must be borne in mind; for a minority cannot impeach an account which relates to matters as to which the majority can bind the minority (*l*), and which the majority have assented to with adequate knowledge of the facts.

Discovery.

With respect to discovery the only points to which attention need be called in a treatise like the present are these, viz.:

1. The Court may order interrogatories to be delivered to any member or officer of any company, whether incorporated or not (*m*). An ordinary member however will not be required

(*f*) Partn., 492 *et seq.*

(*g*) *Wallworth v. Holt*, 4 M. & Cr. 619; *Sheppard v. Owenford*, 1 K. & J. 491, and *ante*, § 1 (3).

(*h*) *Ante*, Bk. III., c. 2.

(*i*) See *Holgate v. Shutt*, 27 Ch. D. 111, and 28 ib. 111; *Holmes' case*, 2 D. G. M. & G. 113; *Kent v. Jackson*, ib. 49; *Ex parte Bignold*, 22 Beav.

143; *Stupart v. Arrowsmith*, 3 Sm. & G. 176. Compare *Portsmouth Banking Co.*, 2 Eq. 167, as to reports without accounts.

(*k*) *Holgate v. Shutt*, 28 Ch. D. 111.

(*l*) *Ante*, Bk. III., c. 1, § 3.

(*m*) R. S. C., Ord. XXXI. r. 5.

to answer interrogatories under this rule unless they relate to matters which he knows more about than the officers of the company (*n*). Bk. III. Ch. 9.
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2. Officers of the company cannot avoid discovery simply by saying they do not know. They must inquire of those officers or servants of the company who do know (*o*); and must either consult the books and documents of the company which contain the information sought or produce them for inspection by the person seeking discovery (*p*), unless such books, &c., are privileged from production. Directors cannot defeat the Court by forbidding their officer to examine the books (*q*).

3. An order for an affidavit of documents may be made under R. S. C., Ord. XXXI., r. 12, against an officer of a company (*r*). Affidavit of
documents.

Books and papers which are in the possession of a company are, for purposes of discovery, in the possession or power of the directors, and they cannot avoid giving a list of the documents of the company by saying that they, the directors, have none (*s*). Directors deny-
ing possession.

When an order is made against a company for the inspection of its books, and the directors will not allow them to be produced, an order for their production will be made against the directors personally (*t*). Inspection of
books of cor-
porations.

The right of the members of a company to inspect and take copies of its accounts and other books and documents, apart from legal proceedings, has been already alluded to, see Bk. III., c. 3, § 4 (*u*).

(*n*) *Berkeley v. Standard Discount Co.*, 13 Ch. D. 97. 128, and 1 Ph. 222.

(*o*) *Taylor v. Rundell*, 11 Sim. W. N. (1875) 220.

(*p*) *Clinch v. Financial Corporation*, 2 Eq. 271.

(*q*) *Lacharme v. Quartz Rock Mining Co.*, 1 Hurl. & Colt. 134. As to the form of an order for production by a corporation, see *Ranger v. Great Western Rail Co.*, 4 De G. & J. 74.

(*r*) See *Drake v. Symes*, Johns. 647.

(*s*) See also *infra*, under the heads

(4) Injunction, and (6) Mandamus.

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4. *Of injunctions.*

Injunctions
against com-
panies and
their directors.

With respect to injunctions against companies and their directors, little remains to be added to what was said when considering the principles by which Courts are guided in interfering in matters of internal management (*c*), and in controlling majorities (*y*). In order, however, to facilitate reference, it will be convenient to collect those cases in which an injunction has been granted or refused, although they may have been noticed in previous pages.

In relying upon the authorities here collected, it is to be borne in mind that the circumstances under which the Court will grant an injunction have been somewhat extended by the Judicature act, 1873, § 25 (8), but not much (*z*). It must also be recollected that before the trial of a cause, the Court will not restrain the exercise of a clear legal right, unless the Court is satisfied that it will be compelled to do so at the trial (*a*); nor will it interfere, if it is not in the possession of all the material facts, and convinced that an immediate injunction is imperatively required (*b*).

Injunctions
granted.

I.—*An injunction has been granted to restrain—*

1. The improper insertion or continuance of a person's name on a company's prospectus (*c*) or on the register of shareholders (*d*);
2. The registry of an improper transfer of shares (*e*);
3. The making of calls for illegal purposes (*f*);

(*c*) *Ante*, p. 574 *et seq.*

(*y*) *Ante*, p. 314 *et seq.*

(*z*) See *North London Rail. Co. v. Great Northern Rail. Co.*, 11 Q. B. D. 30.

(*a*) *Playfair v. Birmingham, &c., Rail. Co.*, 1 Ra. Ca. 640.

(*b*) *Fielden v. Lancashire, &c., Rail. Co.*, 2 De G. & S. 531.

(*c*) *Routh v. Webster*, 10 Beav. 561.

(*d*) *Taylor v. Hughes*, 2 Jo. & Lat. 24; *Shortridge v. Bosanquet*, 16 Beav. 84. Compare *Bullock v. Chapman*, 2 De G. & S. 211. This is

now usually done by an application to rectify the register, as to which see *ante*, p. 57 *et seq.* and 121 *et seq.*

(*e*) *Egfe v. Swaby*, 16 Jur. 49.

(*f*) See as to this, *Preston v. Grand Collier Dock Co.*, 11 Sim. 327, and *Holykinson v. National Live Stock Insur. Co.*, 26 Beav. 473, and 4 De G. & J. 422, both of which, however, were decided on demurrer. See further on this subject, *Orr v. Glasgow Rail. Co.*, 3 MacQu. 799, and the other cases cited *infra*, under the next head, Nos. 2 to 6.

4. The making of calls on a shareholder induced to become such by fraud (*g*) ;

5. The illegal issue of shares (*h*) ; *e.g.*, preference shares issued pursuant to a special resolution (*i*) ;

6. The illegal forfeiture of shares (*k*) ;

7. The unfair use by a company of a creditor's name in an action against a shareholder (*l*) ;

8. The illegal suspension of a shareholder from his rights (*m*) ; *e.g.*, the improper rejection of his vote (*n*) ;

9. The illegal payment of dividends not actually declared (*o*) , *e.g.*, payment of dividends out of capital or borrowed money (*p*) ;

10. The payment of dividends in shares (*q*) ;

11. The making of loans to directors (*r*) ;

12. The departure by a company from the objects to attain which it was formed ; *viz.*, to restrain

A fire and life insurance company from engaging in marine insurances (*s*) ;

A railway company from dealing extensively in the purchase and sale of coals (*t*) ;

A railway company from guaranteeing the payment of dividends by a steam packet company (*u*) ;

From taking an unauthorised number of shares in another railway company (*v*) ;

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Injunctions
granted.

(*g*) *Smith v. Reese River Co.*, 2 Eq. 264, and L. R. 4 H. L. 64 ; *Blocom v. Metrop. Cab Co.*, 4 N. R. 51.

(*h*) *Fraser v. Whalley*, 2 Hem. & M. 10. See *infra*, under second head, No. 8.

(*i*) *Hutton v. Scarborough Cliff Co.*, 2 Dr. & Sm. 514 and 521.

(*k*) *Johnson v. Lyttle's Iron Agency*, 5 Ch. D. 687 ; *Watson v. Eales*, 23 Beav. 294 ; *Norman v. Mitchell*, 5 De G. M. & G. 648 ; *Naylor v. South Devon Rail. Co.*, 1 De G. & Sm. 32.

(*l*) *Taylor v. Hughes*, 2 Jo. & Lat. 24, and other cases cited *ante*, p. 560.

(*m*) *Adley v. Whitstable Co.*, 17 Ves. 315 ; 19 ib. 304 ; 1 Mer. 107.

(*n*) *Pender v. Lushington*, 6 Ch. D. 70, and see *Moffatt v. Farquhar*, 7 Ch. D. 591.

(*o*) *Fawcett v. Laurie*, 1 Dr. & Sm. 192 ; *Carlisle v. South Eastern Rail. Co.*, 1 Mac. & G. 683 ; *Henry*

v. Great Northern Rail. Co., 4 K. & J. 1, and 1 De G. & J. 606, and other cases cited *ante*, p. 429 *et seq.*

(*p*) *Dent v. London Tramways Co.*, 16 Ch. D. 344 ; *Darison v. Gillies*, ib. 347 n. ; *Guinness v. Land Corporation of Ireland*, 22 Ch. D. 349. Compare under 2nd head, No. 14 ; *Blocom v. Metrop. Rail. Co.*, 3 Ch. 337 ; *McDonnell v. Jersey Hotel Co.*, 2 Hem. & M. 523.

(*q*) *Hoole v. Great Western Rail. Co.*, 3 Ch. 262.

(*r*) *Black v. Mullaluc*, 27 Beav. 398.

(*s*) *Natusch v. Irving*, Part. 316 *et seq.*, and Gow on Partnership, App. 398, ed. 3.

(*t*) *A.-G. v. Great Northern Rail. Co.*, 1 Dr. & Sm. 154.

(*u*) *Colman v. Eastern Counties Rail. Co.*, 10 Beav. 1.

(*v*) *Salomons v. Laing*, 12 Beav. 377.

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Injunctions
granted.

- From making a different railway from that which it was incorporated to make (*y*);
Or part only of such railway (*z*);
Or one only out of several railways which it had been formed to make (*a*);
13. The transfer, by one company, of its business to another company (*b*), otherwise than under § 161 of the Companies Act, 1862 (*c*);
14. The amalgamation of two companies having similar objects (*d*);
15. A company and its directors from applying to Parliament at the expense of the company, for power to do what it was not formed to do (*e*);
16. A chartered company from surrendering its charter (*f*);
17. The publication of the contents of books and documents inspected under an order (*g*);
18. The payment out of the funds of a company of money borrowed by its promoters, to enable them to comply with the standing orders of the House of Lords (*h*);
19. Proceeding to arbitration under an *ultra vires* agreement (*i*);
20. Prosecuting a suit instituted by a stranger, but alleged to be for the benefit of the company (*k*);
21. Prosecuting proceedings for a libel on the directors (*l*);

(*y*) *Bayshaw v. Eastern Union Rail. Co.*, 7 Ha. 114, and 2 Mac. & G. 359; *Simpson v. Denison*, 10 Ha. 51.

(*z*) *Cohen v. Wilkinson*, 12 Beav. 125, and 1 Mac. & G. 481; *Logan v. Courtown*, 13 Beav. 22.

(*a*) *Hodgson v. Paris*, 12 Beav. 392 and 529, and 1 De G. M. & G. 6.

(*b*) *Charlton v. Newcastle and Carlisle Rail. Co.*, 5 Jur. N. S. 1096; *Benan v. Rufford*, 1 Sim. N. S. 550; *Winch v. Birkenhead, &c., Rail. Co.*, 5 De G. & S. 562. See, too, *Salmons v. Laing*, 12 Beav. 377; *Hattersley v. Shulburne*, 10 W. R. 801, where it was intended to obtain an act to legalise the transfer.

(*c*) See, as to this, *Southall v. British Mutual Life Ass. Soc.*, 11 Eq. 65, and 6 Ch. 614.

(*d*) *Kearns v. Leaf*, 1 Hem. & M. 681; *Gilbert v. Cooper*, 10 Jur. 580. See, also, the last note but one.

(*e*) *Lytle v. East Bengal Rail. Co.*

36 Beav. 10; *Munt v. Shrewsbury and Chester Rail. Co.*, 13 Beav. 1; *Simpson v. Denison*, 10 Ha. 51; *Great Western Rail. Co. v. Rushout*, 5 De G. & Sm. 290; *Vance v. East Lanc. Rail. Co.*, 3 K. & J. 50. See, also, *A.-G. v. Norwich*, 16 Sim. 225, and compare *Bateman v. Mayor of Ashton-under-Lyne*, 3 H. & N. 323.

(*f*) *Ward v. Society of Attorneys*, 1 Coll. 370, as to which, see *ante*, p. 323.

(*g*) See *Williams v. Prince of Wales Co.*, 23 Beav. 338.

(*h*) *Spackman v. Lattimore*, 3 Giff. 16.

(*i*) *Mannell v. Midland Great Western Rail. Co.*, 1 Hem. & M. 130, and compare *North London Rail. Co. v. Great Northern Rail. Co.*, 11 Q. B. D. 30. See also 31 Ch. D., p. 368.

(*k*) *Kernaghan v. Williams*, 6 Eq. 228.

(*l*) *Pickering v. Stephenson*, 14 Eq. 322, and compare *Studdert v. Grosvenor*, 33 Ch. D. 528.

22. The purchase by a company of its own shares (*m*) ;
23. Improper application of company's funds, viz. :—
 Subscription to the Imperial Institute (*n*) ;
 Stamping proxy forms and paying return postage stamp on them (*o*) ;
 Printing proxy forms in a way calculated to influence the votes of shareholders (*o*) ;
 Paying costs of a winding-up petition presented by the directors, but opposed by a number of shareholders and a minority of directors (*p*) ;
 Giving gratuities to servants and remunerating directors for past services when company has ceased to carry on business (*q*) ;
24. Illegally preventing a person from acting as a director (*s*) ;
25. To prevent directors from laying resolutions favourable to themselves on a question in which their interests are in conflict with those of the shareholders before a meeting which has been convened by them by a misleading circular, and one which contains statements calculated to obtain proxies in their favour without giving the shareholders sufficient information to enable them to form a proper opinion as to the proper persons to whom to entrust their votes (*t*) ;
26. Illegally preventing a debenture or stock holder from inspecting the company's books (*u*).

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 Injunctions
 granted.

II.—An injunction has been refused to restrain—

Injunctions
 refused.

1. A company from commencing business on a smaller scale than contemplated by the prospectus, or before its nominal capital had been subscribed (*x*) ;
2. The making of calls by a company commencing business with less capital than that originally contemplated (*y*) ;
3. The making of necessary calls by directors who had been guilty of improper conduct (*z*) ;

(*m*) *Hope v. International Financial Soc.*, 4 Ch. D. 327. See also *Trevor v. Whitworth*, 12 App. Ca. 409.

(*n*) *Tomkinson v. South Eastern Rail. Co.*, 35 Ch. D. 675.

(*o*) *Studdert v. Grosvenor*, 33 Ch. D. 528.

(*p*) *Smith v. Duke of Manchester*, 24 Ch. D. 611.

(*q*) *Hutton v. West Cork Rail. Co.*, 23 Ch. D. 654, and compare *Hampson v. Price's Patent Candle Co.*, 24 W. R. 754 ; *Taunton v. Royal Insurance Co.*, 2 H. & M. 135. *Henderson v. Bank of Australasia*, 40 Ch. D. 170.

(*s*) *Pulbrook v. Richmond Consoli-*

dated Mining Co., 9 Ch. D. 610 ; *Munster v. Cammell Co.*, 21 Ch. D. 183. And see *Harben v. Phillips*, 23 Ch. D. 14, and *Bainbridge v. Smith*, W. N. 1889, p. 72.

(*t*) *Jackson v. Munster Bank*, 13 L. R. Ir. 118. Compare *Isle of Wight Rail. Co. v. Tchouridin*, 25 Ch. D. 320.

(*u*) *Holland v. Dickson*, 37 Ch. D. 669 ; *Mutter v. Eastern and Midlands Rail. Co.*, 38 Ch. D. 92.

(*x*) *McDougall v. Jersey Hotel Co.*, 2 Hem. & M. 528.

(*y*) *Norman v. Mitchell*, 19 Beav. 278, and 5 De G. M. & G. 648.

(*z*) *Logan v. Courtoun*, 13 Beav. 22.

- Bk. III. Chap. 9. 4. The making of calls on some only of the members of an amalgamated
 Sect. 4. society (*a*) ;
- Injunctions 5. The making of calls on all the members of two amalgamated com-
 refused. panies, to pay the debts of one of such companies (*b*) ;
6. Actions for calls on improperly relinquished or forfeited shares (*c*) ;
7. The borrowing of money by a limited company (*d*) ;
8. The issuing of preference shares (*e*) ;
9. The application of the money raised by the issue of preference shares to a purpose different from that for which it was raised (*f*) ;
10. The return of deposits to subscribers (*g*) ;
11. The payment of dividends actually declared (*h*) ;
12. The payment of dividends before payment of debts (*i*) ;
13. The payment of dividends before the completion of the company's works (*k*) ;
- 13A. The payment of dividends without making good lost capital (*l*) ;
14. The continuance in office of directors appointed in the place of others removed for alleged misconduct (*m*) ;
15. The management of a company's affairs by directors whose conduct was complained of ; no sufficient attempt having been made to control them before applying to the Court (*n*) ;
16. Directors improperly appointed, from acting (*o*) ;
17. Directors from putting their own names on negotiable instruments relating to the affairs of the company (*p*) ;

(*a*) *Bailey v. Birkenhead, &c., Rail. Co.*, 12 Beav. 433. Compare *Preston v. Grand Collier Dock Co.*, 11 Sim. 327, and see No. 15, *infra*.

(*b*) *Cooper v. Shropshire Union Rail. Co.*, 6 Ra. Ca. 136 ; S. C., 13 Jur. 443.

(*c*) *Harris v. North Devon Rail. Co.*, 20 Beav. 384 ; *Playfair v. Birmingham, &c., Rail. Co.*, 1 Ra. Ca. 640.

(*d*) *Bryon v. Metropolitan Saloon Omnibus Co.*, 4 Jur. N. S. 680, and on appeal, 3 De G. & J. 123. See No. 15.

(*e*) *Edwards v. Shrewsbury, &c., Rail. Co.*, 2 De G. & Sm. 537. See under first head, No. 5.

(*f*) *Yettis v. Norfolk Rail. Co.*, 3 De G. & Sm. 293. See No. 15, *infra*.

(*g*) *Kent v. Jackson*, 14 Beav. 367, and 2 De G. M. & G. 49.

(*h*) *Farwell v. Laurie*, 1 Dr. & Sm. 192 ; the suit, however, was defective for want of parties. See

ante, p. 574 note (*s*).

(*i*) *Stevens v. South Devon Rail. Co.*, 9 Ha. 326. See No. 15.

(*k*) *Brown v. Monmouthshire, &c., Rail. Co.*, 13 Beav. 32. See No. 15.

(*l*) *Lee v. Neufchatel, &c., Co.*, W. N. (1889) 31. Compare *supra*, under first head, No. 9.

(*m*) *Inderwick v. Snell*, 2 Mac. & G. 216.

(*n*) *McDougall v. Gardiner*, 1 Ch. D. 13, and 10 Ch. 696 ; *Carlen v. Drury*, 1 V. & B. 154 ; *Waters v. Taylor*, 15 Ves. 10 ; *Foss v. Harbottle*, 2 Ha. 461 ; *Mosley v. Alston*, 1 Ph. 790. And see *Harben v. Phillips*, 23 Ch. D. 14. This principle was acted on in the cases cited under Nos. 4, 5, 7, 8, 9, 12, 13.

(*o*) *Hattersley v. Shelburne*, 10 W. R. 881. And see *Imperial Hydro-pathic Hotel Co. v. Hampson*, 23 Ch. D. 1.

(*p*) *Bluck v. Mallalac*, 27 Beav. 398.

18. The sailing of a ship on a voyage disapproved of (*q*) ; Bk. III. Chap. 9.
 19. The assignment of a company's property to trustees, upon trust to Sect. 4.
 sell and pay the company's debts (*r*) ; Injunctions
 20. The total abandonment by a railway company of its works, it not refused.
 having funds to complete them (*s*) ;
 21. The application to Parliament, otherwise than at the expense of the
 company, for power to enable the company to do what it was never in-
 tended it should do (*t*), though the application is in the name and under
 the seal of the company (*u*) ;
 22. The sealing of an agreement to make such an application (*v*) ;
 23. A company from applying to a foreign legislature for increased
 powers (*y*) ;
 24. An application to Parliament to legalise an agreement for the transfer
 of the business of one company to another (*z*) ;
 25. A railway company empowered to purchase a canal, from exercising
 the powers of a canal company (*a*) ;
 26. A railway company having steam ferry-boats from using them for
 other than ferry purposes when not wanted for those purposes (*b*) ;
 27. A railway company from carrying out a traffic agreement entered
 into with another company (*c*) ;
 28. An hotel company from temporarily letting part of its hotel for other
 than hotel purposes (*d*) ;
 29. A fire insurance company from paying for losses usually paid for but
 not covered by its policies (*e*) ;
 30. The discharge of a servant whose engagement was provided for in the
 company's articles of association (*f*) ;
 31. The non-registry of a transfer of shares (*g*) ;
 32. The voluntary winding up of a company with a view to a transfer of
 its business under § 161 of the Companies act, 1862 (*h*) ;

(*q*) *Miles v. Thomas*, 9 Sim. 606.
 (*r*) *Lord v. Governor and Co. of*
Copper Miners, 2 Ph. 740.

(*s*) *Logan v. Courtown*, 13 Beav. 22.

(*t*) *Ware v. Grand Junc. Water-*
works Co., 2 R. & M. 470.

(*u*) *Ex parte Hartridge*, 5 Ch.
 671; *Great Western Rail. Co. v.*
Rushout, 5 De G. & Sm. 290.
 Compare *Mauvssell v. Midland Great*
West. Rail. Co., 1 Hem. & M. 130.

(*v*) *Winch v. Birkenhead Rail. Co.*,
 5 De G. & Sm. 580.

(*y*) *Bill v. Sierra Nevada Mining*
Co., 1 De G. F. & J. 177.

(*z*) *Hattersley v. Earl of Shelburne*,
 10 W. R. 881.

(*a*) *Rogers v. Oxford, &c., Rail. Co.*,

2 De G. & J. 662.

(*b*) *Forrest v. Manchester, &c.,*
Rail. Co., 30 Beav. 40, affirmed on
 appeal, 4 De G. F. & J. 126, but on
 a different ground.

(*c*) *Hare v. London and North-*
Western Rail. Co., 2 J. & H. 80.

(*d*) *Simpson v. Westminster Palace*
Hotel Co., 2 De G. F. & J. 141, and
 8 H. L. C. 712.

(*e*) *Taunton v. Royal Insur. Co.*, 2
 Hem. & M. 135.

(*f*) *Mair v. Himulaya Tea Co.*,
 1 Eq. 411.

(*g*) *Taft v. Harrison*, 10 Ha. 489.

(*h*) *Southall v. British Mutual*
Life Ass. Soc., 11 Eq. 65, and 6 Ch.
 614.

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| Bk. III. Chap. 9.
Sect. 4.

Injunctions
refused. | 33. The reduction of capital (<i>i</i>) ;
34. A general meeting called by shareholders under § 70 of the Companies clauses act, 1845 (<i>j</i>) ;
35. Giving effect to resolutions of a meeting convened by an irregular meeting of directors (<i>k</i>) ;
36. At the instance of a simple contract creditor to restrain the company from dealing with its assets as it pleases (<i>l</i>).
37. From paying a pension to the family of a deceased officer of the company (<i>m</i>). |
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5. *Receivers.*

Receivers.

The object of obtaining a receiver is to protect property and to insure its due application in accordance with the rights of the persons interested in it. A receiver is not the same as a manager appointed to carry on a business ; but when necessary the same person will be appointed receiver and manager. The Judicature act, 1873, § 25 (8), authorises the appointment of a receiver whenever the Court is of opinion that it is just or convenient to appoint one (*n*) ; but this general enactment is construed somewhat restrictively and with reference to the principles on which the Court of Chancery acted before the Judicature acts came into operation (*o*).

Receivers of a company's property are seldom appointed unless there are conflicting claims to be adjusted, *e.g.*, disputes between secured and unsecured creditors, between debenture holders and judgment creditors, between various classes of shareholders, &c. When a company is being wound up the liquidator is a receiver of its assets for the benefit of its shareholders and creditors ; but this does not prevent persons having claims upon the assets in priority to the liquidator

(*i*) *Bannatyne v. Direct Spanish Telegraph Co.*, 34 Ch. D. 287. An injunction would have been granted in this case had the proposed reduction of capital interfered with the rights of preference shareholders. Compare *Taylor v. Pilsen Light Co.*, 27 Ch. D. 268.

(*j*) *Isle of Wight Rail. Co. v. Tahourdin*, 25 Ch. D. 320.

(*k*) *Browne v. La Trinidad*, 37 Ch. D. 1.

(*l*) *Mills v. Northern Railway of Buenos Ayres Co.*, 5 Ch. 621.

(*m*) *Henderson v. Bank of Australasia*, 40 Ch. D. 170. Compare cases cited *ante*, p. 599, note (*g*).

(*n*) Just or convenient is construed just and convenient. See *North London Rail. Co. v. Great Northern Rail. Co.*, 11 Q. B. D. 30.

(*o*) *Ibid.* For the effect of the appointment of a receiver on the nature of a debenture holder's security, see *ante*, p. 197. For receivers appointed at the instance of judgment creditors of a railway company, see *ante*, pp. 278, 279.

from obtaining a receiver of them so as to protect their preferential rights. The liquidator, however, is usually appointed the receiver in such cases (*p*). Bk. III. Chap. 9.
Sect. 4.

A receiver is an officer of the Court, and any interference with him or with the property under his protection is punishable as a contempt of Court. A person who desires to obtain such property must apply to the Court for an order for its delivery to him or for permission to take it (*q*).

A manager of a business is never appointed by the Court unless temporarily and with a view to a sale or winding up of the business (*r*).

6. *Of mandamus.*

The Common law procedure act, 1854(*s*), authorises the issuing of a mandamus in an action to enforce the fulfilment of any duty in the fulfilment of which the person applying for the writ is personally interested; and the Judicature act, 1873, § 25 (8), has still further enlarged the power of the Court to grant a mandamus (*t*). An action for mandamus can be brought in the Chancery Division of the High Court (*u*). It has been held that the writ ought not to issue for the purpose of compelling the specific performance of an ordinary agreement (*x*), but it has been allowed to go to compel a chartered company to register as a shareholder, a person entitled to be so registered by the provisions of the company's deed of settlement (*y*): and in a recent action for mandamus a clerk has been ordered to deliver up papers (*z*).

It has been recently decided that where an action for mandamus will lie, the prerogative writ will not be allowed to issue (*a*). It will, therefore, be seldom necessary or proper to apply for a prerogative writ to settle disputes between companies and their members. Prerogative writ.

(*p*) See *Perry v. Oriental Hotel Co.*, 5 Ch. 420.

(*q*) *Russell v. East Anglian Rail. Co.*, 3 Me. & G. 104.

(*r*) Partn. 545 *et seq.*; *Roberts v. Eberhardt*, Kay, 148.

(*s*) 17 & 18 Vict. c. 125, § 68, repealed by 46 & 47 Vict. c. 49.

(*t*) See R. S. C. Ord. LIII.

(*u*) *Paris Skating Rink Co.*, 6 Ch. D. 731.

(*x*) *Benson v. Paull*, 6 E. & B. 273.

(*y*) *Norris v. Irish Land Co.*, 8 E. & B. 512.

(*z*) *Nowington Local Board v. Eldridge*, 12 Ch. D. 349.

(*a*) *R. v. Lambourn Valley Rail. Co.*, 22 Q. B. D. 463.

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Sect. 4.

A prerogative writ has, however, been allowed to compel—

The production of a company's register to a creditor (*b*) ;

The entry on the register of the probate of the will of a deceased shareholder (*c*) ;

The registry or transfer of shares (*d*) ;

The production to a shareholder, for a proper purpose and at a proper time, of such books as he has a right to inspect (*e*) ;

The admission of persons to offices to which they have been elected (*f*) ;

The election of directors and officers required to be appointed (*g*) ;

The appointment of a public officer by a company empowered to sue and be sued by one (*h*) ;

The payment by such a company of a debt for which judgment has been obtained against its officer (*i*) ;

The making of a call for the payment of a creditor having no other remedy (*j*).

On the other hand, a mandamus has been refused to compel a company to pay a shareholder dividends wrongfully withheld from him (*k*) ; to compel a company to register a transfer of its stock (*l*) ; to compel it to produce its books to the share-

(*b*) *R. v. Derbyshire, &c., Rail. Co.*, 3 E. & B. 784.

(*c*) *R. v. Worcester Canal Co.*, 1 M. & R. 529.

(*d*) See *R. v. Londonberry, &c., Rail. Co.*, 13 Q. B. 998 ; *R. v. Wing*, 17 ib. 645 ; *R. v. General Cemetery Co.*, 6 E. & B. 415, and see *ante*, p. 61, and *infra*, note *l*.

(*e*) *R. v. Saddlers' Co.*, 10 W. R. 87. See, also, *R. v. Wills, &c., Canal Co.*, 3 A. & E. 477, and *R. v. Mariquita, &c., Mining Co.*, 1 E. & E. 289. In the two last cases, however, the writ was refused. See as to inspection and taking copies, *Mutter v. Eastern and Midlands Rail. Co.*, 35 Ch. D. 92, and the cases there cited. *Holland v. Dickson*, 37 ib. 669, shows that an injunction will be granted, and that a mandamus is not necessary.

(*f*) *Anon.*, 2 Str. 696 ; *Da Costa*

v. Russia Co., ib. 783 ; Com. Dig. Mand. B. 2.

(*g*) See *per* Tindal, C.J., in *Thomas Haven Dock Co. v. Rose*, 4 Man. & Gr. 559.

(*h*) See *per* Parke, B., in *Steward v. Greaves*, 10 M. & W. 721.

(*i*) *Corpe v. Glyn*, 3 B. & Ad. 801 ; *R. v. St. Katherine Dock Co.*, 4 B. & Ad. 360.

(*j*) See *R. v. Victoria Park Co.*, 1 Q. B. 288, where the mandamus was refused, the creditor being in a position to issue execution against the company, though not to get satisfaction by so doing.

(*k*) *R. v. Whitstable Co.*, 7 East, 353.

(*l*) *R. v. Bank of England*, 2 Doug. 524 ; *R. v. Loudon Ass. Co.*, 5 B. & A. 899. *R. v. Lambourn Valley Rail. Co.*, 22 Q. B. D. 463 ; *R. v. Shropshire, &c. Canal Co.*, L. R. 8 Q. B. 420, *ante*, note *d*.

holders for the purpose of enabling them to consider whether a dividend shall or shall not be declared and paid (*m*); to compel it to make calls for the payment of a debt (*n*). Bk. III. Chap. 9.
Sect. 4.

The Queen's Bench Division alone has power to grant the prerogative writ (*o*); and the Court has a wide discretion in granting or refusing it. No prerogative writ of mandamus is allowed to go except to enforce some public duty (*p*); nor unless the applicant has been denied the right he seeks to enforce (*q*); nor unless he applies for the writ within a reasonable time after such denial (*r*); nor unless the Court is satisfied that its interference is sought for a proper purpose (*s*); nor unless the applicant having a legal right has no other adequate legal remedy (*t*). Discretion of
the court.

It has been held that, although a corporation may be compelled by mandamus to affix its seal to a document (*u*), it cannot be thus compelled to remove its seal from a document (*r*). But it is submitted that the difference between doing and undoing, is, in such a case as that alluded to, a difference in words rather than in substance. Registers of shareholders may be rectified both by inserting names wrongfully omitted and by striking out names wrongfully inserted, as has been seen already (*y*). Mandamus to
undo.

7. Other Miscellaneous Actions.

Promoters of companies cannot maintain actions against each other for remuneration for their services unless there is

(*m*) *R. v. Bank of England*, 2 B. & A. 620.

(*n*) *R. v. Victoria Park Co.*, 1 Q. B. 288.

(*o*) See *Glossop v. Keston Local Board*, 12 Ch. D. p. 115, and *R. v. Lambourn Valley Rail. Co.*, 22 Q. B. D. p. 469. As to the mode of application for such a writ, see Crown Office Rules, 1886, rr. 60 *et seq.*

(*p*) See the cases in notes *k* to *n*, and Shortt on Mandamus.

(*q*) *R. v. Wilts, &c., Canal Co.*, 3 A. & E. 477.

(*r*) *R. v. Cockermouth Inclosure*

Commissioners, 1 B. & Ad. 378.

(*s*) *R. v. Wilts, &c., Canal Co.*, 3 A. & E. 477; *R. v. Liverpool, Manchester, &c., Rail. Co.*, 21 L. J. Q. B. 284.

(*t*) See *R. v. Chester*, 1 T. R. 396; *R. v. Stafford*, 3 ib. 616; *R. v. Victoria Park Co.*, 1 Q. B. 288; *R. v. Registrar of Joint Stock Companies*, 21 Q. B. D. 131. *R. v. Lambourn Valley Rail. Co.*, 22 Q. B. D. 463.

(*u*) *R. v. Windham*, Cowp. 377; *R. v. Cambridge*, 3 Burr. 1617; *R. v. York*, 4 T. R. 639.

(*x*) *Ex parte Nash*, 15 Q. B. 92.

(*y*) *Ante*, p. 61.

Bk. III. Chap. 9.
Sect. 4.

some express contract for their payment (z). But a person who is retained by the promoters to assist them, is entitled to be paid by them for his services, although he may afterwards himself subscribe for shares in the company (a).

Company re-
quired to pay
expenses of
formation.

Where a company is required by act of Parliament to apply its first funds in defraying the expenses of its formation, an action lies against it by those who have expended their money, time, and trouble, in forming the company, and who have no other paymasters. But a clause in a company's deed of settlement or articles of association to the like effect, does not necessarily have the same operation (b).

Contribution
between them.

Although the promoters of companies are not impliedly liable to each other for services rendered, nor for money expended by any of them in the prosecution of their common design; still, if they render themselves jointly liable to a third party, and, by virtue of that liability, some only of them are compelled to pay what ought, as between themselves and the others, to be paid by all, an action of contribution lies, at the suit of those who have been so compelled to pay, against the others; and even before the Judicature acts it was no objection to such an action that there were unsettled accounts which required to be taken, before what was due from each to the other could be properly ascertained (c).

Actions for
deposits agreed
to be paid.

If a person has agreed to take shares in a proposed company, and to pay a deposit in respect of such shares, an action will lie for the recovery of the deposit he has agreed to pay (d). The persons to bring such action are those with whom the

(z) See *Holmes v. Higgins*, 1 B. & C. 74; *Wilson v. Curzon*, 15 M. & W. 532; *Milburn v. Codd*, 7 B. & C. 419.

(a) *Lucas v. Beach*, 1 Man. & Gr. 417. See, too, *Caldicott v. Griffiths*, 8 Ex. 898; and *Barnett v. Lambert*, 15 M. & W. 489. Compare *Gorgier v. Morris*, 7 C. B. N. S. 588, where the company was never formed, and the agreement was to pay the plaintiff in shares.

(b) See *ante*, pp. 146, *et seq.*

(c) *Boulter v. Peplow*, 9 C. B. 493;

Batard v. Hawes, 2 E. & B. 287; *Edger v. Knapp*, 7 Jur. 583, C. P. It may be observed here, that where the promoters of a company retain a solicitor, they are all liable to be sued by him for payment of his bill, and that a delivery by him of his bill, duly signed, to any one of those liable, is a sufficient delivery to all, *Mant v. Smith*, 4 H. & N. 324; and that any one of them is entitled to tax his bill, *Re Stephen*, 2 Ph. 562.

(d) See, for instance, *Duke v. Dive*, 1 Ex. 36; *Duke v. Forbes*, *ib.* 356.

agreement sued upon was made. If, therefore, the agreement was with the members of the provisional committee, those members, and not the managing section of them, are the proper parties to sue (*e*). Bk. III, Chap. 9.
Sect. 4.

Actions by subscribers for the return of their deposits have been already considered (*f*).

With respect to ordinary actions between companies and their shareholders, it is unnecessary to add to what has been said in previous chapters. The following subjects have, in fact, been already considered, viz.:— Actions between
companies and
their members.

1. Actions between the promoters of companies and by and against persons who have subscribed for shares (*g*).

2. Applications by shareholders to have a company's register rectified (*h*).

3. Actions by shareholders whose shares have been illegally forfeited (*i*).

4. Actions between the buyers and sellers of shares, and between them and the brokers employed by them (*k*).

5. Actions for contribution and indemnity (*l*).

6. Actions for calls (*m*).

7. Actions for dividends (*n*).

(*e*) *Woolmer v. Tobyn*, 10 Q. B. 691.

(*f*) *Ante*, p. 29 *et seq.*, and § 1 (3) of the present chapter.

(*g*) *Ante*, p. 29.

(*h*) *Ante*, p. 61, 121.

(*i*) *Ante*, p. 534.

(*k*) *Ante*, p. 487 *et seq.*

(*l*) *Ante*, p. 378 *et seq.*

(*m*) *Ante*, p. 427.

(*n*) *Ante*, p. 437.

BOOK IV.

OF THE DISSOLUTION AND WINDING-UP OF COMPANIES.

*Introductory.*Bk. IV.
Introductory.

THE reasons for which an ordinary partnership is held to be dissolved by the death, lunacy, or bankruptcy of any one of its members, or by a transfer of his interest, or by his determination to retire, have no application to companies the shares in which are transferable, and the management of the concerns of which is entrusted by all the shareholders to directors. Nor is there any authority to the effect that companies with transferable shares are or can be dissolved by, or on the happening of, those events which are sufficient to dissolve, or induce the Court to dissolve, an ordinary partnership. The death, bankruptcy, or retirement of a shareholder dissolves his connection with the company (*a*), but does not dissolve the bond by which the remaining shareholders are held to each other (*b*).

Some of the reasons which are sufficient to induce the Court to dissolve a partnership are, however, quite as applicable to companies as to ordinary firms, *e.g.*, the impossibility of going on as contemplated (*c*).

Effect of transfer of shares when company is not incorporated.

BUT notwithstanding the often repeated assertion, that at common law unincorporated companies with transferable shares are mere partnerships, it ought not to be inferred that what is sufficient to dissolve a partnership will also dissolve such a company. The personal relations between the members of a company are very different from those which exist between

(*a*) See *Jefferys v. Smith*, 3 Rus. 158; *Greenfield's case*, 5 De G. & S. 599.

(*b*) See *Thomas v. Wells*, 16 C. B. N. S. 508, where, however, the

marginal note is scarcely warranted by the judgment.

(*c*) *Electric Telegraph Co. of Ireland*, 22 Beav. 471.

partners, and the power to dissolve depends on those relations. But to apply the doctrines relating to the dissolution of partnerships to companies would be to destroy and not to uphold the agreement into which the members have entered. At the same time it was formerly very generally assumed that an unincorporated company with transferable shares might, like an ordinary partnership, be dissolved at the will of any member, if no time was fixed for its duration; and, although the point does not appear to have been ever actually decided, Lord Eldon, in *Van Sandau v. Moore* (d), and the late Vice-Chancellor Shadwell in *Wheeler v. Van Wart* (e), evidently thought that, under ordinary circumstances, unincorporated joint-stock companies might be dissolved by any shareholder on his giving notice to all the other shareholders. Until, however, this view shall have been judicially acted upon, it may be considered as open to question, and, for the reasons given above, the writer ventures to submit that, on principle, it cannot be sustained.

Bk. IV.
Introductory.

Whatever doubt there may be as to unincorporated companies, there can be none with respect to companies incorporated by the Crown or by special act of Parliament or by registration. A corporation cannot, by common law, be dissolved by the will of all its members; for a charter cannot be got rid of without the assent of the Crown, nor can an act of Parliament be got rid of without the assent of the Legislature. What cannot be done by all the members of a body corporate is, *a fortiori*, incapable of being done by less than all, and it consequently follows that, as regards the power of an individual member to insist on a dissolution, there is no analogy at common law between partnerships and incorporated companies. Moreover, as a corporation is distinct from the persons composing it, events which affect those persons individually, *e.g.*, lunacy, death, or bankruptcy, do not affect the existence of the body corporate; and here again, therefore, there is no analogy at common law between partnerships and companies which are incorporated (f).

Effect where the
company is
incorporated.

(d) 1 Russ. 463.

(e) 2 Jur. 292, and 9 Sim. 193.
See, too, *Miles v. Thomas*, 9 Sim. 606.

(f) As to the dissolution of corporations, see Grant on Corporations, p. 295, *et seq.*

Bk. IV.
Introductory.
Causes of the
dissolution of
companies.

Adverting, therefore, solely to the general principles applicable to partnerships and corporations, it is submitted :—

1. That a company which is not incorporated, but the shares in which are transferable, is not dissolved by the death or bankruptcy of a shareholder (except as to him), and ought not to be dissolved by the Court, simply because a shareholder desires a dissolution.

2. That such a company may be dissolved, not only in the manner and under the circumstances provided for in its deed of settlement (*g*), but also (by the Court) whenever it can be shown that the business of the company cannot be carried on as intended.

3. That a company which is incorporated by charter may be dissolved by a formal surrender or cancellation of its charter, and in such other way, if any, as is pointed out therein.

4. That a company which is incorporated by act of Parliament can be dissolved only as therein provided, or by another act of Parliament.

But as will be seen presently, several acts of Parliament, commonly called the winding-up acts, have been passed expressly for the purpose of providing for the dissolution and winding up of companies, whether unincorporated or incorporated, and whether incorporated by charter, special act of Parliament, or registration. These acts do not prevent the Court from dissolving unincorporated companies in the exercise of its general jurisdiction (*h*) ; but they greatly extend its power, especially as regards incorporated companies ; and, practically, the law relating to the dissolution and winding up of companies may be said to depend almost entirely on the acts in question.

Unincorporated
companies.

With respect to bankruptcy, it would seem that unincorporated companies may be adjudicated bankrupt, as they are not excepted by the Bankruptcy act, 1883 (*i*). But it is not probable that recourse will ever be had to proceedings in bankruptcy against them, as they can be much more readily and

(*g*) See *Lyon v. Haynes*, 5 Man. 271 ; *Clements v. Bowes*, 17 ib. 167. & Gr. 405.

(*i*) 46 & 47 Vict. c. 52, § 123.

(*h*) *Jones v. Charlemont*, 16 Sim.

completely wound up under the Companies act, 1862, as will be seen hereafter. Incorporated companies cannot now be adjudicated bankrupt (*k*). Bk. IV.
Introductory.

Winding-up acts.

The first of the winding-up acts was 7 & 8 Vict. c. 111, ^{7 & 8 Vict. c. 111.} which had three principal objects; viz., 1. to give courts of bankruptcy jurisdiction over incorporated, trading or commercial companies, and to enable those courts to apply the assets of such companies in payment of their debts; 2. to enable the affairs of a company adjudicated bankrupt to be wound up in Chancery, so that if its assets were not sufficient to pay its creditors in full, the members might be compelled to raise what might be necessary for that purpose by a contribution amongst themselves, and so that the rights of the members, *inter se*, might also be finally adjusted; and 3. to facilitate the discovery of any abuses which might have attended the formation or management of the company, and the causes of its failure, and to authorise prosecutions against its delinquent directors or officers. This statute, after being considerably modified by 11 & 12 Vict. c. 45, and 20 & 21 Vict. c. 78, was finally repealed by the Companies act, 1862 (see §§ 205—207).

The next statute passed for winding up companies was 11 & 12 Vict. c. 45, which was shortly afterwards amended by 12 & 13 Vict. c. 108. ^{Winding-up acts of 1848 and 1849.} These acts were also repealed by the Companies act, 1862; but they have formed the basis of the law of winding up, and a few observations upon them will not be out of place.

The main object of the Winding-up acts of 1848 and 1849, ^{Object of the Winding-up acts of 1848 and 1849.} was to enable companies to be dissolved, and wound up more expeditiously than was possible by means of an ordinary suit in Chancery, and more completely than was possible under the act of 7 & 8 Vict. c. 111. This latter act was passed principally for the purpose of enabling creditors to obtain payment of their debts from insolvent companies. The acts of 1848

(*k*) Ibid. As to remitting winding-up proceedings to bankruptcy, see the Companies act, 1862, § 8, *infra*, c. 1, § 1.

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and 1849, on the other hand, were passed principally for the purpose of supplying shareholders with a means by which they might relieve themselves from their liabilities to creditors, by having the assets of the company properly got in, and applied in payment of its debts, and by having any deficiency made good by contribution amongst themselves. Under these acts an order for the winding up of a company was obtained by petition to the Court of Chancery, and was carried into effect by an officer called the official manager, acting under the direction of one of the equity judges (or of a master in Chancery) whose duty it was to determine what debts were payable by the company, who were the persons to pay them, what calls, if any, were to be made on such persons for their payment, how the conflicting claims of such persons *inter se* were to be adjusted, how the costs of the winding up were to be provided for, and lastly, how the surplus assets, if any, were to be divided.

Defects of these
acts.

1. Creditor's
right to sue
at law.

These acts had several great defects. The first defect was that the creditors were not restrained from pursuing their legal remedies against the shareholders individually; so that, notwithstanding a winding-up order, any shareholder might be, and frequently was, singled out and utterly ruined by a creditor of the company, although if the creditor could have been compelled to wait, he would have received his principal and interest in full from funds provided by a proper contribution from all the members of the company. This defect was in a great measure removed by 21 & 22 Vict. c. 78, under which the creditors could be required to choose a representative (*the creditors' representative*), and be compelled to wait for payment out of the funds raised by contribution.

21 & 22 Vict.
c. 78.

2. Creditors
not entitled
to obtain a
winding-up
order.

A second defect was that the creditors of a company were not entitled to obtain an order for winding it up. They consequently either sued the shareholders individually, or proceeded against the company in bankruptcy, under 7 & 8 Vict. c. 111. By suing the shareholders individually, the latter were liable to be, and frequently were, utterly ruined; when, under a better machinery, such a result might have been avoided without detriment to the creditors. By proceeding against the company in bankruptcy under 7 & 8 Vict. c. 111,

when the same company was being or might be wound up in Chancery under the acts of 1848 and 1849, the Courts of Chancery and of Bankruptcy were brought into collision, and questions of great difficulty as to the rights of their respective officers arose (*l*). Bk. IV.
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A third defect was that no provision was made by which a company's affairs could be wound up by the shareholders themselves without the intervention of the Court of Chancery. 3. No voluntary winding up.

A fourth defect, which was rendered worse rather than better by the institution of a creditors' representative, was the excessive cost of winding-up proceedings. 4. Expense.

All these defects, except the last, were removed by the Joint-stock companies acts 1856, 1857, and 1858. Under these acts companies might be wound up at the instance of creditors as well as of contributories; the creditors could not sue the shareholders individually, and could only obtain payment from them by means of a contribution; and the shareholders themselves were enabled, when not pressed by their creditors, to wind up their affairs without having recourse to the expensive machinery of the Court of Chancery. Under these acts companies with limited liability could only be ordered to be wound up in bankruptcy; other companies in Chancery (*m*). Acts of 1856 to 1858.
19 & 20 Vict. c. 47.
20 & 21 Vict. c. 14.
21 & 22 Vict. c. 60.

The last-mentioned acts were themselves repealed by the Companies act, 1862 (25 & 26 Vict. c. 89), which with the acts amending it will be found in the appendix. Companies act, 1862.

The Companies act, 1862, provides three modes of winding up, viz.— Modes of winding up.

- 1, compulsorily, or as it is termed by the Court;
- 2, voluntarily, without the intervention of any court; and,
- 3, voluntarily, but subject to the supervision of the Court (see §§ 79, 129, and 147).

Companies registered under the act of 1862, or under the

(*l*) See on this subject, *Aitchison v. Lee*, 3 Drew. 637, and on appeal, 3 Jur. N. S. 95; *London and Eastern Banking Corporation*, 2 De G. & J. 484; *Mitre Assurance Association*, 29 Beav. 1; *Ex parte Colingridge*, 14 Jur. 1129. Such a

conflict may possibly still arise in the case of unincorporated companies. See *ante*, p. 610.

(*m*) See, as to this, *Plumstead Water Co.*, 2 De G. F. & J. 20; *Welsh Potosi Mining Co.*, 27 L. J. Ch. 311.

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former acts of 1856—1858 (*n*), may be wound up in any of these three ways. Unregistered companies can only be wound up in the first of them (*o*) (see § 199, cl. 2). Each of the above methods requires to be studied separately; but there is so much common to them all, that in order to avoid repetition it will be convenient to consider the subject of winding up generally under the first head, and then to draw attention shortly to the differences between winding up by the Court and the other modes of winding up. The dissolution of railway companies will be alluded to in a separate chapter.

Malicious
petitions.

A company is necessarily seriously injured in its credit by having proceedings taken against it in order to have it wound up; and an action lies against a person who maliciously and without reasonable cause presents a petition for the winding up of a company, and in order to sustain such an action it is not necessary for the company to prove special pecuniary damage (*p*).

(*n*) *Torquay Bath Co.*, 32 Beav. 581.

(*o*) To this there are the following exceptions. By 25 & 26 Vict. c. 87, § 17 (now repealed by 39 & 40 Vict. c. 45, § 4), industrial and provident societies registered under that act can be wound up voluntarily under the Companies act, 1862, and by 39 & 40 Vict. c. 45, § 17, societies

registered under that act may be wound up in the same manner. This is also the case with building societies governed by the Building Societies act, 1874 (37 & 38 Vict. c. 42, § 32), and see *Re Sunderland, &c., Building Society*, 21 Q. B. D. 349.

(*p*) *Quartz Hill Gold Mining Co. v. Eyre*, 11 Q. B. D. 674.

CHAPTER I.

WINDING UP BY THE COURT.

SECTION I.—THE COURT HAVING JURISDICTION OVER THE
WINDING UP OF A COMPANY.

THE Court, *i.e.*, the Court having jurisdiction to wind up a company under the Companies act, 1862, is—

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1. In the case of companies which are or have been engaged in (*a*) working mines within and subject to the jurisdiction of the Stannaries, or have been formed for that object, and are not actually engaged in, nor bound by contract to engage in, any works beyond the limits of the Stannaries (*b*)—the court of the Vice-Warden of the Stannaries (§ 81) (*c*).

2. In the case of registered building societies, and industrial and provident societies—the county court within the jurisdiction of which their office is situate (*d*).

3. In the case of other companies registered in England, or, if unregistered, having a principal place of business there—the Chancery Division of the High Court of Justice (§§ 81 and 199, cl. 1, and Judicature act, 1873, § 34).

4. In the case of companies registered in Ireland, or, if unregistered, having a principal place of business there—the Chancery Division of the High Court of Justice in Ireland (*ib.*):

5. In the case of companies registered in Scotland, or, if

(*a*) *Silver Valley Mines*, 18 Ch. D. 472, overruling *East Botallack Mining Co.*, 34 Beav. 82, which decided that it was not necessary that the mine should have been worked. As to the concurrent jurisdiction of the Court of Chancery where the company is not formed solely for the above purpose, see *Penhale and Lomax, &c., Co.*, 2 Ch. 398.

(*b*) 50 & 51 Vict. c. 43, § 28. But this section only applies to metalliferous mines and tin streaming works, see § 3.

(*c*) See 32 & 33 Vict. c. 49, amended by 50 & 51 Vict. c. 43.

(*d*) See as to building societies, 37 & 38 Vict. c. 42, §§ 4 & 32; and as to industrial and provident societies, 39 & 40 Vict. c. 45, § 17.

Bk. IV. Chap. 1. unregistered, having a principal place of business there—the
Sect. 2. Court of Session in either division thereof (*ib.*) (*e*).

Mines in
Stannaries.

If, however, the Vice-Warden of the Stannaries certifies that, in his opinion, a company engaged in working a mine within his jurisdiction would be more advantageously wound up in the Chancery Division of the High Court, then the Court is such Chancery Division (§ 81).

Proceedings in
bankruptcy.

The Chancery Divisions of the High Courts in England, and Ireland respectively, after making an order for winding up a company, may direct all subsequent proceedings for winding up the same to be had in the Court of Bankruptcy having jurisdiction in the place in which the registered office of the company is situate (§ 81) (*f*), or, if the company is unregistered, in the place where it has a principal place of business (§ 199, cl. 1). The Court of Bankruptcy in England is now the High Court or a county court (*f*).

Further, by the Companies act, 1867, the Chancery Division of the High Court in England has power, where it makes an order for winding up a company, to remit the subsequent proceedings to a county court (§ 41 et seq.).

County court.

When these powers are exercised, the Court in Bankruptcy, or the County Court, as the case may be, becomes the court for the purposes of winding up the company, and has all the powers of the Chancery Division of the High Court (*g*).

Duchy of
Lancaster.

The Court of Chancery of the Palatine Duchy of Lancaster has power to wind up companies whose registered offices are within the limits of its jurisdiction (*h*). But the jurisdiction of the Palatine Court is not exclusive (*i*).

SECTION II.—COMPANIES WHICH CAN BE WOUND UP BY THE COURT, OR SUBJECT TO ITS SUPERVISION.

Under the older winding-up acts, questions of considerable difficulty arose with respect to what companies were within

(*e*) See, also, Companies act, 17 & 18 ib. c. 82, the Court of 1886, 49 Vict. c. 23, § 5. Chancery of Lancaster acts, 1850

(*f*) See 46 & 47 Vict. c. 52, § 92. and 1854, and the general orders of

(*g*) See the statutes, and *Ex parte* that Court.

Hirtzel, 2 De G. F. & J. 653.

(*i*) *Lancashire Co-operative Build-*

(*h*) See 13 & 14 Vict. c. 43, and *in J. Co.*, W. N. 1867, p. 246.

their provisions. Thus the 7 & 8 Vict. c. 111, applied only to commercial and trading companies (*k*); and whether the Winding-up act of 1848 applied to companies not falling within the same description, was by no means free from doubt (*l*). The Winding-up act of 1849 greatly extended the operation of the act of 1848. But, notwithstanding the very general word *association*, used in these acts, and although they extended to associations which were neither partnerships nor quasi-partnerships, (*e.g.*, to friendly societies, and to associations having for their object the formation of companies,) still associations not having gain for their object, and in which there were no shares and no liability to contribute, were not within them (*m*).

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Under the Companies act, 1862, the following companies may be wound up by the Court, or subject to its supervision:—

Companies
capable of
being wound
up under the
act of 1862.

1. All companies registered under the act, whether formed under it or not (§§ 79, 180, and 196).

2. All companies registered under the acts of 1856—1858 (see §§ 176 and 177).

3. All other partnerships, associations, or companies, except railway companies incorporated by act of Parliament, consisting of more than seven members (see § 199) (*n*).

What companies can be registered under the act and what not, has been pointed out in a former page (*o*); and it is only necessary to observe that any company or association of persons which is capable of being registered at all may be registered for the purpose only of being wound up (*p*).

(*k*) See, as to these words, *Ex parte Burge*, 1 De G. & S. 588; *Ex parte Spackman*, ib. 599. *London, &c., Ins. Assoc.*, 6 Ch. 421.

(*l*) See *Ex parte Burge*, 1 De G. & S. 588; *Ex parte Spackman*, ib. 599, and 1 Mac. & G. 170.

(*m*) See *St. James's Club*, 2 De G. M. & G. 383.

(*n*) An unregistered insurance company formed between the passing of the Joint Stock Companies acts, 1856 and 1857, may be wound up under this section. *Bank of*

(*o*) *Ante*, p. 114, *et seq.*

(*p*) 25 & 26 Vict. c. 89, § 180. See *Northumberland and Durham Banking Co.*, 2 De G. & J. 357, and *Liverpool Borough Bank v. Mellor*, 3 H. & N. 551, as to registering banking companies governed by 7 Geo. 4, c. 46, in order that they may be wound up. Both of these cases turned on the acts of 1856–8.

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Companies
specially in-
corporated.

Railway com-
panies.

Cost-book
mining com-
panies.

The circumstance that a company is incorporated by a special act of Parliament, or by a grant from the Crown, does not prevent such company from being wound up under the Companies act, 1862 (*q*); even although the property of such company cannot be sold without a special act of Parliament (*r*); and even though part of its property may be a railway (*s*).

Whether a railway company incorporated by special act of Parliament can be registered under the Companies act, 1862, and then wound up under it, is doubtful (*t*); unregistered railway companies (*u*) are expressly excepted from the act (see § 199), and can only be wound up under it where they are duly authorised to abandon their railways under the provisions of other acts of Parliament (*x*).

Companies formed on the cost-book principle for working mines within the jurisdiction of the Stannaries may be wound up under the Companies act, 1862. The law as to winding up these companies was formerly in a very unsatisfactory state (*y*).

(*q*) See § 199, and *Wey v. Arun Junction Canal Co.*, 4 Eq. 197; *Free Fishermen of Faversham*, 36 Ch. D. 329, where, however, the Court refused to make a winding-up order; *South London Fishmarket Co.*, 39 Ch. D. 324. See, also, under the older acts, *Isle of Wight Ferry Co.*, 2 Hem. & M. 597; *Electric Telegraph of Ireland*, 22 Beav. 471, and *Ex parte Croysdill*, 7 De G. M. & G. 199.

(*r*) *Bradford Navigation Co.*, 10 Eq. 331. This case was appealed, but the appellant was not entitled to be heard, see 5 Ch. 600.

(*s*) *Ecmouth Docks Co.*, 17 Eq. 181.

(*t*) See *ante*, p. 116, note (*p*), and §§ 79, 180 and 196; and *Ennis and West Clare Rail. Co.*, 3 L. R., Ir. 94, where such a railway company was wound up. The Court, after a long examination of the various statutes and authorities, expressed a strong opinion that such a company might

be registered and wound up, but decided the case on the ground that § 192 of the Companies act, 1862, precluded them from going behind the registrar's certificate.

(*u*) As to what is a railway company, see *Ecmouth Docks Co.*, 17 Eq. 181. A dock company having a railway was there held not to be a railway company, and was ordered to be wound up; but compare *Great Northern Rail. Co. v. Takourdin*, 13 Q. B. D. 320; *East and West India Dock Co.*, 38 Ch. D. 576. In *Brentford and Isleworth Tramways Co.*, 26 Ch. D. 527, a tramway company was held not to be a railway company, and was ordered to be wound up, though incorporated by a special act and not registered.

(*v*) See 32 & 33 Vict. c. 114, § 4; 30 & 31 Vict. c. 127, § 31, *et seq.*; 13 & 14 Vict. c. 83. See *infra*, c. 4.

(*y*) They were, if formed for working mines in Cornwall, wholly

Friendly societies, building societies, and industrial and provident societies, whether registered under 25 & 26 Vict. c. 87, 37 & 38 Vict. c. 42, or 39 & 40 Vict. c. 45, or not, may be wound up under the provisions of the Companies act, 1862 (z), but as regards registered building and industrial societies the court having jurisdiction is the County Court (a).

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Friendly
Societies, &c.

Scip companies have been ordered to be wound up under the older acts (b); and it is apprehended that they can also be wound up under the act of 1862; for although shares transferable to bearer, and not paid up in full, cannot be validly created under the Companies act, 1862; yet it by no means follows that a company with such shares cannot be wound up (c).

A company which has been dissolved, but the members of which are still under liabilities incurred before the dissolution may be wound up; and orders have been frequently made for winding up companies which have amalgamated with, or

Dissolved
companies.

excepted from the act of 1848, as it originally stood, see 11 & 12 Vict. c. 45, § 2; *Ex parte Wyld*, 1 Mac. & G. 1. Provision was, however, afterwards made for winding them up in Chancery in certain specified cases, 12 & 13 Vict. c. 108, § 1; 20 & 21 Vict. c. 78, § 12. See, on this subject, *Bosworthon Mining Co.*, 26 L. J. Ch. 612; *Wheal Anne Mining Co.*, 10 W. R. 330; and as to the right of creditors to oppose, see *Trefoil and Messer Mining Co.*, 2 J. & H. 421. Cost-book companies formed for working mines in Devonshire might be wound up in Chancery even under the act of 1848, see *South Lady Bertha Mining Co.*, 2 J. & H. 376. Companies formed on the cost-book principle, but not for working mines within the jurisdiction of the Stannaries, were clearly within the Winding-up acts of 1848 and 1849. See, now, 32 & 33 Vict. c. 19, and 50 & 51

Vict. c. 43, § 28, and *ante*, p. 615.

(z) See *Queen's Benefit Building Soc.*, 6 Ch. 815; *Professional, &c., Building Soc.*, ib. 856; *Sunderland Building Soc.*, 21 Q. B. D. 349. See, also, *infra*, app. No. 2, on industrial and provident societies. Such societies were within the provisions of the Winding-up acts, 1848-9. See *St. George's Building Society*, 4 Drew. 154; and as to loan societies, *Ex parte Smith*, 1 Sim. N. S. 165. See *Crown and Cushion Loan Fund Soc.*, 14 Jur. 874. See 39 & 40 Vict. c. 45, § 17.

(a) See *ante*, p. 615.

(b) *Barclay's case*, 26 Beav. 177; *Ex parte Grisewood*, 4 De G. & J. 544.

(c) See *General Co. for Promotion of Land Credit*, 5 Ch. 363, and *Princess Reuss v. Boss*, L. R. 5 H. L. 176. See, *infra*, as to illegal companies.

Bk. IV, Chap. 1. have transferred their assets and liabilities to, other com-
Sect. 2. ————— panies (*d*).

Companies not
within the act.

The 199th section of the Companies act, 1862, is expressed in terms sufficiently large to include all unregistered societies and corporations of whatever kind consisting of more than seven members at the date of the petition (*e*), with the single exception of railway companies incorporated by act of Parliament. But the general scope of the Winding-up acts, shows that there are corporations aggregate to which the winding-up provisions of the Companies act, 1862, have no application: *e.g.*, municipal corporations, ecclesiastical corporations aggregate, and societies such as the Royal Society, incorporated by royal charter for the advancement of science (*f*). The property of all such corporations is liable to their debts, but their members are not personally liable to pay or to contribute to the payment of such debts; nor have the members any rights *inter se* analogous to those which are capable of being adjusted in the course of winding up.

Clubs.

Moreover there are some unregistered and unincorporated societies incapable of being wound up under the act. An ordinary club is an example (*g*). Such an association has no resemblance to a partnership, quasi-partnership, or inchoate partnership; it is not formed for the division of profit amongst its members; they have no shares, in the sense in which that word is used with reference to partnerships, companies, or associations more or less like them; and even if the members

(*d*) For examples, see *Family Endowment Society*, 5 Ch. 118; and under the older acts, *Ex parte Phillips*, 3 De G. & S. 3; *Ex parte Dee*, ib. 112; *Warwick and Worcestershire Rail. Co.*, 13 Jur. 651. A dissolved company, which had been adjudicated bankrupt under 7 & 8 Vict. c. 111, might, nevertheless, be wound up under the acts of 1848-9, see *ante*, p. 613, note (*m*).

(*e*) *South London Fishmarket Co.*, 39 Ch. D. 324, where, in order to prevent the company from being

wound up, the directors endeavoured to get rid of their shares and reduce the number of shareholders below seven. Members in this section does not necessarily mean shareholders. *Bolton Benefit Loan Soc.*, 12 Ch. D. 679.

(*f*) See *Free Fishermen of Faversham*, 36 Ch. D. 329.

(*g*) *St. James's Club*, 2 De G. M. & G. 383, reversing S. C., 20 L. J. Ch. 630. But it seems that a club might be registered under the act, see § 6 and 30 & 31 Vict. c. 131, § 23.

of a club, are, as amongst themselves, bound otherwise than in honour to contribute to its debts, there is nothing to prevent any member who has paid his subscription from sending in his resignation, and so getting rid of any such obligation (*h*).

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For similar reasons, it is doubtful whether an unregistered mutual marine insurance society can be wound up where the members are not in arrear in their contributions. Such a society is not a partnership (*i*); and although mutual marine societies have been ordered to be wound up (*k*), the power of the court to wind them up does not appear to have been contested until too late, and is very doubtful (*l*). The difficulty, however, of winding up such a society otherwise than under the act is very great.

Mutual Marine
Insurance
Societies.

The court has power to order a mutual life insurance society to be wound up, if the society be proved to be insolvent, though instead of so doing it may, if it thinks fit, reduce the amounts of the contracts of the society (*m*).

Mutual Life
Insurance
Societies.

Illegal companies (*n*) cannot be wound up by the court at the instance of themselves or of their own members (*o*); nor at the instance of creditors who had notice of the illegality when their debts were contracted (*p*). It is doubtful whether other creditors can obtain an order to wind up such a com-

Illegal com-
panies.

(*h*) See the last note, and as to suits for winding up clubs, *Richardson v. Hastings*, 7 Beav. 301, 323, and 11 ib. 17.

(*i*) Partn. 51.

(*k*) *E. g.*, *Arthur Average Association*. See 3 Ch. D. 522, and 10 Ch. 542; *Shields Marine Ins. Assoc.*, 5 Eq. 368; *London Marine Ins. Assoc.*, 8 Eq. 176; *Ex parte Phillips*, 3 De G. & S. 3. See the special report made by the Master in this case, 14 Jur. 929.

(*l*) See *Ex parte Hargrove*, 10 Ch. 542; *Arthur Average Association*, 3 Ch. D. 522; *London Marine Ins. Assoc.*, 8 Eq. 176.

(*m*) 33 & 34 Vict. c. 61, §§ 21 &

22. *Great Britain Mutual Life Assurance Soc.*, 16 Ch. D. 246; 19 Ch. D. 39; 20 Ch. D. 351. And see *Rudow v. Great Britain Mutual Life Ass. Soc.*, 17 Ch. D. 600.

(*n*) As to which, see *ante*, p. 130, *et seq.*

(*o*) See *Barclay's case*, 26 Beav. 177; *Fenn's case*, 4 De G. M. & G. 295; *Ex parte Longworth's Executors*, Johns. 465, affirmed on appeal, 1 De G. F. & J. 17. See, also, the next two notes.

(*p*) See, as to this, *Padstow Total Loss Association*, 20 Ch. D. 137; *South Wales Atlantic Steam Ship Co.*, 2 Ch. D. 763, and the cases in the next note.

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pany (*q*) ; but there is nothing to prevent an illegal company being wound up by its own members without any judicial assistance. Moreover, it must be remembered that if a company is illegal simply because it is not registered, the impediment to being wound up can be removed by registration.

Foreign
companies.

A company formed and registered under the act can be wound up under it, although the subscribers of the company's memorandum of association may be all foreigners resident abroad, and although the objects of the company may be mainly the transaction of business abroad (*r*). It has been doubted whether the Court can wind up a company registered under the act, but shown by its own memorandum and articles to be formed exclusively of foreigners resident abroad for the transaction of business abroad (*s*) ; but admitting that such a company ought never to have been registered, its continued existence as a registered company cannot apparently be stopped except through the machinery of a winding-up order.

A company formed and registered abroad, and having a branch office (*t*) in this country, but not registered here, may be ordered to be wound up under the Companies act, 1862 (*u*) ; and the fact that steps are being taken to wind up the com-

(*q*) Compare the last case, and *Ex parte Hargrove*, 10 Ch. 542, with the observations of Jessel, M. R., and Brett, L. J., in *Padstow Total Loss Association*, 26 Ch. D. 137, at pp. 143 & 146. It should be borne in mind that winding up is the modern substitute for an action and sci. fa., as to which, see *ante*, p. 277.

(*r*) *General Co. for promotion of Land Credit*, 5 Ch. 363, and *Princess of Reuss v. Bos*, L. R. 5 H. L. 176.

(*s*) *Princess of Reuss v. Bos*, L. R. 5 H. L. 176.

(*t*) In *Lloyd Générale Italiano*, 29 Ch. D. 219, Pearson, J., refused to make an order for winding up a foreign company which had no branch office in England, but carried on business here by agents.

Compare the cases in the next note.

(*u*) *Commercial Bank of India*, 6 Eq. 517 ; *Commercial Bank of South Australia*, 33 Ch. D. 174 ; *Matheson Brothers, Limited*, 27 Ch. D. 225. And see the following cases under the older acts : a Spanish Rail. Co., *Ex parte Turner and James*, 3 De G. & S. 127, and 2 Mac. & G. 169 ; a German Mining Co., *Ex parte Chippendale*, 4 De G. M. & G. 19 ; a Mexican Mining Co., *Barclay's case*, 26 Beav. 177 ; a Calcutta Bank, see *Ex parte Watson*, 3 De G. & S. 253, where, however, no order was made ; an Indian Rail. Co., *Ex parte Wolesey*, 3 De G. & S. 101 ; a Belgian Rail. Co., *Ex parte Moss*, 14 Jur. 754.

pany in the country in which the company is registered does not affect the jurisdiction of the English court (*x*). But the writer apprehends that it is not competent for any court in this country to dissolve a corporate body created by a competent foreign authority; and a foreign corporation, therefore, cannot be wholly wound up and dissolved in this country. At the same time, if a foreign incorporated company were registered, the corporate body created by registration might be wound up and dissolved without any undue exercise of jurisdiction.

If a company which ought not to be ordered to be wound up is nevertheless ordered so to be, the validity of the winding up order can only be questioned (at least by the company or a contributory) by an appeal (*y*).

Other cases on the older acts.

The following note of other decisions on the acts of 1848-9 is appended for reference:—

The general words partnerships, associations, and companies, were held to include projected, but abortive, railway and other companies, provisionally registered under 7 & 8 Vict. c. 110 (:). But as the subscribers to abortive companies are neither partners nor quasi-partners, it followed, that, unless they had done something whereby they had, as between themselves, incurred a liability to contribute to the demands to which they were respectively subject, an order to wind up a company, never in fact formed, was useless; for, except in the case supposed, there could be no contributories (*a*).

Irish companies were specially provided for by 4 & 5 Vict. c. 45, § 17 (*b*).

Scotch companies were not subject to the acts at all (*c*).

(*x*) *Matheson Brothers, Limited*, 27 Ch. D. 225; *Commercial Bank of South Australia*, 33 Ch. D. 174.

(*y*) See the *Arthur Average Association*, 3 Ch. D. 522; 10 Ch. 542; and *Padstow Total Loss Association*, 20 Ch. D. 137.

(*z*) *Bright v. Hutton*, 3 H. L. C. 341; *Ex parte James*, 1 Sim. N. S. 140; *Ex parte Woolmer*, 5 De G. & S. 117, and 2 De G. M. & G. 665; *Ex parte Barber*, 1 Mac. & G. 176;

Ex parte Turner and James, 3 De G. & S. 127, and 2 Mac. & G. 169; *Ex parte Besley*, 2 Mac. & G. 176; *Ex parte Holinsworth*, 3 De G. & S. 7.

(*a*) See *Ex parte James*, 1 Sim. N. S. 140; *Ex parte Besley*, 3 Mac. & G. 287.

(*b*) *Ex parte Fisher*, 3 De G. & S. 116.

(*c*) 11 & 12 Vict. c. 45, § 127, and 12 & 13 Vict. c. 108, § 40.

SECTION III.—PERSONS AT WHOSE INSTANCE A WINDING-UP ORDER
WILL BE MADE.

Under the Companies act, 1862, an order for winding up a company, may be applied for by all or any of the following persons, viz. :—

1. The company ;
2. One or more of its creditors ;
3. One or more of its contributories ;

and every order made on any petition operates in favour of all the creditors and all the contributories of the company in the same manner as if it had been made upon the joint petition of a creditor and a contributory (§ 82).

A company required to be registered is not entitled, whilst unregistered, to apply for an order to be wound up (*e*).

Creditors.

Any creditor (*f*) of a company is entitled to petition for a winding-up order, and it is not necessary that his debt should be of any particular amount ; but, as will be pointed out in the next section, the evidence which he must adduce in support of his petition depends on the amount of his debt.

A landowner who has a claim against a company for purchase-money and compensation in respect of lands taken by the company under the Lands Clauses act, is not a creditor of the company until a conveyance has been executed (*g*). An assignee of a debt is entitled to petition (*h*), and an executor of a creditor may present a petition before he has obtained probate of the will (*i*). A secured creditor may also present a petition without giving up his security or losing any of his rights (*k*).

(*e*) See § 210, and *Waterloo Assurance Co.*, 31 Beav. 586. In this last case the company was ordered to be wound up on a contributories' petition ; but the company was not illegal : it had been formed and registered under 7 & 8 Vict. c. 110.

(*f*) See, as to disputed debts, *infra*, p. 637, a person claiming unliquidated damages, and whose claim is disputed, cannot obtain an order,

Pen-y-ran Colliery Co., 6 Ch. D. 477 ; *Gold Hill Mines*, 23 Ch. D. 210.

(*g*) *Milford Docks Co.*, 23 Ch. D. 292.

(*h*) *London and Birmingham Alkali Co.*, 1 De G. F. & J. 257.

(*i*) *Masonic and General Life Assurance Co.*, 32 Ch. D. 373.

(*k*) *Moor v. Anglo Italian Bank*, 10 Ch. D. 681.

Whether a debenture holder is entitled to present a petition depends upon whether he is entitled to enforce payment of the debenture by an ordinary action for a debt due and payable by the company. Thus in *Exmouth Docks Co. (l)*, and *Herne Bay Waterworks Co. (m)*, it was held that the rights of the debenture holders were by the statute, under which the debentures were issued, limited to obtaining the appointment of a receiver, and that they were therefore not entitled to a winding-up order; so in *Uruguay Central & Hygueritas Rail. Co. of Monte Video (n)*, the holder of an instrument described as a mortgage bond was held not entitled to a winding-up order, on the ground that he was not a creditor of the company, the covenant to pay being entered into by the company with the trustees of a covering deed, and not with the bond-holders themselves. On the other hand, in *Olathe Silver Mining Co. (o)*, where there was an agreement by the company with the bearer of the debentures to pay him, a debenture holder was held entitled to present a winding-up petition.

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Debenture
holders.

Under the Life assurance companies act, 1870, the holder of a policy granted by a life assurance company may petition for the winding-up of the company if it is insolvent, although the policy is not yet due (*p*).

Policy holders

The meaning of the word contributory will be examined hereafter; for the present purpose the term includes an alleged contributory (see § 74). But the legislature has not said what sort of allegation is to be regarded as sufficient; an admission by the petitioner that he is a contributory in respect of at least one share, seems, however, to be necessary (*q*). It may, however, be remarked, that several of the older cases in which orders were made under the Winding-up act of 1848 on the petition of the subscribers to abortive companies could not be supported at the present day, upon the ground that the peti-

Contributories.
Alleged con-
tributories.

(*l*) 17 Eq. 181.

(*m*) 10 Ch. D. 42.

(*n*) 11 Ch. D. 372, explained in *Olathe Silver Mining Co.*, 27 Ch. D. 278.

(*o*) 27 Ch. D. 278.

(*p*) 33 & 34 Vict. c. 61, § 21. A policy-holder includes an annuitant,

see § 2. See, also, 35 & 36 Vict. c. 41, § 4, as to subsidiary companies.

(*q*) *Ship's case*, 2 De G. J. & Sm. 544; *Times Fire Ass. Co.*, 30 Beav. 596; *Continental Bank*, W. N. (1867) 114 and 178; 15 W. R. 548, and 16 L. T. 112.

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tioners in them were contributories; if those cases are to be supported at all, it must be upon the ground that the petitioners claimed to be contributories, without being so in reality (*r*).

30 & 31 Vict.
c. 131, § 40.

In order, however, to put a stop to the improper practice of buying shares in a company, simply with a view to obtain a right to petition to wind up the company, it is in substance enacted that no contributory shall be capable of presenting a winding-up petition, unless the members are reduced below seven; or unless the petitioner is an original allottee of the shares in respect of which he petitions; or unless he or his wife, or a trustee for him or her has held and been registered in respect of such shares for six months during the eighteen months next before the presentation of the petition; or unless he has acquired them by the death of their former owner (*s*). Registration for six months is enough (*t*), and if the company has been ordered to register the petitioner, he need not be registered in fact (*u*).

Member in
arrear of calls.

A winding-up order may be made at the instance of a contributory who has not paid his calls (*x*).

Holders of fully
paid-up shares
in limited
companies.

A holder of fully paid-up shares in a limited company is not entitled to petition for a winding-up order; unless he can show that the company is in such a state of solvency that there is a reasonable probability of sufficient assets being left for the shareholders to give him a tangible interest in having the company wound up (*y*).

(*r*) That the petitioners in *Ex parte Copper*, 3 De G. & S. 1; *Ex parte Cooke*, ib. 148, and *Ex parte Holinsworth*, ib. 7, would not at the present time be held to be contributories, see *Bright v. Hutton*, 3 H. L. C. 341.

(*s*) 30 & 31 Vict. c. 131, § 40. The petition need not state the fact, *City and County Bank*, 10 Ch. 470.

(*t*) *Wala Wyalal Indian Gold Mining Co.*, 21 Ch. D. 849.

(*u*) *Patent Steam Engine Co.*, 8 Ch. D. 464.

(*x*) *Diamond Fuel Co.*, 13 Ch. D.

400, explaining *Steam Stoker Co.*, 19 Eq. 416; *European Life Ass. Soc.*, 10 Eq. 403. Compare the older cases referred to *infra*, note (*f*).

(*y*) *Diamond Fuel Co.*, 13 Ch. D. 400; *Rica Gold Washing Co.*, 11 Ch. D. 36, modifying the earlier cases; *Tumacacori Mining Co.*, 17 Eq. 534; *National Savings Bank*, 1 Ch. 547; *London Armoury Co.*, 10 Jur. N. S. 962; *Lancashire Brick and Tile Co.*, 34 Beav. 330; *Patent Artificial Stone Co.*, ib. 185; *Cheshire Patent Salt Co.*, 1 N. R. 533.

A person who has been declared by the Court to be entitled to be a shareholder, but who, owing to the negligence of the company, has not been registered, is entitled to petition for a winding-up (*z*). Bk. IV. Chap. 1.
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A scrip-holder is not entitled to petition for a winding-up order unless he is, or admits himself to be, a contributory (*a*); or unless there are surplus assets which he has a right to have distributed. Scrip-holders.

Under the Building societies act, 1874, any member authorised by three-fourths of the members present at a general meeting of the society specially called for the purpose, and any judgment creditor for not less than fifty pounds, may petition to have the society wound up, either voluntarily under the supervision of the Court, or by the Court; but no other person may do so (*b*). Building societies.

The following persons were held entitled to petition under the Winding-up acts of 1848 and 1849; and the decisions in their cases may be usefully referred to on questions arising under the act of 1862:—

A scrip-holder of a provisionally registered railway company, who had not signed either the subscribers' agreement or the parliamentary contract (*c*);

An original subscriber for shares in an abortive company, and a member of its provisional committee (*d*);

A member of the managing committee of an abortive company, who had been compelled to pay the charges of the company's solicitor, but who had not taken any shares (*e*);

A member of a company who had not paid his calls (*f*);

A manager of a cost-book company, who was a creditor of the company for advances made by himself (*g*);

A contributory resident abroad (*h*);

(*z*) *Patent Steam Engine Co.*, 8 Ch. & S. 7.
D. 464.

(*a*) *Littlehampton Steam Ship Co.*, 34 Beav. 256, and 2 De G. J. & S. 148. (*c*) *Ex parte Cooke*, 3 De G. & S.

521, Turner, L. J., dissenting. See under the older acts, *Ex parte Copper*, 3 De G. & Sm. 1. (*f*) *Ex parte Lawton*, 1 K. & J. 204; *Ex parte Hodsell*, 19 L. J. Ch. 234. See, too, *Sherwood Loan Co.*, 1 Sim. N. S. 165. Compare these with the cases cited *supra*, note (*x*).

(*b*) 37 & 38 Vict. c. 42, § 32, subs. 4, and see *Sunderland Building Soc.*, 21 Q. B. D. 349. (*g*) *Ex parte Sedgwick*, 2 Jur. N. S. 949.

(*c*) *Ex parte Copper*, 3 De G. & S. 1. See note (*a*). (*h*) *Ex parte Latta*, 3 De G. & S. 186. But he may be compelled to give security for costs, *ibid*.

(*d*) *Ex parte Holmsworth*, 3 De G.

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The executors of a deceased member, though not members themselves (*i*) ;
Past members (*k*) ;

Where a petition was presented by a shareholder who had entered into an arrangement with his creditors under the Bankrupt act, an order was refused, the trustees of the deed of arrangement not having been served (*l*).

SECTION IV.—THE CIRCUMSTANCES UNDER WHICH A COMPULSORY WINDING-UP ORDER WILL BE MADE.

Circumstances
under which
a company may
be wound up.

A company registered under the act may be wound up by the Court, *i.e.*, compulsorily under the following circumstances (§ 79) :—

a) When
registered.

1. Whenever the company has passed a special resolution, requiring the company to be wound up by the Court ;

2. Whenever the company does not commence its business here or abroad (if its object be to carry on business abroad) within a year from its incorporation, or suspends its business for the space of a whole year (*m*) ;

3. Whenever the members are reduced in number to less than seven ;

4. Whenever the company is unable to pay its debts ;

5. Whenever the Court is of opinion that it is just and equitable that the company should be wound up.

b) When
unregistered.

An unregistered company (except a railway company) may be wound up if it has not less than seven members (*n*) (§ 199, cl. 3)—

1. Whenever the company is dissolved, or has ceased to

(*i*) *Re Norwich Yarn Co.*, 12 Beav. 366.

(*k*) *Times Fire Assurance Co.*, 30 Beav. 596.

(*l*) *Ex parte Walter*, 3 De G. & S. 2.

(*m*) See *Capital Fire Insurance Association*, 21 Ch. D. 209 ; *Tumacacori Mining Co.*, 17 Eq. 534 ; *Metropolitan Railway Warehouse Co.*, 15 W. R. 1121, L. J. Aban-

doning part of the business is not enough, *Norwegian Titanic Iron Co.*, 35 Beav. 223. Nor is a temporary suspension of business with the consent of a large majority of shareholders, *Middlesborough Assembly Rooms Co.*, 14 Ch. D. 104.

(*n*) *Bolton Benefit Loan Society*, 12 Ch. D. 679 ; *South London Fish Market Co.*, 39 Ch. D. 324.

carry on business, or is carrying on business only for the purpose of winding up its affairs (*o*) ;

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2. Whenever the company is unable to pay its debts ;

3. Whenever the Court is of opinion that it is just and equitable that the company should be wound up.

Further, by the Companies act, 1880 (43 Vict. c. 19, § 6), the registrar of joint stock companies is empowered, after the necessary notices have been given, to strike off the register the name of any company which he has reasonable cause to think has ceased to carry on business, and on notice of this being published in the *Gazette*, such company is dissolved.

The act declares the circumstances under which a company is to be deemed unable to pay its debts, both where the company is registered (§ 80), and where it is not (§ 199, cl. 4).

Inability to
 pay debts.

The circumstances mentioned are, in the case of registered companies, in substance as follows (§ 80) :

a) In case of
 registered
 companies.

1. Whenever a creditor for more than 50*l.* has served on the company a demand, under his hand, requiring the company to pay the sum due, and the company has for three weeks afterwards neglected to pay, or secure, or compound for the same to the creditor's satisfaction ;

2. Whenever execution, issued by a judgment creditor against the company, is returned unsatisfied ;

3. Whenever it is proved, to the satisfaction of the Court, that the company is unable to pay its debts (*p*).

In the case of unregistered companies, two other circumstances are added (*q*) (§ 199, cl. 4), viz. :

b) In case of
 unregistered
 companies.

1. Whenever a member is sued for a debt of the company, and notice of the proceeding is served on the company, and the company has not within ten days paid, secured, or compounded for the debt, or procured the proceeding to be stayed, or indemnified the defendant to his satisfaction against the same, and the costs thereof ;

2. Whenever, in the case of a company working a mine

(o) See *Family Endowment Soc.*, 5 Ch. 118, which had transferred its business to another company.

Co. of Utah, 20 Eq. 268 ; *Globe New Patent Iron, &c., Co.*, ib. 337.

(p) This lets in any evidence of insolvency, *Flagstaff Silver Mining*

(q) The substance only of the section is attempted to be here given.

Bk. IV. Chap. 1. within the jurisdiction of the Stannaries, a customary decree
 Sect. 4. or order absolute for the sale of the effects of the mine has
 been made, in a creditor's suit, in the Vice-Warden's Court.

Railway Further, in the case of an unregistered railway company
 company. there must be a warrant for the abandonment of the
 railway (*r*).

Discretion of In connection with the above enactments, it is necessary to
 Court. advert to section 86, which empowers the Court, upon hearing
 a petition for a winding-up order, to dismiss the same with
 or without costs, adjourn the hearing conditionally or un-
 conditionally, or make any interim or other order that it
 deems just.

Moreover, by sections 91 and 149, the Court is empowered
 to have regard to the wishes both of the contributories and of
 the creditors, and to have meetings called in order to ascertain
 such wishes (*s*). It is obvious, from the foregoing provisions,
 that in all cases the Court has a very wide discretion as to
 what it will do when applied to for an order to wind up. But
 wide as the discretion is, there are certain principles by which
 the Court is guided, and which reduce the practice on this
 subject to reasonable certainty. These principles will be best
 expounded by considering first the circumstances under which
 the act declares that a winding-up order can be made, and
 secondly the circumstances by which the Court is usually
 influenced in exercising its discretion as to the course it will
 pursue.

1. *Circumstances under which a winding-up order can be made.*

No company can be wound up by the Court except in the
 cases specified above (*t*), and of these the only two which have
 given rise to difficulty are thus expressed: 1. "*Whenever it is
 proved to the satisfaction of the Court that the company is un-
 able to pay its debts.*" 2. "*Whenever the Court is of
 opinion that it is just and equitable that the company should
 be wound up.*"

(*r*) 32 & 33 Vict. c. 114, § 4.

dec., *Co.*, 17 Eq. 1.

(*s*) This power can be exercised
 on the hearing of a winding-up
 petition, *Western of Canada Oil*,

(*t*) *Langham Skating Rink Co.*, 5
Ch. D. 669; *Cork Shipping and*
Mercantile Co., 7 L. R. Ir. 148.

The difficulty as to insolvency has been to determine whether prospective debts ought to be taken into account. This point was discussed in the case of the *European Life Assurance Society* (u), and it was there decided that by inability to pay debts was meant inability to pay debts actually due and payable; and that liabilities under subsisting policies were not to be reckoned: and this construction of the clause in question may be taken to be correct, although it has been since enacted that in considering the solvency of life insurance companies, the Court is to take into account the contingent or prospective liabilities under policies and annuities, and other existing contracts (c).

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1. Inability to
 pay debts.
 European Life
 Assurance
 Society.

In considering the question of insolvency, uncalled-up capital must be estimated as an asset; and unless there is evidence to show that it cannot be recovered it will be estimated at its full nominal value (y). On the other hand, the paid-up capital of a company is not a debt within the meaning of the statute (z); it is not a debt of the company in any legal sense.

Position of
 capital.

Assuming a company not to be insolvent, circumstances may nevertheless exist to render it just and equitable to wind it up. It is obvious, from the context of the act, that the words, "whenever the Court is of opinion that it is just and equitable that the company should be wound up," were intended to apply to cases other than those previously enumerated; and it has been decided that, wide as the words are, they only apply to cases resembling some one or other of those before described. Unless, therefore, a company can be brought within one or more of the previous specific provisions, or unless there are questions to be settled and rights to be adjusted which can only be settled and adjusted by converting into money the assets of the company, whether actual or raiseable by calls, and by discharging the company's liabilities, distributing the surplus assets and finally dissolving the company, the Court will not order it to be wound up (a).

2. Just and
 equitable to
 wind up.

(u) 9 Eq. 122.

(z) See § 80, and § 199, cl. 4.

(c) 33 & 34 Vict. c. 61, § 21.

(a) *The Agriculturist Cattle Ins.*

(y) *European Life Ass. Soc.*, 9 Eq. 122. See, as to insurance companies, *infra*, p. 634.

Co., 1 Mac. & G. 170. See, also, the judgments in *Ex parte Wgld*, 1 Mac. & G. 1; *Ex parte Wise*, 1

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Misconduct on
part of direc-
tors.

Companies
which ought to
be stopped.

Fraudulent
companies.
London and
County Coal
Company.

Abortive
companies.

In conformity with these principles it has been held, as well under the older acts as under the Companies act, 1862, that where the object of the petitioner is to make directors or others account to the company for the misapplication of its assets, or to make good losses for which they are liable to the company (*b*), or to prevent the directors from exceeding their powers, *e.g.*, by amalgamating with another company (*c*), the Court will leave the petitioner to such other remedies, if any, as he may have, and will not make a winding-up order unless the liabilities of the company are such as to render it necessary or expedient to have recourse to a general winding-up.

At the same time if it can be shown to the satisfaction of the Court that a company, although not insolvent, ought to be annihilated, the Court will order it to be wound up. Proof of inability to commence business after the lapse of a year (*d*), continuing fraud (*e*), improper registration (*f*), will induce the Court to put an end even to a solvent company.

In a case in which a company had been fraudulently got up, and was kept on foot by fraudulent practices, the V.-C. Wood ordered the company to be wound up at the instance of a contributory, although the company had only existed three or four months, and although it consisted of only eleven members, and although the majority of them desired to go on, and although it was not proved that the company was unable to pay its debts (*g*). The evidence showed that it would be unjust and inequitable to allow the company to go on.

Again if it be proved to be impossible for a company to carry on the business for which it was formed, the Court will order the company to be wound up even though it has been in existence less than a year and is solvent; and the fact that the majority of the shareholders are opposed to the petition,

Drew. 465; *Suburban Hotel Co.*, 2 Ch. 737; *Diamond Fuel Co.*, 13 Ch. D. 400. See, also, the other cases referred to in the summary of cases at the end of this section, under the head "Petition dismissed, Company not Insolvent."

(*b*) *Anglo-Greek Steam Co.*, 2 Eq. 1; *Ex parte Wise*, 1 Drew. 465.

(*c*) See *Irrigation Co. of France*, 6 Ch. 176.

(*d*) *Tumacacori Mining Co.*, 17 Eq. 534.

(*e*) See *infra*, note (*g*).

(*f*) *Ante*, p. 622, note (*r*).

(*g*) *London and County Coal Co.*, 3 Eq. 355.

does not affect the question, for a majority however large has no power to force a minority to embark in a business into which it has never undertaken to enter (*h*).

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The greatest difficulty, however, is felt in cases where there are no such circumstances as those just alluded to; but where a company is not prospering.

Company not
 prosperous.

Where a company's assets are sufficient to meet not merely its actual debts, but also its existing liabilities, the Court will not speculate on the possible consequences of continuing the business of the company, and will decline to wind it up (*i*). The fact of there having been fraudulent representations in the prospectus is not sufficient, as the shareholders may waive the fraud and decide to go on (*k*). The circumstance that a company which is solvent will, if not wound up, probably contract further liabilities, which it will be unable to pay, is not of itself sufficient to induce the Court to make a winding-up order (*l*). But if a company's assets, including its uncalled-up capital, are not sufficient to discharge its existing liabilities; then, although the company might be able to pay its existing debts, the Court will deem it just and equitable to order the company to be wound up (*m*).

As regards impossibility of going on at a profit, a difference exists between a limited and an unlimited company. If a company is unlimited, and its capital is all paid up and spent, and the company is making no profit, and is getting worse and worse, a shareholder is entitled to decline to run further risk, and to have the company wound up (*n*). But this reasoning does not apply to a limited company, and consequently the

Difference be-
 tween limited
 and unlimited
 companies.

(h) *Haven Gold Mining Co.*, 20 Ch. D. 151; *German Date Coffee Co.*, *ib.*, p. 169; *Suburban Hotel Co.*, 2 Ch. 737. See, also, *Diamond Fuel Co.*, 13 Ch. D. 400.

441.
(k) *Haven Gold Mining Co.*, 20 Ch. D. 154.

(l) See cases in note (*i*).

(i) *Langham Skating Rink Co.*, 5 Ch. D. 669, noticed *infra*; *Suburban Hotel Co.*, 2 Ch. 737; *Joint Stock Coal Co.*, 8 Eq. 146; *European Life Ass. Soc.*, 9 Eq. 122; *Professional, &c., Building Soc.*, 6 Ch. 856; *Planet Benefit Building Soc.*, 14 Eq.

(m) See the judgment in the *European Life Ass. Soc.*, 9 Eq. 122.

(n) *Partn.* p. 576, and *Norwich Yarn Co.*, 12 Beav. 366; *Electric Tel. of Ireland*, 22 Beav. 471. Compare *Professional, &c., Building Soc.*, 6 Ch. 856, where the petitioners were under no liability.

Bk. IV. Chap. 1. Sect. 4. Court has on several occasions declined to wind up a limited company under circumstances which would have induced it to wind up the company had it been unlimited (o). Thus in the *Langham Skating Rink Company* (p) the Court refused to order a company to be wound up, although the shares were not paid up in full and there was considerable evidence to show that profit was not to be expected. The company was not prospering and had abandoned most of the objects for which it had been formed; but it was not insolvent, and a majority of members opposed the petition.

Langham
Skating Rink
Co.

Life insurance companies. With respect to Life Assurance companies, it has been specially enacted as follows (q):—

33 & 34 Vict. c. 61, §§ 21, 22.

“The Court may order the winding-up of any company, in accordance with the Companies act, 1862, on the application of one or more policy-holders or shareholders, upon its being proved to the satisfaction of the Court that the company is insolvent, and in determining whether or not the company is insolvent, the Court shall take into account its contingent or prospective liability under policies and annuity and other existing contracts; but the Court shall not give a hearing to the petition until security for costs for such amount as the judge shall think reasonable shall be given, and until a *prima facie* case shall also be established to the satisfaction of the judge (r); and in case of a proprietary company having an uncalled capital of an amount sufficient, with the future premiums receivable by the company, to make up the actual invested assets equal to the amount of the estimated liabilities, the Court shall suspend further proceedings on the petition for a reasonable time (in the discretion of the Court), to enable the uncalled capital, or a sufficient part thereof, to be called up; and if, at the end of the original or any extended time for which the proceedings shall have been suspended, such an amount shall not have been realised by means of calls as, with the already invested assets, to be equal to the liabilities, an order shall be made on the petition as if the company had been proved insolvent.”

“The Court, in the case of a company which has been proved to be

(o) See, in addition to the case in the text, *London Suburban Bank*, 6 Ch. 641; *Suburban Hotel Co.*, 2 Ch. 737; *Joint Stock Coal Co.*, 8 Eq. 146. In each of these cases, the company was not prospering, but the majority of members desired to go on.

(p) 5 Ch. D. 669. The petition was a contributory's petition. See the last note, and compare *Diamond Fuel Co.*, 13 Ch. D. 400.

(q) 33 & 34 Vict. c. 61, § 21.

This act includes Mutual Life Assurance companies, see *Great Britain Mutual Life Assurance Society*, 16 Ch. D. 246. For the basis on which annuities and policies are to be valued, see Life Assurance Companies act, 1872, 35 & 36 Vict. c. 41, § 5, and *infra*.

(r) This is not necessary where the company has passed a resolution to wind up voluntarily, *British Alliance Ass. Corp.*, 9 Ch. D. 635.

insolvent, may, if it thinks fit, reduce the amount of the contracts of the Bk. IV. Chap. 1. company upon such terms and subject to such conditions as the Court thinks just, in place of making a winding-up order" (s). Sect. 4.

If the Court proceeds under this latter section the contracts to be included in the scheme for reduction are, in the absence of special circumstances, those in existence at the date of the presentation of the petition for winding up; and if there are two classes of policies, participating and non-participating, they must be reduced *pari passu*. The claims of policy-holders and annuitants, which have matured into debts before the date of the presentation of the petition, and all outside debts, must be paid in full by the company; and the company is entitled to receive in full payment of all monies then due to it, whether in respect of arrears of premium or otherwise (t).

2. *Circumstances influencing the discretion of the Court.*

Assuming that circumstances are proved to exist under which a company may be ordered to be wound up, it by no means follows that it will be ordered so to be (u). The Court, as already observed, has in all cases a wide discretion as to the course it will take; but in the exercise of this discretion a marked difference exists between cases in which a winding-up order is sought by creditors and those in which it is sought by contributories.

a) *Creditors' petitions.*

When a petition is presented by a creditor for an order to wind up a company, and his debt is not disputed, or has been established by legal proceedings, and there is evidence that the company is unable to pay its debts within the meaning of the statute, it is almost a matter of course to make the order (v); a) Creditors' petitions.

(s) 33 & 34 Vict. c. 61, § 22; 20 Ch. D. 352.

Great Britain Mutual Life Assurance Society, 16 Ch. D. 246. If a winding-up order has been made, it must be discharged before the Court proceeds under this section.

(t) *Great Britain Mutual Life Assurance Society*, 19 Ch. D. 39, affd.

(u) See this very clearly laid down in *Metropolitan Saloon Omnibus Co.*, 5 Jnr. N. S. 922.

(v) See *Western of Canada Oil Co.*, 17 Eq. 1, and the cases cited *infra*, notes (c) and (h).

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but if other creditors oppose the petition and it appears that the petitioning creditor will gain nothing by a winding-up order, the petition may be dismissed at once (*y*), or ordered to stand over (*z*). The opposition of the company, or the wishes of the contributories, go for little in such a case (*a*): nor does the fact that the contributories desire to wind up voluntarily (*b*) usually induce the Court to abstain from making a compulsory order (*c*). The smaller, moreover, the assets of the company, the less reason is there to attend to the wishes of the contributories; for where a company is clearly insolvent, its assets may be regarded as belonging rather to its creditors than to its members (*d*). But if the assets are very small and the company is being wound up voluntarily, the Court may make a supervision order instead of a compulsory order, unless the creditor shows that he would be prejudiced thereby (*e*).

The fact that the company is substantially a foreign company, and that there will be great difficulty in winding it up, is not sufficient to justify a refusal to make a winding-up order (*f*); and a winding-up order may be made even though winding-up proceedings are pending abroad (*g*).

Creditors
divided in
opinion.

If, however, the Court is satisfied by proper evidence that the majority of the creditors of a company are of opinion that a compulsory order to wind up is not desirable, the Court will give effect to their wishes (*h*); although where there had been

(*y*) *Uruguay Central, &c., Rail. Co. of Monte Video*, 11 Ch. D. 372; *Chapel House Colliery Co.*, 24 Ch. D. 259; *The Free Fishermen of Faversham*, 36 Ch. D. 329.

(*z*) *Great Western Coal Consumers' Co.*, 21 Ch. D. 769; *Olathe Silver Mining Co.*, 27 Ch. D. 278.

(*a*) See the next four notes.

(*b*) *General Rolling Stock Co.*, 34 Beav. 314.

(*c*) However, in the *Brighton Hotel Co.*, 6 Eq. 339, the Court gave the company time to make some arrangement for paying its creditors. So, also, in *Western of Canada Oil Co.*, 17 Eq. 1; *St. Thomas' Dock Co.*, 2 Ch. D. 116. This indulgence was,

however, refused in *Home Ass. Ass.*, 12 Eq. 114.

(*d*) *Isle of Wight Ferry Co.*, 2 Hem. & M. 597.

(*e*) *New York Exchange, Limited*, 39 Ch. D. 415.

(*f*) *Gen. Co. for Promoting Land Credit*, 5 Ch. 363, and *Princess of Reuss v. Bos*, L. R. 5 H. L. 176.

(*g*) *Commercial Bank of South Australia*, 33 Ch. D. 174; *Matheson Brothers, Limited*, 27 Ch. D. 225.

(*h*) *Olathe Silver Mining Co.*, 27 Ch. D. 278; *Chapel House Colliery Co.*, 24 Ch. D. 259; *Great Western Coal Consumers' Co.*, 21 Ch. D. 769; *Uruguay Central and Hygueritas Rail. Co. of Monte Video*, 11 Ch. D.

ample time to consult them, and they had not been called together, and had not expressed their wishes in such a way as to satisfy the Court, the opposition of a considerable number of them did not induce the Court either to refuse the order, or even to direct the petition to stand over until the creditors could be called together (*i*).

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Again, if the petitioning creditor has assigned or incumbered his debt, so as to have little, if any, interest in it, the Court will be reluctant to make an order at his instance (*k*): and if he has assigned his debt after the petition has been presented the Court will refuse the order (*l*).

Assignment of
petitioning
creditor's debt.

Further, if a company has been specially incorporated for public purposes the Court will not order it to be wound up at the instance of a creditor unless the Court is satisfied that he cannot otherwise obtain payment (*m*).

Company for
public pur-
poses.

Moreover, it was never intended that a petition to wind up a company should be had recourse to for the purpose of trying a disputed debt (*n*): and if the petitioner's debt is *bonâ fide* disputed the Court will either dismiss the petition at once (*o*), or at least not make a winding-up order, until the debt has been

Disputed debt.

372; *West Hartlepool Iron Works Co.*, 10 Ch. 618; *Western of Canada Oil Co.*, 17 Eq. 1; *St. Thomas' Dock Co.*, 2 Ch. D. 116; *Langley Mill Steel, &c., Co.*, 12 Eq. 26, and the next note.

(*i*) See *Oriental Commercial Bank*, W. N. 1866, 283. *The Imperial Mercantile Credit Ass.*, ib. 257, was decided on a contributory's petition; and *Gen. Rolling Stock Co.*, 34 Beav. 314.

(*k*) *European Banking Co.*, 2 Eq. 521, where the petition was dismissed.

(*l*) *Paris Skating Rink Co.*, 5 Ch. D. 959.

(*m*) *Exmouth Docks Co.*, 17 Eq. 181, where the petitioning creditor was an unpaid debenture-holder, and no application had been made for a receiver. And see per Fry, L. J.,

36 Ch. D. 347.

(*n*) In *Cercle Restaurant Castiglione Co. v. Lavery*, 18 Ch. D. 555; *Niger Merchants Co. v. Quipper*, ib. 557 note, and *Cadiz Waterworks Co. v. Barnett*, 19 Eq. 182, injunctions were granted to restrain the presentation of a petition, and in *Gold Hill Mines*, 23 Ch. D. 210, the petition was dismissed on motion, and all proceedings under it stayed. As to malicious petitions, see *ante*, p. 614.

(*o*) *Gold Hill Mines*, 23 Ch. D. 210; *London and Paris Banking Corporation*, 19 Eq. 444; *London Wharfing and Warehousing Co.*, 35 Beav. 37, where twenty-one days after demand had elapsed; *Catholic Publishing Co.*, 2 De G. J. & Sm. 116, where they had not. See, also, *Pen-y-van Colliery Co.*, 6 Ch. D. 477, *ante*, p. 624, note (*f*).

Ek. IV. Chap. 1. established (*p*). But the Court will itself judge whether the debt is disputed simply to get rid of the petition, or *bonâ fide* because it is not due (*q*), and unless the company adduce such evidence as will show that there is a question to be tried a winding-up order ought to be made (*r*).

Judgment
creditor.

Even if the petitioner has obtained judgment against the company, still if there is evidence to show that the judgment was obtained by fraud, and the petitioner declines an inquiry on the subject, his petition will be dismissed (*s*). At all events, a winding-up order ought not to be made in such a case without giving the company an opportunity of impeaching the judgment.

Creditor a
member seeking
an unfair
advantage.

Where the petitioning creditor was himself a member of the company, and the debt due to him was due by the rules of the company, and the company was solvent, and the object of the petitioner was to force the company to pay him in preference to other members in the same position as himself, the Court refused to make a winding-up order (*t*).

Amount of
debt.

Except in the case of building societies (*u*), it is not necessary that the petitioning creditor's debt should amount to 50*l.*; but if it is of less amount he must show that the company is unable to pay its debts by some other evidence than non-payment of himself within three weeks after demand. A judgment debt of less than 50*l.* followed by an unsatisfied execution has been decided to be sufficient (*x*). If non-payment within three weeks after demand is relied upon, that period must have expired before the presentation of the petition (*y*).

Ground of
petition.

Inability to pay debts is, in a creditor's petition, the ground generally relied upon for obtaining a winding-up order; but

(*p*) *Rhydyfelfed Colliery Co.*, 3 De G. & J. 80; *Inventors' Association*, 2 Dr. & Sm. 553. See, also, *Brighton Club and Norfolk Hotel Co.*, 35 Beav. 204.

(*q*) *King's Cross Industrial Dwellings Co.*, 11 Eq. 149.

(*r*) *Great Britain Mutual Life Assurance Society*, 16 Ch. D. 246.

(*s*) *Hope Mutual Life Assurance Co.*, 1 N. R. 542, L. J., and *Bowes*

v. Same Co., 11 H. L. C. 389.

(*t*) *Plawet Benefit Building Soc.*, 14 Eq. 441.

(*u*) See 37 & 38 Vict. c. 42, § 32, cl. 4.

(*x*) *London and Birmingham Alkali Co.*, 1 De G. F. & J. 257.

(*y*) *Catholic Publishing Co.*, 2 De G. J. & Sm. 116. See, also, *ante*, p. 629, note (*p*).

a creditor's petition may be supported on any of the other grounds mentioned in the statute (*ante*, p. 628).

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b) Contributories' petitions.

When a petition to wind up a company compulsorily is presented by a contributory, the Court will take into consideration not only the question whether the company is brought within one or more of the statutory provisions under which it may be wound up, but also whether an order to wind up is necessary or expedient having regard to the interests of the shareholders generally. This was clearly settled when the Winding-up acts of 1848—9 were in force (z); and not only did the Court decline to make a winding-up order under those acts at the instance of a contributory, where the company was not shown to be insolvent (a); but even where a company was under heavy liabilities, and had ceased to carry on its business, the Court would not order it to be wound up if measures were being taken to wind up its affairs out of court, and there was good reason to suppose that its liabilities would be discharged and its assets divided as satisfactorily without the interference of the Court as with it (b).

b) Contributories' petitions.
a) Under older acts.

The discretion entrusted to the Court by the Companies act, 1862, is certainly not more restricted than that which it possessed under the older acts (c); and in exercising that discretion, when a winding-up order is sought by a contributory, the Court is not only guided by the state of the company, but also by the utility of the order, if made (d), and by the wishes

b) Under the Companies act, 1862.

(z) See *Ex parte Wyld*, 1 Mac. & G. 1, where the company, although not prosperous, was solvent; *Ex parte Wise*, 1 Drew. 465; *Metropolitan Saloon Omnibus Co.*, 5 Jur. N. S. 922. In *Ex parte Goldsmith*, 14 Jur. 734, V.-C. Wigram seems to have thought that the act of 1848 was more imperative than it really was.

Ex parte Watson, 3 De G. & S. 253; *Ex parte Guest*, 5 ib. 458; *Re Monmouthshire and Glamorganshire Banking Co.*, 15 Beav. 74. See, too, *Ex parte Phillippis*, 1 Sim. N. S. 605, where a suit was pending.

(c) See §§ 86, 91, 149, of the act of 1862; *Suburban Hotel Co.*, 2 Ch. 737; *Professional, &c., Building Soc.* 6 Ch. 856; *Planet Benefit Building Soc.*, 14 Eq. 441.

(d) *Middlesborough Assembly Rooms*

(a) See the last note.

(b) *Ex parte Wise*, 1 Drew. 465;

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of the majority of the shareholders. Even where it is agreed on all hands that the company must be wound up, the Court will, as a rule, refuse to order it to be wound up compulsorily at the instance of a contributory, if the majority of other shareholders prefer to wind up voluntarily, or subject to the supervision of the Court, and *bonâ fide* intend so to do (*e*). If a resolution to wind up voluntarily has been duly passed and confirmed the Court will not order the company to be wound up compulsorily upon a contributory's petition; unless it be proved that the resolution has been improperly obtained, as for instance where it has been procured by directors or shareholders, whose conduct is complained of and whose object is to prevent inquiry, or unless the petition is supported by creditors (*f*). Nor will the Court grant a supervision order in such a case, unless special circumstances are proved (*g*). If, however, the contributory's petition was presented before the resolution for a voluntary winding-up was confirmed the case may be different (*h*).

Very small
companies.

Although one of the circumstances under which a registered company may be wound up by the Court is when the members are less than seven in number, the Court will not, at the instance of a contributory, order a company with very few members to be wound up compulsorily if a voluntary winding-up is desired, and there are no circumstances showing that the company will not be fairly wound up voluntarily (*i*). But if the question is whether the company shall be wound up or

Co., 14 Ch. D. 104; and *New Gas Generator Co.*, 4 Ch. D. 874, where there were no debts or assets worth mentioning, and no members except the subscribers to the memorandum of association. Compare *Tumacacori Mining Co.*, 17 Eq. 534, where there was property and fraud alleged.

(*e*) See *City and County Bank*, 10 Ch. 470; *London Mercantile Discount Co.*, 1 Eq. 277; *General International Agency Co.*, 36 Beav. 1.

(*f*) *Gold Co.*, 11 Ch. D. 701, where the earlier cases of *Bank of Gibraltar and Malta*, 1 Ch. 69; *Imperial Bank of China and Japan*,

ib. 339; *West Surrey Tanning Co.*, 2 Eq. 737; *Fire Annihilator Co.*, 32 Beav. 561; and *Littlehampton, &c., Steam Ship Co.*, 2 D. J. & S. 521, are examined. See, also, *London and Mercantile Discount Co.*, 1 Eq. 277. The question turns on the true construction of §§ 79, 129 and 145 of the Companies act, 1862.

(*g*) *Gold Company*, 11 Ch. D. 701, 718.

(*h*) *Gold Company*, 11 Ch. D. 701, 717; *West Surrey Tanning Co.*, 2 Eq. 737.

(*i*) *Natal Co.*, 1 Hem. & M. 639, where there were nine shareholders.

go on, and the Court thinks it ought to be stopped, the small number of the members is no reason why a compulsory order should not be made (*k*).

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Where, in the case of a limited company, a contributory seeks for a winding-up order, and the majority of the members are of opinion that there is a reasonable prospect of making arrangements for paying their debts (*l*), or of carrying on the business of the company with success, and they oppose the application on this ground, the Court will give effect to their wishes and decline to make a winding-up order (*m*); unless the company is a fraudulent company which ought to be stopped (*n*), or the object for which the company was formed is clearly unattainable (*o*). In the case of an unlimited company, however, the case is different, as has been already pointed out (*p*).

Majority of
 members de-
 siring to go on.

Although the act declares that a company shall be wound up if it does not commence business within a year from its incorporation, or if it suspends its business for the space of a year, yet, a company which has transferred its business to another company, and has ceased to carry on business itself only by reason of such transfer, will not be ordered to be wound up unless there are other grounds for the order in addition to suspension of business (*q*). If, however, the company which has transferred its business is unable to pay its debts, and the company which has taken its business does not discharge them, an order to wind up the first company will be made (*r*).

Companies
 amalgamated
 with others.

(*k*) *Sanderson's Patents Assoc.*, 12 Eq. 188, where there were only seven shareholders; *London and County Coal Co.*, 3 Eq. 355. But see *New Gas Generator Co.*, 4 Ch. D. 874.

ib. p. 169; *Suburban Hotel Co.*, 2 Ch. 737, and see *ante*, p. 632.

(*p*) See *ante*, p. 633.

(*l*) *City and County Bank*, 10 Ch. 470.

(*q*) *British Provident Assur. Society*, 1 Dr. & Sm. 113; *Anglo-Australian Assurance Co.*, 1 Dr. & Sm. 113, where the petitioner had concurred in the amalgamation; *Ex parte Cookson*, 15 Jur. 615.

(*m*) *Ante*, p. 633. See, also, *Factage Parisien Co.*, 10 Jur. N. S. 121, L. J.; *Metropolitan Saloon Omnibus Co.*, 5 Jur. N. S. 922, L. J.

(*r*) *Ex parte Lorton*, 1 K. & J. 204, where the petitioner was being sued by the creditors. See, also, *Pennant and Craigven Mining Co.*, 15 Jur. 1192; *Ex parte Dec*, 3 De G. & Sm. 112; *Ex parte Phillips*, 3

(*n*) *London and County Coal Co.*, 3 Eq. 355.

(*o*) *Harcen Gold Mining Co.*, 20 Ch. D. 151; *German Date Coffee Co.*,

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Amalgamation
under §§ 161
and 162.

Preliminary
inquiries.

It may here be observed, that if a company has passed a resolution to wind up voluntarily, and has transferred its business to another company, under §§ 161 and 162 of the Companies act, 1862, and a contributory is desirous of impeaching the validity of such transfer, he can only do so by an action. If he petitions for leave to bring an action and for a compulsory winding-up order, the petition will not be dismissed, but will be ordered to stand over with leave to bring an action if the Court is satisfied by the evidence before it that there are reasonable grounds for impeaching the transactions complained of (s).

Under the Winding-up act of 1848, § 12, the Court was expressly empowered to direct preliminary inquiries before finally disposing of a petition to wind up. This power is also exercisable under the Companies act, 1862, and in several cases petitions have been directed to stand over, in order that meetings might be held and the wishes of the creditors and contributories ascertained (t). At the same time it was decided under the older acts, and the same rule applies now, that no preliminary inquiries ought to be directed unless the Court feels unable to come to a satisfactory conclusion as to the proper course to take; nor unless it is also satisfied that further inquiry will enable it to form a more correct or decisive opinion (u).

Where there has been ample opportunity to ascertain the views of creditors or contributories, the Court will not allow

De G. & Sm. 3; *Family Endowment Soc.*, 5 Ch. 118, where, however, the petitioner was a creditor. See *infra*, as to insurance companies.

(s) See *Imperial Bank of China, India, and Japan*, 1 Ch. 339. See, also, *Irrigation Co. of France*, 6 Ch. 176, where a compulsory winding-up order was refused.

(t) See *infra*. Cases in which petitions stand over for such a purpose are not usually reported.

(u) See *Sherwood Loan Co.*, 1 Sim. N. S. 165; *Ex parte Pocock*, 1 De G. & S. 731; *Re Monmouth-*

shire and Glamorganshire Banking Co., 15 Beav. 74; *Ex parte Troutbeck*, 13 Jur. 157. In *Re The Great Eastern and Western Rail. Co.*, 3 De G. & Sm. 218, the petition was unopposed; but it was intimated that it would be well if no winding-up order were to be made on an unopposed petition, without a preliminary inquiry, as it had been found that such orders would very often not have been made if the Court had been more fully informed of the facts. This, however, is not the usual practice.

further time for the purpose, unless there is some special Bk. IV. Chap. 1.
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With respect to Life Insurance companies, which have amalgamated with another which is being wound up, it is provided Amalgamated Insurance companies. as follows by 35 & 36 Vict. c. 41, § 4:

“Where the business or any part of the business of a life assurance company has, either before or after the passing of this act, been transferred to another company under an arrangement in pursuance of which such first-mentioned company (in this act called the subsidiary company), or the creditors thereof, has or have claims against the company to which such transfer was made (in this act called the principal company), then if such principal company is being wound up by or under the supervision of the Court, either at or after the passing of this act, the Court shall (subject as hereinafter mentioned) order the subsidiary company to be wound up in conjunction with the principal company, and may, by the same or any subsequent order, appoint the same person to be liquidator for the two companies, and make provision for such other matters as may seem to the Court necessary, with a view to such companies being wound up as if they were one company; and the commencement of the winding up of the principal company shall, save as otherwise ordered by the Court, be the commencement of the winding up of the subsidiary company; the Court, nevertheless, shall have regard, in adjusting the rights and liabilities of the members of the several companies between themselves, to the constitution of such companies, and to the arrangements entered into between the said companies in the same manner as the Court has regard to the rights and liabilities of different classes of contributories in the case of the winding up of a single company, or as near thereto as circumstances admit.

“When any subsidiary company, or company alleged to be subsidiary, is not in process of being wound up at the same time as the principal company to which it is subsidiary, the Court shall not direct such subsidiary company to be wound up, unless, after hearing all objections (if any) that may be urged by or on behalf of such company against its being wound up, the Court is of opinion that such company is subsidiary to the principal company, and that the winding up of such company in conjunction with the principal company is just and equitable.

“Where any subsidiary company and principal company are being wound up by different branches of the Court, the Court to which appeals

(*x*) *Oriental Commercial Bank, W.*
N. 1866, 283.

(*y*) *Imperial Mercantile Credit Association, ib.* 257.

(*z*) *Langham Skating Rink Co., 5*
Ch. D. 669; *Joint Stock Coal Co., 8*
Eq. 146.

Bk. IV. Chap. 1. from such branches lie shall make an order directing in which branch the winding up of such companies is to be carried on, and the necessary proceedings shall be taken for carrying such order into effect.

“An application may be made in relation to the winding up of any subsidiary company, in conjunction with a principal company, by any creditor of, or person interested in, such principal or subsidiary company.

“Where a company stands in relation of a principal company to one company, and in the relation of a subsidiary company to some other company or where there are general companies standing in the relation of subsidiary companies to one principal company, the Court may deal with any number of such companies together or in separate groups, as it thinks most expedient, upon the principles laid down in this section.”

3. *Summary of cases.*

Analysis of the decisions on this subject.

The decisions bearing on the subject above considered are very numerous, but after the foregoing observations it will be sufficient to notice the most important of them very shortly, and this may best be done by collecting them into three groups, as follows :

1. Cases in which a compulsory winding-up order has been made.

2. Cases in which a compulsory winding-up order has been refused.

3. Cases in which a compulsory winding-up order has been deferred.

Analysis of cases.

The cases in which an order to wind up subject to supervision has been made in preference to a compulsory order will be noticed hereafter (*infra*, c. 2).

1. Order made.

1. ORDER MADE.

A. *Creditors' petitions.*

Orders made on creditors' petitions are seldom reported. It is when no order is made that a report is needed.

Commercial Bank of South Australia, 33 Ch. D. 174.

Bank incorporated, and carried on business, in Australia ; not registered here, but had a branch office in London. Winding up proceedings were pending in Australia. North, J., made an order, but expressed an opinion that the proceedings here should be ancillary to those in Australia, and that the liquidator should only deal with assets in this country. Compare *Matheson Brother, Limited*, 27 Ch. D. 225, when no order was made.

General Rolling Stock Co., 34 Beav. 314.

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Company unable to pay its debts. Members desired to wind up voluntarily, and some creditors supported them.

Isle of Wight Ferry Co., 2 Hem. & M. 597.

Analysis of
 cases.

Company incorporated by act of Parliament, and petitioning for further powers, but utterly insolvent, and alleged to have no saleable assets at all.

1. Order made.

Family Endowment Soc., 5 Ch. 118.

National Provincial Life Ass. Co., 9 Eq. 306.

Company amalgamated with another company which was itself being wound up.

General Co. for Promotion of Land Credit, 5 Ch. 363, and *Princess of Reuss v. Bos*, L. R. 5 H. L. 176.

Company formed and registered under the act; but consisting entirely of foreigners, and with no assets in this country.

King's Cross Industrial Dwellings Co., 11 Eq. 149.

Petitioner's debt disputed, but on grounds considered unsubstantial.

Compare cases under head No. 3, p. 652.

Home Assurance Association (No. 2), 12 Eq. 114.

Company insolvent (?), but desiring time to pay.

Flagstaff Silver Mining Co., 20 Eq. 268; *Globe New Patent Iron Co.*, 20 Eq. 337.

Company proved to be unable to pay its debts, though no execution had issued and no statutory demand had been made.

B. *Contributories' petitions.*

Haven Gold Mining Co., 20 Ch. D. 151.

German Date Coffee Co., 20 Ch. D. 169.

In both these cases it was impossible for the company to carry on the business for which it was formed. The petitions were opposed by the majority of the shareholders, and in the latter case a year had not elapsed since the formation of the company.

Diamond Fuel Co., 13 Ch. D. 400.

Company's business had been carried on at loss, its capital had been expended and its property, except some patents which had nearly expired, had been sold at a great sacrifice, and the business could not be resuscitated. The petitioner was a fully paid-up shareholder, but it was shown that the company had claims for large sums against the directors, which if recovered would leave a considerable surplus to be divided among the shareholders.

Tumacacori Mining Co., 17 Eq. 534.

Company doing nothing after four years; assets to divide; debts to pay; majority desirous of settling out of Court.

Quere, if an order ought in this case to have been made? see 4 Ch. D. 876.

West Surrey Tanning Co., 2 Eq. 737.

Company doing no business—circumstances to be investigated—

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Analysis of
cases.

1. Order made.
Contributory's
petition.

voluntary winding up proposed, but one director able to carry everything as he liked.

Fire Annihilator Co., 32 Beav. 561.

Voluntary winding up going on for five years, and not ended.

See obs. (*ante*, p. 640), note (f).

London and County Coal Co., 3 Eq. 355.

Company only three or four months old; formed dishonestly; the directors themselves not paying anything on their shares, and defraying the expenses out of money obtained from an unwary secretary, who had taken and paid for shares in order to secure his appointment.

Sanderson's Patents Assoc., 12 Eq. 188.

Only seven shareholders, and no business. Compare *New Gas Generator Co.*, 4 Ch. D. 874.

Metropolitan Railway Warehouse Co., W. N. 1867, 94.

Company unable to commence business within a year.

Ex parte Latta, 3 De G. & Sm. 186.

Pennant and Craiguen Mining Co., 15 Jur. 1192.

Ex parte Selgwick, 2 Jur. N. S. 949.

South Lady Bertha Mining Co., 2 J. & H. 376.

Trefoil and Messer Mining Co., 2 J. & H. 421.

Times Fire Assurance Co., 30 Beav. 596.

In all these cases the petitioner was being or had been sued by a creditor of the company, whom the company either could not or would not pay. See, also, the *Bosworthon Mining Co.*, 26 L. J. Ch. 612, M. R., where, however, an inquiry was first directed, in order to ascertain whether the petitioner had paid more than he owed the company.

Ex parte Holinsworth, 3 De G. & S. 7.

Ex parte Turner and James, ib. 127, and 2 Mac. & G. 169.

Ex parte Cooke, 3 De G. & S. 148.

Ex parte Barber, 1 Mac. & G. 176.

Ex parte Woolmer, 5 De G. & S. 117, and 2 De G. M. & G. 665.

Ex parte Goldsmith, 14 Jur. 734.

Larne, Belfast, &c., Rail. Co., ib. 996.

In all these cases the companies had proved abortive and unable to commence business, but there were liabilities to be provided against or assets to be shared. In the last of them the directors would not produce any accounts.

Bastenne Bitumen Company, 3 De G. & Sm. 265.

A suit for a dissolution was pending. The circumstances which induced the Court to make a winding-up order are not stated. It could not have done so as a matter of course. See *Ex parte Philipps*, 1 Sim. N. S. 605, *infra*, p. 652.

Ex parte Walker and Ex parte Troutbeck, 1 De G. & Sm. 585; affirmed 1 H. & T. 100, and 13 Jur. 157.

The company had no outstanding debts, but it had stopped business; a suit for its dissolution was pending, and some of its members had been compelled to pay much more than their proper share of debts.

Sherwood Loan Co., 1 Sim. N. S. 165.

St. George's Building Society, 4 Drew. 154.

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Friendly societies which could not go on, and the rights of whose members could not be adjusted without a winding up.

Electric Telegraph Co. of Ireland, 22 Beav. 471.

The company had spent all its capital, and could not go on without more.

Analysis of
 cases.
 1. Order made.
 Contributory's
 petition.

Norwich Yarn Company, 12 Beav. 366.

The company was insolvent, and daily getting worse, but better times were hoped for.

Wey and Arun Junction Canal Co., 4 Eq. 197.

Canal company incorporated by special act of Parliament, and ruined by railway competition.

Bradford Navigation Co., 10 Eq. 331.

Is another instance of the same sort, but the company itself petitioned.

Company amalgamated with another.

Ex parte Phillips, 3 De G. & S. 3.

Ex parte Dee, ib. 112.

Pennant and Craigen, &c., Mining Co., 15 Jur. 1192.

In each of these cases a company had ceased to carry on business, and had been amalgamated with another company. In *Ex parte Phillips* the company's assets exceeded its liabilities, and there was a surplus to divide; in *Ex parte Dee* it was objected that in consequence of outstanding policies, the company's liabilities could not be settled for many years; in the *Pennant and Craigen Co.* creditors were suing the shareholders.

Ex parte Lawton, 1 K. & J. 204.

The company had failed; its liabilities were outstanding; but a new company had been formed by all the shareholders of the first, save the petitioner and another. It was sworn that the affairs of the old company would speedily be wound up if no order were made. The petitioner alone desired the Court to interfere, and he, not having paid his calls, was sued by a creditor at the instance of the company. The order in this case was made on the ground that the company in question existed only for the purpose of winding up its affairs, that its assets were outstanding, and its liabilities undischarged.

N.B.—For other cases of amalgamated companies, see *ante*, p. 645, and *infra*, pp. 650, 652, 653.

2. PETITION DISMISSED.

A. Creditors' petitions.

Pudston Total Loss Association, 20 Ch. D. 137.

Association illegal under § 4 of the Companies act, 1862, and the petitioning creditor had notice of the illegality.

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Analysis of
cases.

2. Petition
dismissed.

Creditor's
petition.

Herne Bay Waterworks Co., 10 Ch. D. 42.

Uruguay Central and Hygueritas Rail. Co. of Monte Video, 11 Ch. D. 372. }

Petitioner a debenture holder (see *ante*, p. 625, and compare
Olathe Silver Mining Co., 27 Ch. D. 278).

Great Britain Mutual Life Association Society, 16 Ch. D. 247.

Order made on the petition of the second petitioning creditor,
the debt of the first being disputed. On appeal at the desire of a
committee of policy-holders, this order was discharged, and a
scheme for the reduction of the companies' contracts entered into.
See same case, 19 Ch. D. 39, and 20 Ch. D. 351.

The Fishermen of Faversham, 36 Ch. D. 329.

Chapel House Colliery Co., 24 Ch. D. 259. }

Uruguay Central and Hygueritas Rail. Co. of Monte Video, 11 Ch. D. 372. }

In these cases the petition was opposed by the majority of
creditors, and it did not appear that the petitioner would gain
anything by an order.

Bolton Benefit Loan Society, 12 Ch. D. 679.

Company unregistered consisting at the date of the petition of
less than seven members. Compare *South London Fishmarket
Company*, 39 Ch. D. 324.

Pen-y-ran Colliery Co., 6 Ch. D. 477.

Petitioner's claim for unliquidated damages and disputed.

Paris Skating Rink Co., 5 Ch. D. 959.

Petitioner's debt assigned since petition was presented.

Catholic Publishing Co., 2 De G. J. & Sm. 116.

Petitioner's debt disputed—twenty-one days after demand had
not expired when petition was presented.

London and Paris Banking Co., 19 Eq. 444. }

London Wharfing and Warehousing Co., 35 Beav. 37. }

Petitioner's debt disputed—twenty-one days after demand had
elapsed before petition was presented.

Hope Mutual Life Assurance Co., 1 N. R. 542, and 11 H. L. C. 389.

Petitioner's debt, a judgment debt, disputed on the ground of
fraud, and he declined to try its validity.

Gold Hill Mines, 23 Ch. D. 210.

Petitioner's debt was small and disputed, and no evidence of the
company's insolvency was adduced. Petition was dismissed on
motion.

European Banking Co., 2 Eq. 521.

Petitioner's debt small, and attached by judgment creditor of
his own.

Langley Mill Steam, &c., Co., 12 Eq. 26.

Petitioner's debt *not* disputed, but majority of creditors pre-
ferring a voluntary winding up.

Planet Benefit Building Soc., 14 Eq. 441.

Petitioner, a withdrawing member, seeking to obtain an unfair
advantage over others. Company not insolvent.

B. *Contributories' petitions.*

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 Sect. 4.

a) Company not insolvent.

Analysis of
 cases.

Rica Gold Washing Co., 11 Ch. D. 36.

Petitioner was the holder of fully paid up shares for small value, but failed to show that there would be a substantial amount of assets to be divided amongst the shareholders.

2. Petition
 dismissed.
 Contributor's
 petition.

The charges of fraud were too vague.

Capital Fire Insurance Association, 21 Ch. D. 209.

Reason alleged was that company had not commenced business within a year. The company was formed to carry on business here or abroad. It had commenced business in France, and intended doing so in England.

Middlesborough Assembly Rooms, 14 Ch. D. 104.

Under the circumstances the suspension of business for more than a year (the reason alleged in the petition for the winding up) was reasonable. The majority of shareholders opposed the petition.

Langham Skating Rink Co., 5 Ch. D. 669.

Company the reverse of prosperous, but not insolvent.

New Gas Generator Co., 4 Ch. D. 474.

Only seven members, and nothing to be gained by making an order. Compare *Sanderson's Patents Assoc.*, 12 Eq. 188.

Ex parte Wyll, 1 Mac. & G. 1.

Company solvent, and carrying on business; petitioner would not pay his calls, and was sued by a creditor at the instigation of the directors.

Ex parte Spackman, 1 Mac. & G. 170.

Company solvent, and carrying on business. Petitioner was dissatisfied with an arrangement by which several shareholders had retired. This arrangement was subsequently held to be *ultra vires* (a).

National Live Stock Insurance Co., 26 Beav. 153.

The company was carrying on its business. It was alleged to be insolvent, and would have been so, if it could not have recovered monies due to it from its own directors and others for calls. But it was in a position to recover such monies, and was solvent when credited with them.

European Life Ass. Soc., 9 Eq. 122, and 10 Eq. 403.

Company not proved to be unable to pay all its existing debts and liabilities, but was not flourishing, and would probably be unable to discharge liabilities it would incur if it continued business.

Ex parte James, 1 Sim. N. S. 140.

A member of the managing committee of an abortive company petitioned to have it wound up. There were no *bona fide* debts outstanding; the real object of the petitioner was to obtain pay-

(a) See *ante*, p. 522.

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Analysis of
cases.

2. Petition
dismissed.

Contributory's
petition.

ment of his brother's bill of costs, which was disputed, and for which an action had been brought and discontinued.

Anglo-Greek Steam Co., 2 Eq. 1, *ante*, p. 632.

Misconduct on part of managers and directors alleged, but no insolvency, and no reason why business should not be profitable with better management.

Hop and Malt Exchange Co., W. N. 1866, 222.

Company not a year old, and not in debt; members about equally divided as to whether they should go on or not, and articles providing that four-fifths must concur in order to pass a resolution to dissolve.

Suburban Hotel Co., 2 Ch. 737.

London and Suburban Bank, 6 Ch. 641.

Joint Stock Coal Co., 8 Eq. 146.

Factage Parisien Co., 10 Jur. N. S. 121.

Metropolitan Saloon Omnibus Co., 5 Jur. N. S. 922.

Company not prospering, but not insolvent, and majority desirous of going on. Company limited, and capital not all paid up.

Professional Building Society, 6 Ch. 856.

Similar circumstances, but no limit to liability. Petitioner under no liability.

Spence's Patent, &c., Cement Co., 9 Eq. 9.

No allegation of insolvency in the petition; but evidence of insolvency, and allegation and proof of continued loss. Petition supported by creditor.

Ex parte Fisher, 3 De G. & Sm. 116.

A subscriber for shares in a proposed railway company, petitioned to wind up a company formed for making and working portion only of the line originally contemplated. The projectors were authorised to apply for an act to enable the company to make a less line than that first intended.

Planet Benefit Building Soc., 14 Eq. 441, *ante*, p. 648.

b) Company amalgamated with another.

Anglo-Australian Assurance Co., 1 Dr. & Sm. 113.

The company's business had been transferred to another company, and the petitioner had become a shareholder in it, and was bound by the transfer. The amalgamation, however, was disputed, and the selling company was being sued for its debts.

Ex parte Cookson, 15 Jur. 615.

A projected company had been amalgamated with another company, which had undertaken to buy up the scheme of the first. There were no debts of the former company outstanding or unsettled, but the money agreed to be paid was still unpaid. The sole object of the petition was to have this money got in and divided. See, also, the previous heads and next head.

c) Company being wound up voluntarily.

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Irrigation Co. of France, 6 Ch. 176. }
Imperial Bank of China and Japan, 1 Ch. 339. }

Company being wound up voluntarily in order to be amalgamated with another.

London and Mercantile Discount Co., 1 Eq. 277.

Directors charged with breaches of trust, and commanding a majority of votes.

Bank of Gibraltar and Malta, 1 Ch. 69. }
Gold Company, 11 Ch. D. 701. }

Company being wound up voluntarily, petitioner showed no fraud in the passing of the resolution for that purpose, though fraud in other matters was alleged. See *ante*, pp. 639, 640.

General International Agency Co., 36 Beav. 1.

Majority in favour of voluntary winding up.

Ex parte Watson, 3 De G. & Sm. 253.

The company had carried on business as bankers in India and in this country, and was being wound up extra-judicially. The petition was presented by a shareholder, who, declining to pay the amount required of him, was sued by a creditor.

Ex parte Guest, 5 De G. & Sm. 458.

The company was being wound up in a way approved by a majority of the shareholders. There was a large judgment debt to provide for, but the creditor was not pressing for payment.

Ex parte Wise, 1 Drew. 465.

This was a somewhat similar case to the last, and the real object of the petitioner was to make the directors account to the company for a misapplication of its assets.

d) Company small, and better wound up out of Court than in.

Natal, &c., Co., 1 Hem. & M. 639.

Sea, River, and Marine Insurance Co., W. N. 1866, 253. }

Companies having only nine and seven members respectively, no debts, and no reason why they should not be wound up voluntarily. In both cases the company desired to wind up voluntarily.

e) Winding-up order useless if made.

New Gas Generator Co., 4 Ch. D. 874.

Compare *Tumacacori Mining Co.*, 17 Eq. 534.

Ex parte Inderwick, 3 De G. & Sm. 231.

The petitioner was a subscriber to an abortive company. There were no outstanding liabilities, and no assets except what might be recovered from the promoters in respect of matters which occurred five years before, and which had been already made the subject of two compromises.

Analysis of
 cases.

2. Petition
 dismissed.
 Contributory's
 petition.

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Analysis of
cases.

2. Petition
dismissed.

Contributory's
petition.

Ex parte Murrell, 3 De G. & Sm. 4.

The petitioner was a subscriber to an abortive company, but it appeared that there were no outstanding liabilities, and no assets except what could be got by opening accounts which had been long acquiesced in and acted upon. The petitioner had received back the greater part of his subscriptions. Compare *Ex parte Pocock*, 1 De G. & S. 731; *Ex parte Williams*, 1 Sim. N. S. 57.

Ex parte Phillipps, 1 Sim. N. S. 605.

Suit for dissolution pending, in which everything could be done. Compare *Bastenne Bitumen Co.*, 3 De G. & S. 265, *ante*, p. 646.

f) Foreign company.

Lloyd Generale Italiano, 29 Ch. D. 219.

Petition presented by the company. Order refused on the ground that the Court has no jurisdiction to wind up an unregistered foreign company which has merely carried on business in England by agents without having any office in this country.

See *ante*, p. 622.

3. Petition
ordered to
stand over.

3. PETITION ORDERED TO STAND OVER.

A. Creditors' petitions.

Western Canada Oil Co., 17 Eq. 1.

St. Thomas Dock Co., 2 Ch. D. 116.

Exmouth Docks Co., 17 Eq. 181.

Brighton Hotel Co., 6 Eq. 339.

In all these the petition stood over to see if means could be found for paying dissentient creditors.

Glathe Silver Mining Co., 27 Ch. D. 278.

Petitioner was a debenture holder, and the petition was ordered to stand over for inquiry whether the company had any assets other than those comprised in the debentures. See *ante*, p. 625.

Great Western Coal Consumers' Co., 21 Ch. D. 769.

Petition was opposed by the majority of creditors, and it was ordered to stand over for six months on terms, this being considered more beneficial to the other creditors than dismissing it.

Rhydyfelf Colliery Co., 3 De G. & J. 80.

Petitioner's debt disputed.

Inventor's Association, 2 Dr. & Sm. 553.

Petitioner's debt disputed—voluntary winding up proceeding—action against company commenced by petitioner, but obstructed by liquidator.

Imperial Guardian Life Ass. Soc., 9 Eq. 447.

Company amalgamated with another and in course of voluntary liquidation. Petitioner's debt disputed, and security offered.

N.B.—Compare *King's Cross Industrial Dwellings Co.*, 11 Eq. 149.

B. *Contributories' petitions.*

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City and County Bank, 10 Ch. 470.

Company desired to wind up voluntarily and to carry out an arrangement with its creditors, to which they agreed.

Imperial Bank of China, 1 Ch. 339.

Resolution to wind up voluntarily, in order to amalgamate with another company. Petition impeached whole proceeding, and was ordered to stand over, with liberty to file a bill.

British Provident Assurance Society, 1 Dr. & Sm. 113.

The company had transferred its business to another company, which was not shown to be unable or unwilling to fulfil its engagements.

Wheat Anne Mining Co., 30 Beav. 601.

The petition was ordered to stand over with a view to an arrangement being made. Creditors were suing in the Stannary Courts.

North Western Trunk Co., 3 De G. & Sm. 266.

The company had proved abortive, but it was not clear that anything capable of being wound up had really ever existed.

Ex parte Williams, 1 Sim. N. S. 57.

The company was abortive, and had, in fact, had its affairs wound up, but, as the petitioners alleged, in an improper manner. Compare *Ex parte Pocock*, 1 De G. & S. 731; *Ex parte Murrell*, 3 ib. 4; *Larne, Belfast, &c., Rail. Co.*, 14 Jur. 996.

Monmouthshire and Glamorganshire Banking Co., 15 Beav. 74.

The petition was ordered to stand over, to enable the company, if possible, to wind up its own affairs, which it had begun to do.

Ex parte Collins, 8 W. R. 170.

The petition was ordered to stand over with liberty to apply; the solvency of the company depending on its right to enforce a disputed contract for the sale of its business to another company.

Ex parte Pocock, 1 De G. & Sm. 731.

The company proved abortive. The great majority of the subscribers had been repaid part of the money they had paid for deposits and had released the directors. A dissatisfied subscriber, who had not executed the release, presented a petition for winding up the company, alleging a refusal by the directors to produce the accounts, and a misapplication of assets by them. The Court declined to order the company to be wound up; it also declined to direct any inquiry as to the expediency of winding it up; at the same time it would not dismiss the petition but ordered it to stand over, so that the petitioner might have an opportunity of seeing the accounts which had been withheld from him. What ultimately became of the petition does not appear. See, too, *Ex parte Capper*, 3 De G. & S. 1; and compare *Ex parte Murrell*, ib. 4. In *The Larne, Belfast, &c., Rail. Co.*, 14 Jur. 996, the directors refused to produce the accounts, and a winding-up order was therefore made.

Analysis of
 cases.

3. Petition
 ordered to
 stand over.

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Sect. 5.

Bosworthton Mining Co., 26 L. J. Ch. 612, M. R.

Inquiries were directed by consent, in order to see whether the petitioner, who was being sued by a creditor, had paid more than he owed to the company. A winding-up order was ultimately made.

Ex parte Moss, 14 Jur. 754.

An inquiry was directed to ascertain the position of the company abroad, it being half a foreign and half an English company.

Petition for
winding-up
order.
Form of
petition.

SECTION V.—PROCEEDINGS TO OBTAIN A WINDING-UP ORDER AND TO DISCHARGE IT, AND TO STAY PROCEEDINGS UNDER IT (*b*).

The proper mode of applying to the Court for a winding-up order, whether by the Court or subject to the supervision of the Court, is by petition (*c*).

No form of petition is given, but it must be entitled in the matter of the Companies acts, 1862 and 1867, and of the company sought to be wound up (*d*). The petition should show the nature of the company, the title of the petitioner to present the petition, and the circumstances on which he relies for obtaining the order; the petition should state such circumstances in sufficient detail to enable the Court to see from the petition itself that a winding-up order ought to be made, if the statements in the petition are not denied or satisfactorily explained by those who oppose it (*e*). If fraud be alleged the facts constituting the fraud must be stated (*f*). A petition presented by a contributory should show that the provisions of

(*b*) This section relates only to the procedure in the Chancery Division of the High Court. As to the Stan-
dards, see 32 & 33 Vict. c. 19, and 50 & 51 Vict. c. 43. The procedure in the County Court is the same as that in the Chancery Division. See 30 & 31 Vict. c. 131, §§ 41–43, and County Court Rules, 1886, Ord. xlii.

(*c*) 25 & 26 Vict. c. 89, §§ 82 and 148.

(*d*) See Order of 1868, Rule I.

(*e*) *Wear Engine Works Co.*, 10 Ch. 188. See, also, *Langham Skating Rink Co.*, 5 Ch. D. 669. For a form of petition, see Palmer's Company Precedents (4th ed.), 649, 2 Smith's Chan. Prac. 319, ed. 7, and for a form under the older acts, see *Re North of England Banking Co.*, 1 De G. & S. 545.

(*f*) *Rica Gold Washing Co.*, 11 Ch. D. 36.

30 & 31 Vict. c. 131, § 40, have been complied with; but an omission to state this is not fatal to the petition (*g*). One petition to wind up two companies is wrong (*h*). A petition may be amended by leave of the Court (*i*).

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Sect. 5.

Every contributory or creditor is entitled to have a copy of the petition, on payment of 4*d.* per folio (Rule 5).

The petition must be advertised seven clear days before the hearing, once in the *London Gazette*, and once at least in two London daily morning newspapers, or local newspapers, according to the situation of the company's office (Rule 2).

Advertisements.

The advertisement must state the day on which the petition was presented, and the name and address of the petitioner, and of his solicitor and London agent (Rule 2). Forms of advertisement are given in the schedule to the rules (*k*).

Care should be taken to make no mistake in advertising. An advertisement that a petition will be heard on Saturday the 20th of December, when the 20th fell on a Thursday, has been held insufficient (*l*); and a mistake, although trifling, in the name of the company may prove fatal (*m*); but the Court may give leave to amend the petition either with (*n*) or without (*o*) ordering it to be re-advertised.

In a case where a petition comes on to be heard too soon, the Court can in its discretion dispense with fresh advertisements (*p*); or order the petition to stand over in order that fresh advertisements may be issued (*q*). The petition may be

(*g*) *City and County Bank*, 10 Ch. 470. As to holder of fully paid-up shares, see *ante*, p. 626.

(*h*) *Shields Marine Ins. Co.*, W. N. 1867, 265 and 296.

(*i*) *Queen's Benefit Building Soc.*, 6 Ch. 815.

(*k*) For the form of advertisement, see rule 2 and form 1 in the 3rd schedule to the rules. As to dispensing with fresh advertisements on a rehearing, *Patent Floor Cloth Co.*, 8 E. 664.

(*l*) *Re The Joint Stock Companies Winding-up Act*, 13 Beav. 434.

(*m*) *City and County Bank*, 10 Ch. 470.

(*n*) *Army and Navy Hotel*, 31 Ch. D. 644; *Newcastle Machinists' Co.*, W. N. 1888, 146, and note W. N. 1889, 1.

(*o*) *Cork Constitution Ltd.*, 9 L. R., Ir. 163.

(*p*) *City and County Bank*, 10 Ch. 470.

(*q*) *London and Westminster Wine Co.*, 1 Hem. & M. 561. Under the older acts, it was held that the advertisement of the petition in the *London Gazette* need not be seven days before the hearing of the petition, although the advertisement in the other papers must, *English and Irish Church and University*

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presented and the advertisements issued on the same day : and where an advertisement stated that a petition had that day been presented, and the petition was presented on that day, but not until after the advertisement had been published, the Court held the advertisement sufficient (*r*).

It is improper to publish in a newspaper the contents of a petition before it is heard (*s*).

Service of
petition.

The petition, unless presented by the company itself, must be served at its registered office (*t*) ; and if there is no such office, then at the company's principal or last known principal place of business, if any can be found ; and the service must be upon some member, officer, or servant (*u*) of the company there ; or if no such person can be found there, then by being left at the registered office or principal place of business of the company (*x*). If it is found impracticable to comply with these directions, application must be made to the Court for leave to serve the petition upon some member of the company (*y*). These rules, however, are directory only ; and if the solicitor of the company accepts service for it, service at the registered office may be dispensed with (*z*).

Where a company is being wound up voluntarily, a petition to have it wound up subject to the supervision of the Court must be served on the liquidators (*a*) ; but, owing probably to an oversight, the rules do not require that the liquidator

Assurance Society, 10 W. R. 33. It is, however, different now.

(*r*) *Cork and Youghal Rail. Co.*, W. N. 1866, 279.

(*s*) *Cheltenham and Swansea Railway Carriage, &c., Co.*, 8 Eq. 580.

(*t*) As to which see the Companies act, 1862, §§ 39, 40, and rule 3.

(*u*) These words occurred in 11 & 12 Vict. c. 45, § 10, and it was held that service on a member of the provisional committee was insufficient, *Re London and Dublin, &c., Railway Company*, 3 De G. & S. 208 ; so service on the company's solicitor, *Ex parte Dale*, ib. 11.

(*x*) Rule 3 of the order of 1862.

This order is meant where no other is referred to.

(*y*) *Ib.* Service on some member seems necessary. Under 11 & 12 Vict. c. 45, § 10, service might be dispensed with altogether. As to whether service can be dispensed with by consent, see *Re Brighton, Lewes, &c., Rail. Co.*, 1 De G. & S. 604 ; *Ex parte Wolsely*, 3 ib. 101 ; *Re Tring, Reading, &c., Rail. Co.*, ib. 10 ; *Regent United Service Stores*, 8 Ch. D. 75, and *Pannonia Leather Cloth Co.*, 13 W. R. 1015.

(*z*) *Regent United Service Stores*, 8 Ch. D. 75.

(*a*) Rule 3.

should be served with a petition to have the company wound up compulsorily. This, however, ought, it is conceived, to be done.

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Where a company's registered office was shut up, the Court directed the petition to be dropped into the letter-box of the office, and to be served on the company's solicitor, and on one of the directors (*b*). In another case, where the company was being wound up voluntarily, service was directed on all the directors and two or three of the principal shareholders (*c*). Service without leave of the Court on a workman at the last registered office of a company, which had long ceased to carry on business there and had amalgamated with another company, is not sufficient (*d*); but service on two directors at the actual office of the company has been held sufficient (*e*).

The petition must be verified by the affidavit of the petitioner, or one of the petitioners; or, if the company is the petitioner, by some director, secretary, or principal officer (*f*). An affidavit by the petitioner himself will, however, be dispensed with under special circumstances (*g*). If one company petitions for an order to wind up another, an affidavit by the secretary or one of the acting directors of the petitioning company would probably be sufficient. The affidavit must be entitled like the petition (*h*), sworn and filed within four days after the petition is presented (*i*); but the time will be enlarged by the Court if any reasonable grounds for so doing are shown (*k*). The affidavit is sufficient *primâ facie* evidence of the statements in the petition (*l*).

Evidence in
support of
petition.

(*b*) *London and Westminster Wine Co.*, 1 Hem. & M. 561. abroad.

(*c*) *Inventors' Assoc.*, 6 N. R. 349.

(*d*) *Manchester and London Life Ass. and Loan Assoc.*, 9 Eq. 643.

(*e*) *Fortune Copper Mining Co.*, 10 Eq. 390.

(*f*) Rule 4. A form of affidavit is given, see form 2 in the 3rd schedule to the rules of 1862, but as to the heading, see order of 1868, rule 1.

(*g*) *Fortune Copper Mining Co.*, 10 Eq. 390, where the petitioner was

(*h*) See note (*f*), *ante*.

(*i*) Rule 4; not before, see *Western Benefit Building Soc.*, 33 Beav. 368.

(*k*) See rule 73; *Patent Screwed Boot Co.*, 32 Beav. 142; *Kentish Royal Hotel Co.*, 5 N. R. 423.

(*l*) Rule 4. Strictly speaking the affidavit is seldom proof of anything, being hearsay as to most matters sworn to: *Gold Hill Mines*, 23 Ch. D. at p. 214. The rule, however, is a check on reckless assertions.

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Evidence in
opposition.

Appearance in
support and
opposition.

Costs.

If the petition is opposed on grounds not disclosed in it, or in the affidavits filed in support of it, the additional facts necessary to be proved, must be verified by affidavit.

The persons making affidavits can be cross-examined; the Court will, if necessary, order the books of the company to be produced on such cross-examination (*m*).

All persons served with the petition, and also all contributories and creditors (*n*), but apparently no other persons (*o*), are entitled to appear on the petition, and to support or oppose it. But as regards costs the following rules are usually followed:

1. The costs of a petition on which a winding-up order is made are borne by the company (*p*); these costs include the costs of the petitioner and of the company, and the costs of all other persons, if any, properly served with the petition (*q*).

2. The costs of a petition which is dismissed are borne by the petitioner; unless the Court is of opinion that the petition was justifiable, in which case the dismissal will be without costs. If dismissed with costs, such costs include those of the company, and of all persons, if any, served with the petition (*r*).

3. With respect to persons who appear to support or oppose a petition, although not served with it, the usual practice is: 1, to allow one set of costs to those contributories, and one set to those creditors, who upon reasonable grounds (without being served) appear on the petition and support the view which ultimately prevails—*i.e.*, support a successful, or oppose an unsuccessful, petition; 2, to give no costs to those who (not being served) support an unsuccessful, or oppose a suc-

It has been suggested that this part of rule 4 is *ultra vires*, see Buckley on the Companies act, 5th ed., p. 615, but in practice no other evidence is adduced in the majority of cases, at least in the first instance.

(*m*) *Emma Silver Mining Co.*, 10 Ch. 194. As to inspection of company's books, see *Credit Co.*, 11 Ch. D. 256, and *West Devon Great Consols Mine*, 27 Ch. D. 106.

(*n*) See *Marlborough Club Co.*, 1

Eq. 216, and the next note.

(*o*) See *Bradford Navigation Co.*, 9 Eq. 80, and 5 Ch. 600. See, also, S. C., 10 Eq. 337.

(*p*) The order is usually silent as to the costs. It was so under the older acts, see the form in 1 De G. & Sm. 547.

(*q*) *Humber Iron Works Co.*, 2 Eq. 15.

(*r*) *Humber Iron Works Co.*, 2 Eq. 15.

cessful, petition; but, 3, to make a petitioner pay the costs of persons who appear to answer and succeed in refuting unfounded charges made against them (s). Bk. IV. Chap. 1.
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A provisional liquidator is only in the nature of a receiver, and will not be allowed his costs of appearing on a winding-up petition (t).

Where a petition was presented by a shareholder in a cost-book mining company, who had been sued by a creditor, and the petition was opposed on the ground that the petitioner was indebted to the company and had not been compelled to pay more than he owed to the company, and an inquiry upon that point was directed by consent, and the result showed that the petitioner had paid more than he owed the company, and a winding-up order was then made, the costs of the preliminary inquiries were thrown on those whose opposition caused them to be directed (u). Costs of preliminary inquiries.

A petition may be withdrawn by the petitioner (c), and ought to be withdrawn as soon as his claim is satisfied (y); but as a general rule, he can only withdraw it on payment of the proper costs of those who appear on it, whether to support or oppose it (z), though under special circumstances the Court will allow the petition to be withdrawn without payment of costs (a). Separate sets or only one set of costs may be given to the shareholders and creditors appearing on the petition (b). Withdrawal of petition.

(s) See *Hull and County Bank*, 10 Ch. D. 130; *New Gas Co.*, 5 Ch. D. 703; *Anglo-Egyptian Nav. Co.*, 8 Eq. 660; *European Banking Co.*, 2 Eq. 521; *Anglo-Greek Steam Co.*, ib. 1; *Humber Iron Works Co.*, ib. 15. Lord Hatherley, when V.-C., refused costs to persons not served. See *Oriental Commercial Bank*, W. N. 1866, 283; *Hop and Malt Exchange Co.*, ib. 222; *Imperial Merc. Credit Ass.*, ib. 256.

(t) *General International Agency Co.*, 36 Beav. 1. He was, however, allowed some costs in *Times Life Ass., &c., Soc.*, 9 Eq. 382, and in *European Banking Co.*, 2 Eq. 521.

(u) *Re Bosworthon Mining Co.*, 26

L. J. Ch. 612.

(c) *Hereford and South Wales Waggon, &c., Co.*, 17 Eq. 423; *Times Life Ass., &c., Co.*, 9 Eq. 383; *Home Ass. Association*, 12 Eq. 59.

(y) *Times Life Ass., &c., Co.*, 9 Eq. 383.

(z) *Nacupai Gold Mining Co.*, 28 Ch. D. 65; *Patent Cocoa Fibre Co.*, 1 Ch. D. 617; *Hereford and South Wales Waggon, &c., Co.*, 17 Eq. 423; *Marlborough Club Co.*, 1 Eq. 216; *Home Ass. Association*, 12 Eq. 59.

(a) *District Bank of London*, 35 Ch. D. 576; *United Stock Exchange, Limited*, 28 Ch. D. 183.

(b) *Paper Bottle Co.*, 40 Ch. D. 52;

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The petitioner, on the hearing of his petition, may elect to take a supervision order instead of a compulsory order, and in this case the costs of creditors who appear to support the petition for a compulsory order will be allowed, though they may have opposed the supervision order (*c*).

Several petitions.

There is nothing to prevent the presentation of several petitions by several persons; and as no person can prevent the withdrawal of a petition presented by another person, and as petitions are frequently presented in order that they may be withdrawn or pressed on as may be afterwards found convenient, it has become common for several persons to present several petitions to wind up the same company. This practice, however, is discouraged as much as possible by the courts; and if the petitions are presented to different branches of the Court, those subsequent to the first will be transferred to that branch of the Court to which the first has been presented (*d*).

Persons who present petitions in ignorance that a petition has already been presented, are generally allowed the costs incurred by them before they had notice of the previous petition (*e*); but persons who, without some special justification, present petitions, or proceed with petitions they have already presented, after they know of the presentation of a petition earlier than their own, run great risk of having to pay the costs incurred by themselves, if not also the costs of the persons they have served (*f*). Where, however, the first petition is presented by persons in the interest of the company and is of a suspicious character, a second petition is considered justifiable (*g*); and where there are several justifiable petitions and a winding-up order is made, one order is usually made on all the petitions, and the costs of them all are paid by

North Brazilian Sugar Factories, 56 L. T. (N. S.) 229; *Criterion Gold Mining Co.*, W. N. 1889, p. 46. ~~now reported 41 Ch. D. 146~~
(*c*) *Chapstow Bobbin Mills Co.*, 35 Ch. D. 563.

(*d*) *West Hartlepool Iron Works Co.*, 10 Ch. 629. In *United Ports and General Ins. Co.*, 39 L. J. Ch. 146, V.-C. K., the priority of several petitions was determined by the dates of their advertisements.

(*e*) *General Financial Bank*, 20 Ch. D. 276; *G. F. Brooke & Co.*, W. N. 1888, 213.

(*f*) See, on this subject, *Ex parte Turner*, 3 De G. & S. 127; *Times Fire Ass. Co.*, 30 Beav. 596; and the cases in the next note.

(*g*) *General Financial Bank*, 20 Ch. D. 276; *Humber Iron Works Co.*, 2 Eq. 15; *Commercial Discount Co.*, 1 N. R. 416.

the company (*h*); one set of costs being allowed to the unserved creditors and one to the unserved contributories appearing and supporting the petitions (*i*). Each, however, of several petitions must be dealt with on its own merits (*h*).

If a petition is presented by a limited company (*l*), or by a person resident out of the jurisdiction, or in the case of a life insurance company by a policy-holder or a contributory (*m*), or if the petitioner before the hearing has filed a petition in bankruptcy (*n*), the petitioner can be compelled to give security for costs before his petition is heard; and such security can be applied for, either when the petition comes on for hearing (*o*) or before (*p*); and the respondent does not lose his right to security by filing affidavits in opposition to the petition (*q*). Persons opposing the petition cannot be ordered to give security for costs (*r*).

If a petitioner dies between the presentation and hearing of the petition, his personal representatives may obtain leave to continue and carry on the petition (*s*).

Appeals from and staying proceedings under winding-up orders.

A winding-up order made by a court having no jurisdiction to make it, is wholly invalid, and must be so treated although not appealed against (*t*); but an order made by a court having jurisdiction must be treated as valid until reversed on

(*h*) See the cases in the last two notes, and *Ex parte Walker*, 1 De G. & Sm. 585.

(*i*) *Ante*, pp. 658, 659.

(*k*) *European Bank Co.*, 2 Eq. 521. As to the carriage of the order in such cases, see *infra*, p. 686.

(*l*) See the Companies act, 1862, § 69.

(*m*) 33 & 34 Vict. c. 61, § 21.

(*n*) *Carta Para Mining Co.*, 19 Ch. D. 457, but compare *Rhodes v. Dawson*, 16 Q. B. D. 548.

(*o*) *Home Ass. Assoc.* (No. 2), 12 Eq. 112; *Ex parte Seidler*, 12 Sim. 106.

(*p*) *Atkins v. Cooke*, 3 Drew. 694.

(*q*) See last note but one, and *Martano v. Mann*, 14 Ch. D. 419; *Lydney and Wigpool Co. v. Bird*, 23 Ch. D. 358, and R. S. C. Ord. lxxv. r. 6, which leaves the amount of the security to be given in the discretion of the judge.

(*r*) *Percy and Kelly Nickel, &c.*, Co., 2 Ch. D. 531.

(*s*) *Dynevor Duffryn Collieries Co.*, W. N. 1878, 199, and see *Atkins' Estate*, 1 Ch. D. 82; *Commercial Bank of London*, W. N. 1888, 213 and 234.

(*t*) *Plumstead Water Co. v. Davis*, 28 Beav. 545, and 2 De G. F. & J. 20.

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Security for
costs.

Death of
petitioner.

Improper
orders.

Bk. IV. Chap. 1. appeal (*u*). Under the older winding-up acts, if an order were
 Sect. 5. — made upon the petition of a person not entitled to petition, the order was not void; but it, and all proceedings under it, were allowed to stand, and its further prosecution was, upon a proper application to the court, entrusted to a qualified person (*x*). There is no express provision to this effect in the Companies act, 1862, but the old winding-up practice is so continued that probably the above rule would still be observed (*y*).

Appeal from
the winding-up
order.

After an order for the winding up of a company has been made, such order may be appealed from in the ordinary way (*z*), by a person entitled to appear and be heard on the petition (*a*) in 21 days (*b*). The appointment of a liquidator does not prevent the directors of the company authorising an appeal (*c*), but when a limited company appeals without joining anyone personally responsible for costs, it will as a rule be ordered to give security for the costs of the appeal (*d*). It does not follow that because the order is appealed against, proceedings under it will be stayed until the appeal is disposed of (*e*).

Discharge of
order

Before the Judicature acts, a winding-up order might have

(*u*) *Padstow Total Loss Assoc.*, 20 Ch. D. 137; *Arthur Average Assoc.*, 3 Ch. D. 522; *Ex parte Hargrove*, 10 Ch. 542; *London Marine Ins. Assoc.*, 8 Eq. 189 and 193; *Ex parte Oakes and Peck*, W. N. 1867, 101, and L. R. 2 H. L. 369.

(*x*) 11 & 12 Vict. c. 45, § 9.

(*y*) See the Companies act, 1862, §§ 82, 170; the latter section was repealed by 44 & 45 Vict. c. 59, but see § 4 of that act.

(*z*) 25 & 26 Vict. c. 89, § 124. A company successfully appealing was allowed its costs out of its own estate in *National Savings Bank Association*, 1 Ch. 554.

(*a*) See *Bradford Navigation Co.*, 5 Ch. 600.

(*b*) See R. S. C., Ord. lviii. rr. 9 and 15; *National Funds Ass. Co.*, 4 Ch. D. 305. The time may be extended by the Court of Appeal, as to

which, see *New Collao*, 22 Ch. D. 484; *Manchester Economic Building Society*, 24 Ch. D. 488; *Madras Irrigation and Canal Co.*, 23 Ch. D. 248. Before the Judicature acts, the limit of twenty-one days did not apply to appeals from winding-up orders. See *Re Universal Bank*, 1 Ch. 428; *Anglo-Californian Mining Co.*, 1 Dr. & Sm. 628; *Plumstead Water Co.*, 2 De G. F. & J. 20. The fact that calls had been made and other proceedings taken did not prevent an appeal. See *National Permanent Benefit Building Soc.*, 5 Ch. 309.

(*c*) *Diamond Fuel Co.*, 13 Ch. D. 400.

(*d*) *Diamond Fuel Co.*, 13 Ch. D. 400; *Photographic Artists Association*, 23 Ch. D. 370.

(*e*) See R. S. C., Ord. lviii. r. 16, and *Ex parte Barber*, 1 Mac. & G. 183.

been discharged on motion or petition by the judge who made it; but now no judge can rehear an order, whether made by himself or another judge, the power to rehear being part of the appellate jurisdiction which was transferred to the Court of Appeal (*f*).

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Cases may occur in which a winding-up order has been rightly made, but in which its further prosecution is not desirable, as for instance when the Court wishes to reduce the contracts of a life insurance society instead of making an order to wind the society up (*g*). In such a case, application should be made to the Court which made the order, to stay the proceedings under it. This the Court has power to do on the application of any creditor or contributory (*h*); and the Court will accede to the application if it is satisfied that it is not for the advantage of the company, or of any of the persons interested in its winding up, that further proceedings should be taken (*i*). Thus in the case of *The Worcester, Tenbury, and Ludlow Railway Company* (*k*), a winding-up order had been made, an official manager had been appointed, all the company's debts had been paid, and a surplus remained. It had been found impossible to make out a complete list of contributories, as the allottees of a considerable number of shares could not be discovered, but the known allottees held the great bulk of the shares which had been issued. Upon their petition the Court ordered the fund in Court to be paid to them, they undertaking to deal with it as the Court should direct, and to pay the costs incurred in the winding up. So proceedings will be stayed in order to enable a company to resume business if circumstances justify such an order (*l*).

Staying proceedings under order.

Worcester,
Tenbury, &c.,
Railway
Company.

But a winding-up order is in the nature of a judgment for the benefit as well of creditors as of contributories (*m*); and

Winding-up order in the nature of a judgment.

(*f*) *St. Nazaire Co.*, 12 Ch. D. 88; *ante*, p. 625.

Manchester Economic Building Soc., 24 Ch. D. 488.

(*g*) *Great Britain Mutual Life Assurance Soc.*, 16 Ch. D. 247.

(*h*) See § 89 of the Companies act, 1862. A person applying as an alleged contributory must admit himself to be a contributory. See

(*i*) In *Ex parte Barber*, 1 Mac. & G. 176, proceedings pending an appeal were not stayed.

(*k*) 3 De G. & S. 189.

(*l*) *South Barrule Slate Quarry Co.*, 8 Eq. 688.

(*m*) See § 82 of the Companies act, 1862.

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Sect. 6.

proceedings under it cannot be stayed without giving those who have acquired rights consequent upon it an opportunity of opposing the application to stay proceedings (*n*). Consequently, an order to stay proceedings will not be made, unless the contributories, and the creditors who have proved their debts, have had proper notice of the intention to apply for the order; and such an order will not, therefore, be made upon notice of a motion to discharge a call (*o*), or to be struck off the list of contributories (*p*).

Costs to be
provided for
on staying
proceedings.

Again, where an order has been obtained and acted on and costs have been incurred under it, these costs must be provided for by those who seek to have further proceedings stayed (*q*).

SECTION VI.—EFFECT OF WINDING UP AS REGARDS DEALINGS WITH PROPERTY.

1. *Commencement of winding up.*

1. Compulsorily. When a petition is presented to wind up a company by the Court, the commencement of the winding up dates from the presentation of the petition (*r*). Hence the importance, when there are several petitions, of making a winding-up order, if possible, on that first presented. But if the petition is dismissed, the winding up commenced on its presentation will obviously be at an end.
2. Voluntarily. When a resolution has been passed to wind up a company voluntarily, the voluntary winding up dates from the passing of the resolution (*s*). But if the company is afterwards ordered

(*n*) See *Curew's case*, 5 De G. Mac. & G. 94; *Underwood's case*, ib. 677; *Clifton's case*, ib. 743. As to serving the provisional liquidator, see *Ex parte Coleman*, 3 De G. & S. 139.

(*o*) *Curew's case*, 5 De G. M. & G. 94, reversing S. C., 2 Sm. & G. 1.

(*p*) *Underwood's case*, 5 De G. M. & G. 677; *Sharpus's case*, 3 De G. & S. 49.

(*q*) *Clarke's case*, 1 K. & J. 22; *Ex parte Woolmer*, 5 De G. & S. 117, and 2 De G. M. & G. 665.

(*r*) § 84. *Taurine Co.*, 25 Ch. D. 118.

(*s*) § 130, *i.e.*, the confirmation of the resolution when the resolution is special. See *Emperor Life Assurance Society*, 31 Ch. D. 78; *Dawes case*, 6 Eq. 232, and *infra*, c. 2.

to be wound up compulsorily, the commencement of the winding up will date from the time of the presentation of the petition on which the order is made (*t*): but not so as to invalidate what has been done or to let in a distress (*u*). The consequence of altering the date of the commencement of a winding up is sometimes a good reason for not making a compulsory order when a company has been for some time winding up voluntarily.

An order to wind up a company subject to the supervision of the Court pre-supposes a prior resolution to wind up voluntarily, and in fact continues the voluntary winding up. The commencement, therefore, of a winding up subject to supervision dates from the passing of the resolution to wind up voluntarily, and not from the time of the presentation of the petition on which the order is made (*v*); and this is the case although a provisional liquidator has been appointed, and a compulsory order made before the resolution for a voluntary winding up was passed, if the compulsory order is subsequently changed into a supervision order (*y*); and the Court has no jurisdiction to alter this date (*z*).

It seems that if a compulsory order is made after an order to wind up under supervision, the date of the commencement of the winding up is not altered by the second order (*a*).

As regards life insurance companies which have transferred their business to others, the enactment contained in 35 & 36 Vict. c. 41, § 4 (*b*), must not be forgotten; it in effect makes

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3. Subject to supervision.

Life insurance companies.

(*t*) § 84. *Taurine Co.*, 25 Ch. D. 118.

(*u*) *Thomas v. Patent Lionite Co.*, 17 Ch. D. 250.

(*v*) *Emperor Life Assurance Society*, 31 Ch. D. 78; *Weston's case*, 4 Ch. 20, and 6 Eq. 238; *Ex parte Colborne and Strawbridge*, 11 Eq. 478, §§ 148, 151, and 164. Compare *Ex parte Bradshaw*, 15 Ch. D. 472, where for the purpose of fixing the date of a debenture-holder's charge, the date, at which a provisional liquidator was appointed, was taken.

(*y*) *Emperor Life Assurance Society*,

31 Ch. D. 78; *Dry Docks Corporation of London*, 39 Ch. D. 306.

(*z*) *West Cumberland Iron and Steel Co.*, 40 Ch. D. 361.

(*a*) See *United Service Co.*, 7 Eq. 76, where a company was being wound up voluntarily, and an order was made on one petition to continue such winding up, subject to supervision, and a compulsory order was made on another petition, and was dated the day after the first order.

(*b*) *Ante*, p. 643.

Bk. IV. Chap. 1. the commencement of the winding up of the purchasing com-
 Sect. 6. — pany the commencement of the winding up of the selling
 company, unless the Court otherwise orders; but the enact-
 ment does not apply to a purely voluntary winding up.

Importance of
 the commence-
 ment of wind-
 ing up.

The exact time of the commencement of the winding up of a company is important, inasmuch as after that time great restrictions are put on all dealings with the property of the company, on all alterations in the status of its members, and on all proceedings by creditors to enforce payment of their debts. The leading principle pervading the winding-up provisions of the Companies act, 1862, is that nothing shall be done after the commencement of the winding up of a company except with a view to realise its assets and distribute them ratably first among its creditors, and then, if there is a surplus, amongst its members (c).

2. *Effect of winding up on dealings with property.*

Lis pendens.

A petition to wind up a company compulsorily is not a *lis pendens* (d).

Retrospective
 effect of order
 to wind up.

When an order has been made to wind up a company compulsorily, or subject to the supervision of the Court, all dispositions of the property, effects, and things in action of the company made subsequently to the commencement of the winding up of the company are void unless confirmed by the Court (e).

The winding-up order has thus a retrospective effect; and the section in question apparently even renders void all dispositions of property made previously to the order by voluntary liquidators unless the Court expressly sanctions them (f).

After a winding-up order has been made, no disposition of the company's property is valid unless made by the liquidators or the Court (g).

(c) This will be seen by examining the following sections, 85, 87, 95, 98, 102, 107, 109, 133, 153, 158, 163, 164, and 196 to 204. And see *Ashbury's case*, 5 Eq. 223, and *Ex parte Grissell*, 1 Ch. 528.

(d) 30 & 31 Vict. c. 47. See,

before this act, *Ex parte Thornton*, 2 Ch. 171.

(e) § 153.

(f) See, also, § 151. But quære if this is the true construction.

(g) See §§ 92 and 95.

After a resolution to wind up voluntarily, no disposition of a company's property can, it is apprehended, be made, except by the liquidators (*h*). Bk. IV. Chap. 1.
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It will be observed that what are avoided are dispositions by the company of its property, not transfers or payments to it, *e.g.*, not a transfer of shares to the company (*i*), nor payment of a debt to it (*k*).

Payments by the company after the commencement of the winding up are however avoided unless sanctioned by the court; and this rule applies even to the payment of a petitioning creditor's debt if an order is made on his petition or on any petition presented previously to it (*l*).

In a recent case it was held that a customer of the Oriental Bank Corporation, who had paid money in at a branch office of the bank in the Mauritius in exchange for drafts on the head office in London, after the presentation of a petition in London to wind up the bank, and the appointment of a provisional liquidator, but before any notice of these facts had, or could have, reached the Mauritius, had no right to have his money refunded, but was only entitled to prove in the winding up for the amount of the drafts *pari passu* with other creditors (*m*).

The Court will, however, confirm *bonâ fide* sales (*n*), mortgages (*o*), or other dispositions of the company's property made in the interval which elapses between the presentation of the petition and the winding-up order. Further, if the property in goods sold in that interval has passed to the purchaser, the Court will order the liquidator to deliver such goods to him (*p*); but if the property has not passed, the purchaser cannot obtain the goods; he can only prove against the company in respect of damages (*q*). Bonâ fide sales,
&c., upheld.

(*h*) See §§ 131 and 133.

(*m*) *Ex parte Guillemin*, 28 Ch. D.

(*i*) *Ex parte Contract Corporation*, 3 Ch. 105. 634.

(*n*) *Pearson's case*, 3 Ch. 443.

(*k*) *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.*, 9 App. Ca. 434, and 9 Q. B. D. 648. 312.

(*o*) *Gibbs and West's case*, 10 Eq.

(*p*) *Pearson's case*, 3 Ch. 443.

(*q*) *Ib.*

(*l*) *Ex parte Greenwood*, 9 Ch. 511; *Daly & Co.*, 19 L. R. Ir. 83.

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Sect. 6.

Liens.

Wiltshire Iron
Company v.
Great Western
Railway Com-
pany.

Fraudulent
preference.

Liens acquired on a company's property before the commencement of the winding-up are not avoided (*r*), and if a debt due to a company has been equitably assigned before a petition to wind it up is presented the assignee's title is not affected by a subsequent winding-up order (*s*). But a lien cannot be acquired after the winding up has commenced, *e.g.*, a solicitor cannot retain documents of the company come to his hands since that date (*t*).

In connection with this subject, an important decision of the Court of Queen's Bench and Exchequer Chamber requires notice. A company had agreed that a carrier should have a general lien on all goods carried for it; the company was ordered to be wound up, and the liquidator continued to employ the carrier without coming to any fresh agreement with him. The carrier sought to detain goods sent by the liquidator until he should pay the debt due from the company; but it was held that the carrier was not entitled to do so (*u*). The Court seems to have thought that the winding-up order put an end to the previous agreement for a lien, and that the goods sent by the liquidator were not the goods of the company. But it is submitted that neither of these views was correct. As, however, there was no plea on equitable grounds, the Court was not in a position to give due weight to the difference between an equitable security and a common law lien.

Where a company is being wound up, whether by the Court or subject to its supervision, or voluntarily, the doctrines of fraudulent preference are applicable to it; and with reference to these doctrines, the presentation of the petition in the first two cases, and the resolution to wind up in the last case, is equivalent to an act of bankruptcy (*v*).

It has been decided that a disposition of property, which is invalid on grounds of fraudulent preference, can be set aside

(*r*) See the next two notes, and the authorities there cited.

(*s*) *Gorringe v. Irwell India Rubber, &c., Works*, 34 Ch. D. 128.

(*t*) *Capital Fire Ins. Assoc.*, 24 Ch. D. 408.

(*u*) *Wiltshire Iron Co. v. Great Western Rail. Co.*, L. R. 6 Q. B. 101 & 776, not followed in *Llangennoch Coal Co.*, W. N. 1887, p. 22.

(*v*) § 164; Bankruptcy act, 1883, § 48; *Kent's case*, 39 Ch. D. 259;

in an action instituted by the company itself (*x*); but no disposition of a company's property can be impeached on the ground of fraudulent preference, except for the benefit of the general body of creditors (*y*); and the disposition must have been made in contemplation of a winding up, and without pressure (*z*). Pressure, however, by a director of an insolvent company to obtain security for a debt owing to himself by that company has been held not to be enough (*a*).

The doctrines of reputed ownership have no application to companies which are being wound up (*b*). Bk. IV. Chap. 1.
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Reputed ownership.

All conveyances or assignments by a company formed under the act of 1862 to trustees for the benefit of all its creditors, are wholly void (*c*). Creditor's deeds.

The effect of the commencement of the winding up of a company on transfers of shares and the status of members and agreements with them will be examined hereafter. Transfers of shares, &c.
see p. 47 & p. 632.

3. *Effect of winding up on legal proceedings against the company and its members.*

No part of the law relating to the winding up of companies Old law. has been more altered or improved than that which relates to the rights of creditors to enforce payment of their debts by ordinary legal proceedings (*d*). Under the Winding-up acts of 1848 and 1849 it was held (*e*)— Acts of 1848 and 1849.

Inns of Court Hotel Co., 6 Eq. 82; *Syke's case*, 13 Eq. 255. Compare *Poole Jackson and Whyte's case*, 9 Ch. D. 322.

(*x*) *Gas Light Improvement Co. v. Terrell*, 10 Eq. 168.

(*y*) *Willmott v. London Celluloid Co.*, 34 Ch. D. 147, affirming 31 Ch. D. 425, where it was held that debenture-holders could not take advantage of this doctrine to recover money exclusively for their own benefit; and see *Ex parte Cooper*, 10 Ch. 510.

(*z*) *Inns of Court Hotel Co.*, 6 Eq. 82; *Ex parte Birmingham Banking Co.*, 6 Ch. 83. N.B. It is not every

disposition of property which would be an act of bankruptcy, that is void under § 164. See the last case. See Partn. 628, for the principles applicable to this subject.

(*a*) *Gas Light Improvement Co. v. Terrell*, 10 Eq. 168, and observe that the security there included all the company's property. Compare *Habershon's case*, 5 Eq. 287, and see *Syke's case*, 13 Eq. 255.

(*b*) *Gorringe v. Irwell India Rubber Works*, 34 Ch. D. 128; *Crumlin Viaduct Works Co.*, 11 Ch. D. 755.

(*c*) § 164.

(*d*) See *ante*, p. 611 *et seq.*

(*e*) The statements in the text

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1. That a winding-up order *per se* did not prevent a creditor of the company from obtaining and executing judgments against it or its members (*f*).

2. That a winding-up order, and the appointment of an interim manager, did not preclude a creditor from obtaining judgment against the company or its members, or from enforcing a judgment against the latter; but merely precluded the judgment creditor from intermeddling with the property of the company protected by the interim manager (*g*).

3. That after a winding-up order, and the appointment of an official manager, proceedings by a creditor of the company against the company or its members would be stayed until the creditor had, so far as he was able, proved his debt in the winding up (*h*).

4. That this last rule did not apply to persons in a position to sue one or more individuals by virtue of some contract binding on them, otherwise than as members of the company, *e.g.*, upon some separate undertaking or promissory note, on which they were personally liable (*i*).

5. That a creditor of the company who had, so far as he was able (*k*), proved his debt in the winding up, was at liberty to proceed to enforce his demand against the company or its

apply to the creditors suing in the ordinary courts of law. Creditors suing in the Stannary Courts were in a much worse position, for their proceedings were stayed by the mere presentation to the Court of Chancery of a petition for winding up, and notice thereof to the Vice-Warden. See 12 & 13 Viet. c. 108, § 1, and 20 & 21 Viet. c. 78, §§ 12 and 13. It was, however, decided that a creditor was not entitled to appear and oppose the petition. *Trefoil and Messer Mining Co.*, 2 J. & H. 421.

(*f*) *Re India and Australia Steam Packet Co.*, 17 Sim. 15; *Hill v. London and County Assurance Co.*, 1 H. & N. 398; *Re Phillips*, 18 Beav. 629.

(*g*) *Brettell v. Davis*, 7 Ex. 307.

(*h*) *Hutchinson v. Harding*, 11 Ex. 561; *Thompson v. Universal Salvage Co.*, 3 Ex. 310; *Macgregor v. Keiley*, 4 Ex. 801; *Prescott v. Hallow*, 5 Ex. 726; *Marson v. Lund*, 13 Q. B. 664. But non-proof in the winding up was no defence to an action, *MacKenzie v. Sligo, &c., Rail. Co.*, 18 Q. B. 862.

(*i*) *Re Sudlow and Kingdon*, 12 Beav. 527; *Penkivil v. Connell*, 5 Ex. 381; *Beardshaw v. Lonsborough*, 11 C. B. 498. See, too, *Macgregor v. Keiley*, 4 Ex. 801; *Dover and Deal Rail. Co.*, 17 Sim. 18.

(*k*) An unsatisfactory affidavit of debt is not sufficient proof, *Hutchinson v. Harding*, 11 Ex. 561.

members without further hindrance or delay, save that he could not seize the property of the company vested in the official manager. Therefore the Court of Chancery would not restrain such creditor from issuing execution against a contributory (*l*); nor would a court of law withhold from a judgment creditor of the company permission to enforce payment of his debt from the individuals liable to pay it (*m*); nor was there anything to prevent such a creditor from suing the official manager for the purpose of obtaining a judgment, decree, or order against him (*n*), or from afterwards enforcing such judgment, decree, or order against the individuals represented by him (*o*).

By 20 & 21 Vict. c. 78, however, these rights of the creditors of a company which was being wound up under the acts of 1848 and 1849, were materially altered. For in the first place, the Master or Judge acting in the winding up was empowered to call upon the creditors, by advertisement, to meet and choose one or more persons, other than the official manager, to represent them in the winding up; and after they had been thus called upon by advertisement, the creditors became parties to the winding up (*p*).

In the next place, as soon as the creditors had chosen, or had been required to choose, representatives, no action or suit could be either commenced or prosecuted by any creditor against the official manager or the company, or any other person representing the same, or any person as a contributory thereof, except by leave of the Master or Judge acting in the

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Alterations made
by 20 & 21 Vict.
c. 78.

When leave
to sue was
required.

(*l*) *Re Dover and Deal Rail. Co.*, 17 Sim. 18; *Re Phillips*, 18 Beav. 629; *Prichard's case*, 5 De G. M. & G. 484.

(*m*) *Morisse v. Royal Brit. Bank*, 1 C. B. N. S. 67; *Palmer v. Justice Assurance Society*, 6 E. & B. 1015; *Hill v. London and County Assurance Co.*, 1 H. & N. 308; *Carroll v. Kennedy*, 6 Ir. Com. Law Rep. 11; *Mackenzie v. S'ijo, &c., Rail. Co.*, 4 E. & B. 119.

(*n*) *Robson v. McCreight*, 25 Beav.

272; *Thompson v. Norris*, 5 De G. & S. 686.

(*o*) But a judgment against the official manager of a so-called company which has no capacity to sue or be sued, either by a corporate name or by a public officer, cannot be enforced against the individuals composing such company, *Re Weiss*, 15 C. B. 331.

(*p*) 20 & 21 Vict. c. 78, § 1. See *Mexican and South American Mining Co.*, 26 Beav. 172.

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b) Under the
companies act,
1862.

winding up (*q*). It was not, however, incumbent on the Master or Judge to require the creditors to choose a representative; and until they were required to do so, their right to sue was not affected (*r*).

The Companies act, 1862, proceeds upon an entirely different principle; the leading idea being that when the winding up of a company has once commenced, its creditors ought to be paid *pari passu* (*s*). In order to give effect to this principle the act enables the Court, when a company is being wound up either compulsorily or voluntarily (*t*), to stay actions and executions, not only against companies which are being wound up, but also against their members in those cases in which such proceedings against them individually can still by law be taken.

It has been already pointed out that the members of a company formed and registered under the Companies act, 1862, or under the former acts of 1856-8, are not liable to be proceeded against personally by action in respect of the debts of the company (*u*); but it may be otherwise as regards companies not formed under these acts; and it therefore becomes material for the present purpose to distinguish companies of the first class from those of the second.

a) As regards companies formed and registered under the act.

1. Where com-
pany is being
wound up by
the Court.
Restraining
actions, &c.

With respect to companies formed and registered under the Companies act, 1862, or under the repealed acts of 1856-8 (*x*), it is enacted that at any time after the presentation of the petition, and before any winding-up order is made upon it, the Court may, upon the application of the company, or any creditor or contributory of the company, restrain further pro-

(*q*) *Ib.* § 7. Such leave was obtained in Chambers, *Royal British Bank*, 3 Jur. N. S. 1114; if not obtained, the court in which the action was brought would stay proceedings, *Thomas v. Wdls*, 16 C. B. N. S. 508. See, as to judgment creditors, *Barnes v. Thrupp*, 3 Jur. N. S. 1242.

(*r*) *Robson v. M'Cright*, 25 Beav. 272. See, also, *Ex parte Tobin*, 7

W. R. 4.

(*s*) See *ante*, p. 666, note (*c*), and *Ex parte Grissell*, 1 Ch. 528; *Ashbury's case*, 5 Eq. 223; *Wiltshire Iron Co. v. Great Western Rail. Co.*, L. R. 6 Q. B. 101 & 776.

(*t*) See §§ 85, 87, 138, 163.

(*u*) See *ante*, p. 276 *et seq.*

(*x*) See §§ 176 and 177 of the Companies act, 1862.

ceedings in any action, suit, or proceeding against the company (y); and further, that after a winding-up order is made, no action, suit, or other proceeding shall be proceeded with or commenced against the company, except with the leave of the Court, and subject to such terms as the court may impose (z). Moreover, where a company is being wound up by the Court, or subject to the supervision of the Court, any attachment, sequestration, distress or execution, put in force against the estate or effects of the company after the commencement of the winding up, is declared to be void to all intents (a).

There are no similar provisions expressly applicable to companies which are being wound up voluntarily; but upon the application of the liquidators or any of the contributories of such companies, the Court is empowered to restrain creditors from proceeding with actions, executions, &c., in like manner as it can where a company is being wound up by the Court (b); and this power has been exercised on several occasions (c). Neither a creditor nor the company, however, is apparently entitled to apply to the Court to interfere in these cases (d).

Where a company is being wound up under the supervision of the Court, the Court has the same jurisdiction over suits and actions as it has when the company is being wound up compulsorily (e).

These enactments do not apply to proceedings by the Crown (f).

(y) Companies act, 1862, § 85.

(z) *Ib.* § 87.

(a) *Ib.* § 163; *Ex parte Fourdrinier*, 21 Ch. D. 510. In *Harford v. Amicable, &c., Asso. Co., Ir.* L. R. 5 Com. Law, 368, the Court set aside a judgment entered up against a company after it had been ordered to be wound up. See *infra*.

(b) § 138.

(c) Actions stayed, *Keynsham Co.*, 33 Beav. 123; *Life Assurance Co. of England*, 10 Jur. N. S. 762; *Thames Plate Glass Co. v. Land and Sea Telegraph Co.*, 11 Eq. 248; and 6 Ch.

643; *Walker v. Banagher Distillery Co.*, 1 Q. B. D. 129; *Rose & Co. v. Gardden Lodge Coal Co.*, 3 Q. B. D. 235. Execution stayed, *Poole Fire Brick and Blue Clay Co.*, 17 Eq. 268; *Sublonière Hotel Co.*, 3 Eq. 74; *Peninsular Banking Co.*, 35 Beav. 280.

(d) See § 138; *Thomas v. Patent Lionite Co.*, 17 Ch. D. at p. 257.

(e) §§ 148 to 151.

(f) *Oriental Bank Corporation, Ex parte The Crown*, 28 Ch. D. 643; *Henley & Co.*, 9 Ch. D. 469.

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Notwithstanding the clear words of § 163 they have been construed as controlled by § 87, and the Court has declared itself competent to allow attachments, &c., to proceed, if to stop them will deprive the person putting them in force of all remedy against the company (*g*). But an attachment, &c., which is void under § 163 is void altogether—*i.e.*, as against secured creditors, and not only as against the company (*h*).

It is necessary to notice in greater detail the numerous decisions on the foregoing enactments with respect to actions, executions, and distresses.

Staying actions.

As regards actions.—When the Court is asked to stay an action, the only material question to be considered is, whether there are any circumstances which render it necessary that the action should be continued, or whether the claim of the plaintiff is not one which can be as easily dealt with in the winding up as in any other way. If the claim sought to be enforced is capable of being satisfactorily dealt with in the winding up, other proceedings to enforce it will be stayed (*i*); but the costs already incurred by the creditor will be added to his debt (*j*). Even where a company is being wound up voluntarily, actions against it will be stayed upon these terms (*k*).

If the Court is of opinion that the action ought not to be stopped, *e.g.*, where an action is instituted against directors or other individuals as well as against the company, the Court will allow the proceedings to go on (*l*), but will require the

(*g*) *Exhall Coal Mining Co.*, 4 De G. J. & S. 377; *Ex parte Carnellby*, 35 Ch. D. 656.

(*h*) *Ex parte Fourdrinier*, 21 Ch. D. 510.

(*i*) *Hermann Loog, Limited*, 36 Ch. D. 502, action in Scotland; *International Pulp and Paper Co.*, 3 Ch. D. 594, action in Ireland; *Australian Direct Steam Nav. Co.*, 20 Eq. 325, a suit to enforce a maritime lien, and compare *Rio Grande do Sul Steamship Co.*, 5 Ch. D. 282; *Re Briton Medical Assur. Assoc.*, 32 Ch. D. 503, summonses to recover penalties. See, also, the next note.

(*j*) *Keynsham Co.*, 33 Beav. 123;

Life Assurance of England, 10 Jur. N. S. 762; *Rose & Co. v. Gardden Lodge Coal Co.*, 3 Q. B. D. 235, where the plaintiff's costs of appearing on the application to stay proceedings were not allowed.

(*k*) See *Rose & Co. v. Gardden Lodge Coal Co.*, 3 Q. B. D. 235; *Poole Fire Brick, &c., Co.*, 17 Eq. 268, and other cases, *ante*, p. 673, note (*c*).

(*l*) As in *Wyley v. Exhall Coal Co.*, 33 Beav. 538; *Hall v. Old Tulargoch, &c., Co.*, 3 Ch. D. 749, and *Rio Grande do Sul Steamship Co.*, 5 Ch. D. 282.

plaintiff to undertake not to issue execution against the company without the leave of the Court (*m*). So the Court has allowed a suit to go on until the defendants have answered, but no further (*n*). A mortgagee will not be restrained from enforcing his rights against the mortgaged property (*o*). Bk. IV. Chap. 1.
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Applications for leave to continue proceedings against a company which has been ordered to be wound up should be made to the judge who made the order (*p*); and should be made by summons at chambers (*q*): and if he gives leave to proceed, the appeal court will not interfere (*r*).

The liquidator ought to be the receiver in actions in which receivers are necessary (*s*).

By Order XLIX. r. 5, of the Rules of the Supreme Court, 1883, "when an order has been made by any judge of the Chancery Division for the winding up of any company, the judge in whose court such winding up shall be pending shall have power, without any further consent, to order the transfer to such judge of any cause or matter pending in any other court or division brought or continued by or against such company" (*t*). R. S. C.
XLVI. 2, 5.

The Court has no power to order the costs of an action which has been dismissed by consent in consequence of the company being wound up, to be paid out of the assets of the Costs.

(*m*) *McEwen v. London and Bombay and Mediterranean Bank*, W. N. 1866, 407; *Hagell v. Currie*, ib. 1867, 75.

(*n*) *Thames Plate Glass Co. v. Land and Sea Telegraph Co.*, 11 Eq. 248, and 6 Ch. 643.

(*o*) *Lloyd v. Lloyd*, 6 Ch. D. 339; *Longdendale Cotton Spinning Co.*, 8 Ch. D. 150, where the company was being wound up in the County Palatine Court of Lancashire; *Morr v. Anglo-Italian Bank*, 10 Ch. D. 681, where the property subject to the mortgage was in Italy, and proceedings were being taken in that country; and *Hodson v. Tea Co.*, 14 Ch. D. 859.

(*p*) *Wilson v. Natal Investment Co.*, W. N. 1867, 68.

(*q*) *Hagell v. Currie*, W. N. 1867, 75.

(*r*) *Thames Plate Glass Co. v. Land and Sea Telegraph Co.*, 6 Ch. 643.

(*s*) *Perry v. Oriental Hotels Co.*, 5 Ch. 420. See, also, *Campbell v. Compagnie Générale de Bellegarde*, 2 Ch. D. 181. See, in a voluntary winding up, *Boyle v. Bettres Llantwit Coll. Co.*, ib. 726.

(*t*) Compare Ord. li. r. 2a, of the Rules of 1875, and *Madras Irrigation Co.*, 16 Ch. D. 702, correcting *Landore Siemens Steel Co.*, 10 Ch. D. 489.

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company, although the action was brought by shareholders for the benefit of the company (*u*).

Proceedings before a magistrate to recover penalties from a company may be restrained (*x*).

Practice.

An application to stay an action in the High Court should be made by summons in the action, and not to the judge in whose Court the company is being wound up (*y*). To stay other actions application must be made to him.

When a winding-up petition has been presented and has not been heard, the usual practice is to apply *ex parte* to have actions stayed until the petition is heard or disposed of; and an order to this effect is generally granted, on the usual undertaking being given as to damages. This practice was adopted, after consideration, by V.-C. Wickens in *London and Suburban Bank* (*z*), and has been followed since the Judicature acts by all the divisions of the High Court.

Staying executions.

As regards executions.—The Court is much more reluctant to stay executions than other proceedings. To interfere with a creditor whose legal right is established, and who is about to reap the fruit of a successful litigation, is a strong measure scarcely to be justified by considerations of hardship to the debtor, but possibly justifiable on the principle that equality is equity, and that it is unjust to other creditors that one shall obtain payment in full whilst little or nothing is left for them. Even as between creditors, however, some preference is fairly the reward of extra diligence; and where a creditor has actually issued execution against a company before a petition to wind it up has been presented, and the sheriff is in possession when it is presented, the Court will not interfere and deprive the creditor of the fruits of his diligence (*a*), unless

Executions levied before a winding-up order.

(*u*) *Hull Central Drapery Co.*, 15 Ch. D. 326.

(*x*) *Briton Medical, &c., Assoc.*, 32 Ch. D. 503.

(*y*) Jud. act, 1873, § 24, cl. 5; *Artistic Colour Printing Co.*, 14 Ch. D. 502; *Walker v. Banagher Distillery Co.*, 1 Q. B. D. 129; *People's Garden Co.*, 1 Ch. D. 44; *Needham v. Rivers Protection Co.*, ib. 253; *Perkins Beach Lead Mining Co.*, 7

Ch. D. 371, and *Kingchurch v. People's Garden Co.*, 1 C. P. D. 45, *contra*.

(*z*) 19 W. R. 950.

(*a*) *Withernsea Brickworks*, 16 Ch. D. 337; *Parry's case*, 4 De G. J. & Sm. 63. See, also, *London Cotton Co.*, 2 Eq. 53, where the sheriff was kept out of possession; *Bastow, &c., Co.*, 4 Eq. 681.

under very special circumstances, *e.g.*, of oppression or fraud (*b*). But, as a rule, if the sheriff does not seize before the commencement of the winding up, the execution will be stayed (*c*); and receivers appointed in the same interval will be restrained from acting (*d*). In one case, indeed, of this description the creditor was allowed to proceed, but was put under terms as to what property he should seize (*e*); and in two other cases creditors, who had obtained judgment before the commencement of the winding up, but had at the request of the company refrained from issuing execution, were allowed in one case to issue execution after the commencement of the winding up, and in the other case to have the same advantages as if the sheriff had seized before the winding up had commenced (*f*). It has, however, been doubted in a later case whether the fact of the creditor having given time to the company is sufficient to entitle him to such an indulgence (*g*); but if the company has behaved in such a way as to make it unfair for it to restrain a creditor from proceeding on his judgment, the Court will allow execution to issue (*h*). On other occasions, where the execution preceded the petition to wind up, the Court, whilst staying the execution, has directed the liquidator to sell for the benefit of the execution creditor (*i*), thus substantially securing to him the fruits of his diligence. *A fortiori* will the Court not interfere with an execution

(*b*) See *Perkins Beach Lead Mining Co.*, 7 Ch. D. 371; *Hill Pottery Co.*, 1 Eq. 649, where the sheriff had seized before the petition was presented.

(*c*) See *Ex parte Railway Steel and Plant Co.*, *In re Williams*, 8 Ch. D. 192; *London and Devon Biscuit Co.*, 12 Eq. 190, where the writ was lodged before the petition was presented.

(*d*) *Campbell v. Compagnie Générale de Bellegarde*, 2 Ch. D. 181; *Perry v. Oriental Hotels Co.*, 5 Ch. 420. But see where the winding up is voluntary, *Boyle v. Bettws Llantwit Coll. Co.*, 2 Ch. D. 726.

(*e*) *Bastow, &c., Co.*, 4 Eq. 631. See the cases in note (*c*).

(*f*) *Richards & Co.*, 11 Ch. D. 676; *Ex parte Railway Steel and Plant Co.*, *In re Taylor*, 8 Ch. D. 183.

(*g*) *Vron Colliery Co.*, 20 Ch. D. 442.

(*h*) *Rudlow v. Great Britain Mutual Life Ass. Soc.*, 17 Ch. D. 600.

(*i*) *Hill Pottery Co.*, 1 Eq. 649; *Plus yn Mhowys Coal Co.*, 4 Eq. 689; *Ex parte Railway Steel and Plant Co.*, *In re Taylor*, 8 Ch. D. 183. See, also, *Dublin Exhibition Co.*, Ir. Rep. 2 Eq. 158.

Bk. IV. Chap. 1. creditor who has actually got his money before the winding-up order is made (*k*).
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Executions
levied after
a winding-up
order.

Executions issued after a petition for a winding-up order has been presented, stand in a different position, and are stopped (*l*); even although the property seized may be in a foreign country (*m*). But the Court will not interfere with creditors who have obtained judgments against the company in actions brought by or against it by its liquidators (*n*). Indeed, it is very doubtful whether the statutory provisions in question have any application to such a case.

Garnishee
orders.

In the case of an execution by a writ of *fi. fa.*, the important date is that on which the sheriff seizes; in the case of an attachment of a debt by means of a garnishee order, the date to be considered is the date on which the order *nisi* is served; in other respects the rules applicable to the stay of these two forms of proceedings are the same (*o*).

Judicature act,
1875, § 10.

It has been decided that section 10 of the Judicature act, 1875, did not introduce into the winding-up of companies, section 87 of the Bankruptcy act, 1869, which deprived execution creditors of the fruits of their execution, where the sheriff had notice of the bankruptcy within fourteen days after sale (*p*); and the same reasoning excludes the application of sections 45 and 46 of the Bankruptcy act, 1883.

Staying
distresses.

As regards distresses.—The 10th section of the Judicature act, 1875, does not place a landlord in the position of a secured creditor by reason of his power of distress, nor give him the priority for a year's rent, which is conferred upon landlords by the bankruptcy acts (*q*). As regards re-entry, the Court will

(*k*) *Ex parte Hawkins*, 3 Ch. 787.

125; *Re Levick*, 5 Eq. 69.

(*l*) *Ex parte Railway Steel and Plant Co., In re Williams*, 8 Ch. D. 192; *Waterloo Life Ins. Co.*, 31 Beav. 589; *Peninsular Banking Co.*, 35 Beav. 280. See, also, *Universal Disinfecter Co.*, 20 Eq. 162; *Dimson's Estate Fire Clay Co.*, 19 Eq. 202, where leave to issue execution was refused.

(*o*) *Stanhope Silkstone Collieries Co.*, 11 Ch. D. 160. See *Hamer v. Giles*, ib. 942.

(*p*) *Ex parte Railway Steel and Plant Co., In re Taylor*, 8 Ch. D. 183; *Withernsea Brickworks*, 16 Ch. D. 337; *Richards & Co.*, 11 Ch. D. 676. *Printing and Numerical Registering Co.*, 8 Ch. D. 535, is overruled, and see *infra*, p. 685, note *h*.

(*m*) *Ex parte Scinde Rail. Co.*, 9 Ch. 557.

(*q*) *Thomas v. Patent Lionite Co.*, 17 Ch. D. 250; *Bridgewater Engin-*

(*n*) See *Re Mackrill Smith*, 3 Ch.

not prevent a landlord from exercising his power of re-entry, if his right to enter under the terms of the lease is clear (*r*). Bk. IV. Chap. 1.
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Further, the sections of the Companies act, 1862, under consideration only apply to a landlord who seeks to distrain upon goods of a company, which is his legal tenant. Therefore in *New City Constitutional Club Co.* (*s*), the Court decided that it could not prevent a landlord from distraining upon goods which, although originally the property of the company, had ceased to be so by being charged for more than their full value in favour of debenture holders. Again when the landlord has no right of proof against the company, *e.g.*, where the company is not the legal tenant (*t*) of the landlord but is the undertenant (*u*) or the *cestui que trust* (*c*) of his lessee, the Court will not restrain the landlord from levying a distress on the company's goods, even although the company may offer to allow him to prove for his rent in the winding up (*y*). In one case of this sort the Court allowed a distress although the landlord held the company's promissory note for the rent, and could therefore prove for it (*z*). But this case has been questioned and not without reason (*a*). Where landlord
cannot prove
for the rent.

New City Con-
stitutional Club
Company.

In cases of this class, *i.e.*, where the company is not tenant to the person distraining, it is immaterial whether the rent, for which the landlord seeks to distrain, accrued due before, or after, the commencement of the winding up, for the landlord not being a creditor of the company in respect of his rent, has no right to prove for it in the winding up (*b*).

ceering Co., 12 Ch. D. 181; *Coal Consumers' Co.*, 4 Ch. D. 625. *Stockton Iron Furnace Co.*, 10 Ch. D. 335, can no longer be relied upon as an authority to the contrary.

(*r*) *General Share Co. v. Wetley Pottery Co.*, 20 Ch. D. 260. § 163 of the Companies act, 1862, does not apply to such a case.

(*s*) 34 Ch. D. 646. The debenture-holders after the hearing of the action in the Court of first instance, offered to give up their charge on the chattels in favour of the liquidator. The court of appeal held this could not affect the landlord's right, which must be ascertained from the state

of circumstances at the commencement of the winding up.

(*t*) *Lundy Granite Co.*, 6 Ch. 462.

(*u*) *Carriage Co-operative Supply Association*, 23 Ch. D. 154; *Regent United Service Stores*, 8 Ch. D. 616.

(*v*) *Echall Coal Mining Co.*, 4 De G. J. & S. 377.

(*y*) *Regent United Service Stores*, 8 Ch. D. 616. See, also, *Lundy Granite Co.*, 6 Ch. 462.

(*z*) *Ex parte Clemence*, 23 Ch. D. 154.

(*a*) *New City Constitutional Club Co.*, 34 Ch. D. 646.

(*b*) See the cases in the last five notes, and the next note.

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Where landlord
can prove for
the rent.

If the landlord is the legal creditor of the company in respect of the rent, which he wishes to recover by a distress upon the company's goods, he must, in order to obtain leave to distrain under section 87, show either that it is inequitable for the company to insist on section 163, or that the rent ought to be paid in full as one of the expenses of the winding up (c). In applying these principles to any given case it is important to ascertain whether the rent for which the landlord seeks to distrain accrued due before, or after, the commencement of the winding up. If the rent accrued due before the commencement of the winding up, the landlord will not be allowed to distrain (d), even though the liquidator may have retained possession of, and carried on the company's works upon the land (e); the landlord must prove for his debt like any other creditor (e). If the rent accrued since the commencement of the winding up, the landlord will be allowed to distrain for it, or receive payment in full, if the liquidator has retained possession of the property for the purposes of the winding up, or for carrying on the company's business, or in order to sell it or do the best he can with it; for under these circumstances the rent is considered as one of the expenses of the winding up, and should be paid in full, like any other debt properly incurred by the liquidator (f). But if the

(c) *Oak Pits Colliery Co.*, 21 Ch. D. 330; *Lancashire Cotton Spinning Co.* 35 Ch. D. 656. A mortgagee who has a power of distress under an attornment clause, is in a less favourable position for obtaining leave to distrain than an ordinary landlord. *Ib.*

(d) *Traders' North Staffordshire Carrying Co.*, 19 Eq. 60, where the distress was for tolls in arrear; *Coal Consumers' Association*, 4 Ch. D. 625, where the liquidator retained possession, but not for any purpose of liquidation; *Thomas v. Patent Lionite Co.*, 17 Ch. D. 250, where distress was levied after a resolution for a voluntary winding up had been passed, but before the order for a

compulsory winding up, which superseded the voluntary winding up, had been made.

(e) *North Yorkshire Iron Co.*, 7 Ch. D. 661; *Brown, Bayley, and Dixon*, 18 Ch. D. 649 (case of a mortgagee with power of distress); *South Kensington Co-operative Stores*, 17 Ch. D. 161; *Oak Pits Colliery Co.*, 21 Ch. D. 322.

(f) *Lundy Granite Co.*, 6 Ch. 462; *North Yorkshire Iron Co.*, 7 Ch. D. 661; *Silkstone and Dodworth Iron Co.*, 17 Ch. D. 158; *South Kensington Co-operative Stores*, 17 Ch. D. 161; *Brown, Bayley, and Dixon*, 18 Ch. D. 649; *Oak Pits Colliery Co.*, 21 Ch. D. 322.

liquidator has retained possession by arrangement with the landlord for his benefit as well as for that of the company, or has done nothing, but has merely abstained from trying to get rid of the property, and has not agreed to pay rent, the landlord will not be allowed to distrain, but must prove for the rent in the winding up (*g*). If the rent has accrued due partly before and partly after the commencement of the winding up, and the landlord establishes his right to distrain, or be paid in full, for the latter portion of the rent, the rent will be apportioned and the distress will be allowed for so much as accrued after the winding up commenced (*h*).

Questions of a similar nature have arisen in respect to rates. It was settled that the local authorities had no right (under § 10 of the Judicature act, 1875) to be paid in full rates due at the commencement of a winding up in priority to other debts (*i*). As these rates were debts provable in the winding up, the overseers were not allowed to distrain for them after the winding up had commenced (*k*), and inasmuch as rates, unlike rent, cannot be apportioned, if a rate had been assessed before the commencement of a winding up for a period which extended beyond that date, the local authorities were not entitled to receive any portion in full, but had to prove for the whole (*l*). Now, however, by the Preferential Payments in Bankruptcy act, 1888 (*m*), all parochial or other local rates due from a company at the commencement of the winding up and which have become due within twelve months next before that time, have been given a priority and are to be

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Rates before
winding up.

(*g*) *Progress Assurance Co.*, 9 Eq. 370; *Bridgewater Engineering Co.*, 12 Ch. D. 181; *Oak Pits Colliery Co.*, 21 Ch. D. 322.

(*h*) *South Kensington Co-operative Stores*, 17 Ch. D. 161.

(*i*) *Albion Steel and Wire Co.*, 7 Ch. D. 547; *Art Engraving Co.*, W. N., 1889, 38. Bankruptcy act, 1883, § 40.

(*k*) The Court would have allowed a distress to be levied before the commencement of a winding up, although a provisional liquidator might have been appointed. See

Dry Docks Corporation of London, 39 Ch. D. 306.

(*l*) Rates are not within the Apportionment act, 33 & 34 Vict. c. 35, and as the occupation by the company before the winding up is the same occupation as that by the liquidator afterwards, there is no change of occupation, so as to allow the rate to be apportioned under the Public Health act, 1875, 38 & 39 Vict. c. 55, § 211, sub-s. (3). *Wearmouth Crown Glass Co.*, 19 Ch. D. 640.

(*m*) 51 & 52 Vict. c. 62.

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Rates after
winding up.

paid, *pari passu* with certain other preferential debts, if possible in full, and at once.

The rights of the local authorities with respect to rates assessed after the commencement of the winding up, have given rise to some difference of opinion. In the two earliest cases on this subject (*n*), payment in full was refused on the ground that the liquidator's occupation of the property had not been beneficial, in that he had made no profit by it. The Court of Appeal, however, in the other two cases which have arisen (*o*), did not approve of this test, but in both cases ordered the rates to be paid in full, though the liquidator had made no profit out of his occupation, on the ground that the occupation of the property was continued with a view to the more advantageous realisation of the company's assets. In the latter of these two cases Lord Justice Bowen expressed an opinion, in which Lord Justice Fry concurred, that the true test is whether the liquidator's occupation has been beneficial within the ordinary meaning of that expression in cases of rating. The Court will not, except in a very extreme case, take into consideration complaints by the liquidator as to the unreasonable amount of the rates; if the assessment is wrong, he should appeal against it in the ordinary way (*p*).

b) As regards companies not formed under the act.

The winding-up provisions of the Companies act, 1862, apply, as has been seen, not only to companies formed and registered under it, but also to other companies (*q*). As regards actions, executions, &c., against companies themselves, it is not material to distinguish those formed under the act from other companies (*r*). But in the case of a company not

(*n*) *West Hartlepool Iron Co.*, 34 L. T. N. S. 570; *Watson, Kipling & Co.*, 23 Ch. D. 500.

(*o*) *International Marine Hydro-pathic Co.*, 28 Ch. D. 470; *National Arms Co.*, *ib.* 474.

(*p*) *National Arms Co.*, 28 Ch. D. 474; and see *Watson, Kipling & Co.*, 23 Ch. D. 500.

(*q*) *Ante*, p. 617.

(*r*) See *Rudow v. Great Britain Mutual Life Assurance Society*, 17 Ch. D. 600, and §§ 196 to 198, and 199, 201, 202, and 204. An action against official liquidators in whom the company's property is vested under § 203 in their official capacity can be stayed as an action against

formed under the act of 1862, or under the prior acts of Bk. IV. Chap. 1. Sect. 6. 1856—1858, creditors of the company may be entitled to proceed against members individually; and accordingly the act of 1862 contains provisions enabling the Court, before any winding-up order is made, to stay such proceedings upon the application of any creditor both when the company has been registered (*s*) and when it has not (*t*): only a creditor, however, is entitled to apply for a stay of such proceedings (*u*). But after a winding-up order has been made, no action, suit, or other legal proceeding can be commenced or proceeded with against any contributory in respect of any debt of the company except with the leave of the Court, and subject to such terms as the Court may impose (*v*). The reasons already noticed for making a distinction between actions on the one hand, and executions on the other, and the decisions referred to in connection with that distinction ought to be borne in mind when considering these enactments (*y*).

Where a debt has been contracted by an unincorporated company, and the company is afterwards registered, those persons only who are members of the company at the time of registration become members of the incorporated company. Consequently, even although such company may be afterwards wound up, the common law liabilities of persons who had ceased to be shareholders before the registration of the company remain wholly unaffected, and may be enforced as if the company had never been registered or ordered to be wound up. Thus in *Lanyon v. Smith* (*z*), a cost-book mining company was formed, and whilst the defendant was a member of it the debt to the plaintiff was contracted; the defendant sold and transferred his shares and ceased to be a shareholder; afterwards the company was registered and ordered to be wound up. The defendant's name was placed on the list of contributories

Debts contracted before registration.

Lanyon v. Smith.

the company, *Graham v. Edge*, 20 Q. B. D. 538; on appeal the action was decided to be against the liquidators personally, see *ib.* 683.

(*s*) § 197.

(*t*) § 201.

(*u*) See the sections 197 and 201.

(*x*) §§ 198 and 202, and see as to

a voluntary winding up, § 138. As to the Court to apply to, see *ante*, p. 676.

(*y*) *Ante*, p. 676.

(*z*) 3 B. & Sm. 938. *Harcey v. Clough*, 2 New R. 204, Ex., was a precisely similar case. See, also, *Fountain's case*, 11 Jur. N. S. 553.

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as a past member, but the plaintiff nevertheless sued him at law; and the Court of Queen's Bench held that the action ought not to be stayed, inasmuch as the defendant never was a member of the company being wound up, and his name ought not to have been placed on the list of contributories of that company.

SECTION VII. — PROCEEDINGS UNDER COMPULSORY WINDING-UP ORDERS.

1. *Generally.*

Form of order.

A compulsory winding-up order is in the following form, "This Court doth order that the — company be wound up by this Court under the provisions of the Companies acts, 1862 and 1867" (*a*). Under the Winding-up acts of 1848 and 1849, the order dissolved the company (*b*); but, under the act of 1862, the company is not dissolved until the winding up is completed (*c*).

Notice of the order.

When a winding-up order is made, notice is to be given to the registrar of joint-stock companies (*d*); and the order must be advertised, within twelve days after the date thereof, by the petitioner in the *London Gazette*, and be served upon such persons (if any) and in such manner as the Court may direct (*e*).

(*a*) See the orders, schedule 3, form 3. For a form of order giving the liquidator power to act without the previous sanction or interference of the Court, see *Rochdale Property and General Finance Co.*, 12 Ch. D. 775.

(*b*) See 11 & 12 Vict. c. 45, § 16, and form 2 in the schedule; *Ex parte Barber*, 1 Mac. & G. 183; *Re North of England Banking Co.*, 1 De G. & S. 545; and *Re Newcastle, &c., Bank*, 17 Beav. 470.

(*c*) 25 & 26 Vict. c. 89, §§ 111 and 143. As to the jurisdiction of the Court over a company actually

dissolved, see *Crookhaven Mining Co.*, 3 Eq. 69; *Pinto Silver Mining Co.*, 8 Ch. D. 273, and *London and Caledonian Insurance Co.*, 11 Ch. D. 140.

(*d*) § 88.

(*e*) Rule 6. As to dispensing with the advertisement under the old practice, see 12 & 13 Vict. c. 108, § 16; and *Re Worcester Corn Exchange*, 15 Jur. 960, where the advertisement of an order of reference as to the expediency of winding up a company was dispensed with.

A form of advertisement is given in the third schedule to the rules promulgated under the act (f). Bk. IV. Chap. 1.
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These rules apply as well to orders for winding up compulsorily as to orders for winding up subject to the supervision of the Court (g); but the remaining proceedings under such orders are so different that it is necessary to distinguish the one class of orders from the other. In the present place the proceedings under a compulsory order will be alone adverted to; those under an order to wind up subject to the supervision of the Court will be noticed in a subsequent section.

The general practice of the Chancery Division of the High Court (h), including the practice in winding up companies under the older winding-up acts, applies to the winding up of companies under the Companies act, 1862, so far as such practice is not inconsistent with that act, and the rules which have been issued under its authority (i). Those matters only which have special reference to the winding up of companies will be found in the present work, and for detailed information on minor points of practice the reader is referred to the Companies act, 1862, and to the rules which, with a full index to them, will be found in the appendix.

(f) See form No. 5.

(g) See as to the advertisements, rule 6; and as to the notice to the registrar, see §§ 88 and 151.

(h) Not the practice in bankruptcy as distinguished from that in chancery. See *Smith, Fleming & Co.'s case*, 1 Ch. 543, *per* Turner, L. J., as to set off; *Kellock's case*, 3 Ch. 769, as to secured creditors; *Ebbw Vale Co.*, 5 Ch. 112, as to interest; *Merchants' Co.*, 4 Eq. 453, as to examinations; *Chapman's case*, 1 Eq. 346, as to servant's wages. But by the Judicature act, 1875, § 10, the rules which in bankruptcy regulate the rights of secured and unsecured creditors, the debts and liabilities provable, and the valuation of annuities, of future and contingent liabilities, are to be observed in winding up any company whose

assets are insufficient to pay its debts and liabilities, and the costs of winding up, which has been ordered to be wound up since 2nd Nov. 1875, *Joseph Suche & Co.*, 1 Ch. D. 48. See as to the effect of this act, *infra*, p. 719 *et seq.*

(i) See § 170, now repealed by 44 & 45 Vict. c. 59, see § 4 and rule 74; *Luard's case*, 1 De G. F. & J. 533; *Ex parte Kintrea*, 5 Ch. 95, as to costs. Although rules have been made under § 170, it is apprehended that in cases not provided for the old winding-up practice would be followed; but see the section. As to serving notices in the winding up on persons out of the jurisdiction of the Court, see *Anglo-African Steamship Co.*, 32 Ch. D. 348; *Nathan, Newman & Co.*, 35 Ch. D. 1.

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Proceedings in
chambers.

The present practice is for the judge who makes the winding-up order to refer the prosecution of it to his own chambers; the winding up is then proceeded with there by his chief clerk, and under his own immediate superintendence (*k*). The decision of the judge himself can always be required as a matter of right; no one being bound to abide by the decision of the chief clerk (*l*). The judge, moreover, is empowered to do in chambers everything which the Court is authorised to do by the Companies act, 1862 (*m*).

Carriage of the
order.

If more than one petition has been presented the carriage of the order is usually given to the first petitioner (*n*). As a general rule the priority of the petitions is determined by the date of advertisement (*o*); but where two petitions were both advertised in the same gazette the carriage of the order was given to the petitioner whose petition was first presented (*p*).

Proceedings
after the order.

As soon as practicable after a compulsory winding-up order is made, it is the duty of the Court to settle the list of contributories, and to cause the assets of the company to be collected and applied in discharge of its liabilities (*q*). To work out the order, a copy of it must be left by the petitioner at the chambers of the judge within ten days after the order has been passed and entered (*r*); and in default any other person interested in the winding up may leave the same, and the judge may, if he thinks fit, give the carriage and prosecution of the order to such person (*s*). Upon the copy of the order being left, a summons to proceed upon it must be taken out and served upon the parties who appeared upon the hearing of the

(*k*) See *Wheel Virtue Mining Co.*, 3 Jur. 659; *Re Newcastle, &c., Bank*, 17 Beav. 470.

(*l*) *Agriculturist Cattle Insurance Co.*, 3 De G. F. & J. 194.

(*m*) See § 83 and rule 73.

(*n*) *Storforth Lane Colliery Co.*, 10 Ch. D. 487; *General Financial Bank*, 20 Ch. D. 276; *Dublin Grains Co.*, 17 L. R., Ir. 512.

(*o*) *Trades Bank Co.*, W. N. 1877, 268.

(*p*) *Storforth Lane Colliery Co.*, 10 Ch. D. 487.

(*q*) § 98.

(*r*) Rule 7.

(*s*) *Ib.* *Ex parte Baker*, 3 De G. & Sm. 243. It is presumed that a similar rule would apply where the petitioner delayed to draw up the order. The carriage of the order will not, however, be given to a person who could not himself obtain a compulsory order, if his object is to force on proceedings which others are desirous of staying, *Brighton Club and Norfolk Hotel Co.*, 35 Beav. 204.

petition (t). Upon the return of the summons the judge may ^{Bk. IV. Chap. 1. Sect. 7.} fix a time for the appointment of an official liquidator, and for the proof of debts, and for the list of contributories to be brought in, and directions may be given as to the advertisements to be issued for such purposes, and generally as to the proceedings and the parties to attend (u). The proceedings under the order are to be continued by adjournment, and when necessary by further summons, and any directions may be given, added to, or varied, at any subsequent time as may be found necessary (x).

With respect to the attendance of parties, every contributory ^{Attendance of parties.} on the list, and every creditor of the company whose debt or claim is allowed, is entitled, at his own expense, to attend the proceedings before the judge, and to have notice thereof (y). Every person desirous of attending must leave the name and address of himself and of his solicitor at the judge's chambers (z). The judge, moreover, may appoint any one or more of the contributories or creditors to represent before him, at the expense of the company, all or any class of the contributories or creditors, upon any question as to a compromise with any of the contributories or creditors, or in and about any other proceedings before him relating to the winding up of the company, and may remove the person or persons so appointed (a).

Service of notices, &c., upon contributories and creditors ^{Service of notices.} may be effected (when personal service is not required) by letter sent through the post; and such service is to be considered as made at the time the letter ought to be delivered in the due course of delivery by the post-office (b). The Court has no jurisdiction to serve notices of orders or of other pro-

(t) Rule 7.

(u) Ib.

(x) Ib.

(y) Ib. 60. As to the right of a creditor to attend the examination of persons under § 115, see *infra*.

(z) Ib. 62.

(a) Ib. 61. As to discharging the petitioner from further attendance, see *Barber's case*, 1 De G. & S. 726.

(b) Rules 63 and 64, and see §§ 62 & 63 of the act. Service of a debtor summons by leaving it at the registered address of a member will not be good if it is not his true or last known address. See *Ex parte Chatteris*, 10 Ch. 227. As to the service of notices under the Stannaries acts, see 32 & 33 Vict. c. 19, § 8.

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ceedings in a winding up upon persons residing out of the jurisdiction of the Court, if the notices are in substance the commencement of proceedings against the persons on whom they are served (*c*); but notices which are not of this character may be served abroad (*d*).

Wishes of creditors and contributories to be consulted.

In all matters relating to the winding up of companies, the Court may have regard to the wishes of the creditors or contributories (*e*), and may direct meetings to be held in order to ascertain their wishes, and may appoint a person to act as chairman (*f*). When the judge directs a meeting to be held under this section (*g*), the official liquidator is to give notice in writing, seven days before the day appointed for the meeting, to every creditor or contributory, of the time and place appointed for the meeting, and of the matter upon which the judge desires to ascertain the wishes of the creditors or contributories (*h*). The notice may, however, be given by advertisement, if the judge so directs (*i*). Votes may be given at such meetings either personally or by proxy (*k*), but no creditor can vote by proxy unless his debt has been allowed, and no contributory can so vote unless he is settled on the list (*l*). The form in which the chairman of the meeting is to report its result is given in the 3rd Schedule to the Rules, No. 48.

Inspection of books, &c.

The right of creditors and contributories to inspect the books of a company being wound up, will be alluded to hereafter when noticing the duties of the liquidators.

(*c*) *Anglo-African Steamship Co.*, 32 Ch. D. 348.

(*d*) *Nathan, Newman & Co.*, 35 Ch. D. 1; and *Baron Liebig's Cocoa Works, Limited*, W. N. 1888, 120.

(*e*) § 91. Including alleged contributories, see § 74.

(*f*) See, as to submitting proposals with reference to matters arising in the winding up, *Slutter's Executors*, 5 De G. & S. 34, and 1 De G. M. & G. 64.

(*g*) § 91. The direction is to be

testified by a memorandum signed by the chief clerk. See rule 47, and the form in schedule 3, No. 47.

(*h*) Rule 45, and, for the form of notice, see the 3rd schedule, No. 45.

(*i*) Rule 45.

(*k*) Rule 46, and, for the form of proxy, see schedule 3, No. 46.

(*l*) Rule 46. This, it is presumed, is what is meant by the expression "contributory of the company" at the end of rule 46.

2. *Extraordinary powers of the Court.*

In order to enable the Court more effectually to exercise its winding-up jurisdiction, certain extraordinary powers are conferred upon it which it will be convenient here to notice (*m*). The Court which will be referred to in the following pages will, however, be only the Chancery Division of the High Court of Justice in England, the reader being referred to the act itself for information as to other courts (*n*). Substantially, however, their powers will be found to be much alike.

In order to enable the Court to ascertain the real state of its affairs, the Court is empowered, after making a winding-up order, to summon before it any officer of the company or any person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to it, or any person whom the Court may deem capable of giving information concerning the trade, dealings, estate or effects of the company; and the Court may require him to produce any books or documents in his power relating to the company (*o*), and may examine him upon oath concerning its affairs (*p*). An order may be made under this section on the application of the liquidator, or of a contributory or alleged contributory; in the former case the order is made *ex parte*, and the liquidator is not required to make any affidavit; it is sufficient if he makes a written statement showing a case of suspicion (*q*); in the latter case, the contributory is generally required to file an affidavit in support of his application, and he must serve the liquidator with notice of motion, but he need not serve the persons for whose examination the order is wanted (*r*).

Power to summon and examine,
§§ 115, 117.

Upon the application of liquidator or contributory.

It is entirely in the discretion of the Court whether it will in

(*m*) These extraordinary powers are in addition to and not restrictive of the ordinary powers of the Court, § 119.

(*n*) As to the jurisdiction of the Stannary Courts, see §§ 68, 83, 108, 116, 120, and 172 of the Companies act, 1862; 32 & 33 Vict. c. 19, and 50 & 51 Vict. c. 43.

(*o*) § 115.

(*p*) § 117. For the summons, see form 54 in the 3rd schedule to the rules.

(*q*) *Gold Co.*, 12 Ch. D. 77; *Imperial Continental Water Corporation*, 23 Ch. D. 314.

(*r*) See cases in last note.

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Court of Appeal will not interfere with the Court of first instance in the exercise of this discretion, except in a very extreme case (*s*); but an appeal will be allowed, even by a person ordered to attend for examination, if the Court of first instance has decided on a wrong principle, or if it had no jurisdiction to order the appellant to attend (*t*).

Commissioners
for taking evi-
dence.

The judges of the county courts sitting at places more than twenty miles from London, and the commissioners of bankrupts, and the assistant barristers and recorders in Ireland, and the sheriffs of counties in Scotland, are made commissioners for taking evidence under the act, and examining any witnesses whom the Court may direct to be examined by them (*u*). Provision, moreover, is made for the examination of persons in Scotland (*x*).

Attendance for
examination.

The proper mode of obtaining the attendance of a person for examination under §§ 115 and 117 is by summons, not by subpoena (*y*).

A person is not bound to attend unless his expenses are tendered him (*z*). A witness who does not answer to the satisfaction of the judge acting in the winding up, or who refuses to produce documents which he ought to produce, is liable to commitment (*a*); and a person is not justified in refusing to be sworn on the ground that it is necessary for him to have counsel's assistance during his examination (*b*); but it has been decided that he is entitled to the assistance of a solicitor and counsel, and to be re-examined by them, and to have notes taken of his own examination (*c*). A person sum-

(*s*) *Ib.*, and *Heiron's case*, 15 Ch. D. 139.

(*t*) *Whitworth's case*, 19 Ch. D. 118; *Heiron's case*, 15 Ch. D. 139. Compare the dicta of Jessel, M. R., and Baggallay, L. J., in *Gold Company*, 12 Ch. D. 77.

(*u*) § 126.

(*x*) § 127.

(*y*) *English Joint-Stock Bank*, 3 Eq. 203; *Gold Company*, 12 Ch. D. 77.

(*z*) See § 115, and *Mercer's case* 5 De G. M. & G. 26, and 2 Sm. & G. 87.

(*a*) *Stone's case*, 3 De G. & S. 120.

(*b*) *Ex parte Bunn*, 3 Jur. N. S. 1013.

(*c*) *Cambrian Mining Co.*, 20 Ch. D. 376; *Breech-Loading Armoury Co.*, 4 Eq. 453; *Merchants' Co.*, *ib.* Compare *Ex parte Bunn*, 3 Jur. N. S. 1013.

moned *ex parte*, under § 115, must attend before a special examiner (*d*). The examination is as a general rule entrusted to the liquidator, but if necessary, the Court may entrust either the whole, or some part of it, to a creditor or contributory; it will then as a rule point out the extent and limits of the examination (*e*). It may be added, that neither the public (*f*) nor creditors, who are entitled to attend proceedings at their own expense, whether under rule 60 of the orders of 1862 (*g*), or under an order of court (*h*), have any right to be present at an examination under this section, and the examiner, if requested to do so, is bound to exclude them; the Court, however may, in its discretion allow their attendance (*i*).

Under this section it has been held that bankers (*k*),
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 brokers (*l*), relatives (*m*), and other persons (*n*), acquainted with the affairs of defaulting contributories, or of persons sought to be put on the list of contributories, may be examined concerning such contributories or persons, and transfers of shares by or to them. Moreover, a person is liable to examination under § 115, although there may be a pending litigation between him and the company, and his examination may relate to the subject-matter of such litigation (*o*). But it seems that a mere creditor of a company is not as such liable to examination under this section (*p*), although he can of course be cross-examined on his own claim.
Persons liable
to be examined.

This power of summoning persons for examination is con-

(*d*) *Re Contract Corporation*, 13 Eq. 27. See *Smith, Knight & Co.*, 8 Eq. 23, as to objecting to the examiner.

(*e*) *Whitworth's case*, 19 Ch. D. 118.

(*f*) *Western of Canada Oils Co.*, 6 Ch. D. 109.

(*g*) *Grey's Brewery Co.*, 25 Ch. D. 400.

(*h*) *Norwich Equitable Fire Insurance Co.*, 27 Ch. D. 515.

(*i*) *Grey's Brewery Co.*, 25 Ch. D. 400.

(*k*) *Druitt's case*, 14 Eq. 6; *Smith, Knight & Co.*, 4 Ch. 421.

(*l*) *Clement's case*, 13 Eq. 179 *n*.

(*m*) *Swan's case*, 10 Eq. 675; *Fricker's case*, 13 Eq. 178.

(*n*) *Trower and Lawson's case*, 14 Eq. 8; *Bloxam's case*, 36 L. J. Ch. 687; *Massey v. Allen*, 9 Ch. D. 164.

(*o*) *Lisbon Steam Tramways Co.*, 2 Ch. D. 575; and see *English Joint-Stock Bank*, 3 Eq. 203; *Re Cathcart*, 5 Ch. 703; *Venables v. Schweitzer*, 16 Eq. 76. Compare *Heiron's case*, 15 Ch. D. 139; *Imperial Continental Water Corporation*, 33 Ch. D. 314.

(*p*) *Accidental and Marine Ins. Corp.*, 5 Eq. 22.

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ferred upon the Court for the purposes of the winding up, and for the benefit of all the persons interested in it; and the Court will not allow the power to be used in a vexatious manner or for an improper object (*q*). It may, however, be exercised for the purpose of tracing monies of the company, and investigating any of its transactions (*r*). Monies due to a company are part of its estate and effects within the meaning of § 115 (*s*); and a person's ability to pay what he owes may be inquired into (*t*).

Compelling
production of
documents.

The power of compelling the production of documents only extends to such documents as may be required to be produced consistently with established rules (*u*). But the solicitors of a company being wound up are compellable to produce the accounts, deeds, and documents of the company in their possession, but without prejudice to any lien they may have against the company for their costs (*v*).

Liquidators may be examined by contributories, or alleged contributories, or by creditors, and be compelled to produce the company's books for inspection (*y*).

Power to arrest.

In order to prevent persons liable to contribute to the payment of the debts of the company from escaping from justice and avoiding examination, the Court may, either before or after making a winding-up order, cause any contributory or alleged contributory (*z*) to be arrested, and his books, money, and effects to be seized, if proof is given that there is probable

(*q*) *Heiron's case*, 15 Ch. D. 139; *Imperial Continental Water Corporation*, 33 Ch. D. 314.

(*r*) See *Smith, Knight & Co.*, 4 Ch. 421; *Contract Corp.*, 6 Ch. 145.

(*s*) See *Clement's case*, *ubi supra*, and *Devon and Somerset Rail. Co.*, 6 Eq. 610.

(*t*) See *Bloran's case*, *ubi supra*, and others of that sort.

(*u*) An order will not be made *ex parte*. *Commercial, &c., Wine Co.*, 35 Beav. 35.

(*v*) *Capital Fire Insurance Association*, 24 Ch. D. 408; *Ex parte Paine and Layton*, 4 Ch. 215; *Cameron's*

Coalbrook Rail. Co., 25 Beav. 1; *Potter's case*, 1 De G. & S. 728, *contra*, was under the older acts.

(*y*) *Mutual Society*, 22 Ch. D. 714; *Burned's Banking Co.*, 2 Ch. 350; *Gooch's case*, 7 Ch. 207. See *Gooch's case* as to the affidavit the liquidator must make. See, also, *Emma Silver Mining Co.*, 10 Ch. 194. As to the right of plaintiffs in an action to compel the liquidator of a company, which has been wound up and dissolved, to produce the books of such company, see *London and Yorkshire Bank v. Cooper*, 15 Q. B. D. 473.

(*z*) § 74.

cause for believing that he is about to abscond, or to remove or conceal any of his goods or chattels for the purpose of evading the payment of calls, or examination (*a*). Bk. IV. Chap. 1.
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In order to facilitate the collection of the company's assets, the Court may order any contributory settled on the list, and any trustee, receiver, banker, or agent, or officer of the company, to hand over any books, monies, or effects in his hands, and to which the company may be *primâ facie* entitled (*b*). The Court may also order any contributory settled on the list to pay any monies due from him or from the estate of the person he represents to the company, exclusively of any calls made in the winding up (*c*). If the company is limited, payment under this section must be made irrespectively of any set-off; but if the company is unlimited, set-off may be allowed in respect of monies due from the company otherwise than on account of dividends or profits (*d*). The payment of calls is also enforced by a summary order (*e*). Summary order
to hand over
money, &c.,
§§ 100, 165.

All monies ordered to be paid under these sections are to be paid into the Bank of England, unless specially directed to be paid to the liquidator (*f*).

These summary powers of obtaining money belonging to the company were introduced in the Winding-up act of 1848 (*g*); and it was at one time held that these powers ought not to be exercised where there was a serious question as to the right of the company to what was withheld from it (*h*); but recent de-

(*a*) § 118. See *Ulster Land Co., Limited*, 17 L. R., Ir. 591, where a form of order will be found; *Imperial Mercantile Credit Co.*, 5 Eq. 264, which shows that an order to seize property may be made, though the Court will not on the evidence order an arrest.

(*b*) § 100, and see also § 165. In *British Imperial Corporation*, 5 Ch. D. 749, leave was given to serve a summons for this purpose out of the jurisdiction.

(*c*) § 101, and see § 165.

(*d*) § 101. As to set-off, see *infra*, § 9.

(*e*) §§ 102 and 103. See, as to

bankrupt shareholders, *Mitchell's case*, 5 Ch. 400.

(*f*) §§ 103 and 104, and rule 38. See, as to enforcing payment into the bank, *Leeds Banking Co.*, 1 Ch. 150.

(*g*) 11 & 12 Vict. c. 45, §§ 66 and 67. See *Ex parte Chadwick*, 15 Jur. 597.

(*h*) See *Royal Hotel Co. of Great Yarmouth*, 4 Eq. 244; *Bank of Gibraltar and Malta*, 1 Ch. 69, and *Carpenter's and Weiss's case*, 5 De G. & S. 402; *Ex parte Johnson*, 1 Jur. N. S. 913; *Ex parte Chadwick*, 15 Jur. 597.

Bk. IV. Chap. 1. cisions show that the Court will exercise these summary powers
Sect. 7. wherever it can do so without injustice (*i*).

Not exercisable over strangers. The summary powers conferred by § 100 cannot be exercised against a person who is not a contributory, trustee, receiver, banker, agent or officer of the company (*k*). Therefore no order can be made under these sections on the trustee of a bankrupt solicitor to a company (*l*); nor on the executors of a deceased contributory or director (*m*); nor on a fully paid-up shareholder who objects to be on the list of contributories (*n*); nor on a creditor who has obtained payment after the commencement of the winding up (*o*); nor on a banker of the company who cannot be proved to have in his hands money of the company (*p*).

Where a company had borrowed money beyond its powers, and had deposited deeds as a security for it, the Court refused to order the deeds to be given up, although the debt was not enforceable against the company (*q*).

Exercisable over directors, § 165.

The Court is expressly empowered to examine into the conduct of any director (*r*), manager, liquidator, or other officer if it appears that he has misapplied, or retained in his own hands, or become liable or accountable for, any monies of the company, or been guilty of any misfeasance or breach of trust in relation to the company; and the Court is empowered to

(*i*) *Pearson's case*, 5 Ch. D. 336, and 4 ib. 222; *McKay's case*, 2 Ch. D. 1; *Stringer's case*, 4 Ch. 475; *Runce's case*, 6 ib. 104. See, also, under the acts of 1856-8, *Cardiff Coal Co. v. Norton*, 2 Eq. 558, affirmed 2 Ch. 405.

(*k*) *Ex parte Hawkins*, 3 Ch. 787.

(*l*) *Hollinsworth's case*, 3 De G. & S. 102. See, also, *Coc's case*, ib. 180; and *Northfield Iron and Steel Co.*, W. N. 1866, 253, where the Court refused to order a railway company to deliver up goods on which it claimed a lien.

(*m*) *British Guardian Life Assurance Co.*, 14 Ch. D. 335; and *Felton's Executors' case*, 1 Eq. 219, decided on § 165.

(*n*) *Marlboro' Club Co.*, 5 Eq. 365.

(*o*) *Ex parte Hawkins*, 3 Ch. 787.

(*p*) *Re National Bank*, 10 Eq. 298, where the Court held that it could not either under § 100, or under § 165, compel the bankers of a company being wound up to refund money improperly paid to the bank, but not proved to be the money of the company in question.

(*q*) *Wilson's case*, 12 Eq. 516. This case did not, however, turn on any particular section of the act.

(*r*) A director *de facto* is within the section, *Coventry and Dixon's case*, 14 Ch. D. 660.

compel him to repay such monies, with interest, or to make such compensation to the company as the Court may deem just (s). This clause applies where a company is being wound up voluntarily (t). The application may be made by the liquidator (u) or any creditor (r), or any contributory of the company (y). It does not seem necessary, in order to entitle the liquidator to a summons under this section, that the claim he seeks to assert should be one which the company itself might have asserted were it not being wound up; but if any objection be taken on this ground, the Court will order the summons to be amended by joining a creditor with the liquidator (z). The clause does not create any new liability, but only provides a summary mode of enforcing rights, which must otherwise have been enforced under the ordinary procedure of the Court (a); and proceedings can only be taken under this section when there has been some breach of duty towards the company (b), which has resulted in a loss to the company's funds (c).

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Upon the application of liquidator, creditor, or contributory.

Under the clause in question a director has been compelled

(s) § 165, and see upon it, *Rance's case*, 6 Ch. 104; *Stringer's case*, 4 Ch. 475; *McKay's case*, 2 Ch. D. 1; *Madrid Bank v. Bayley*, L. R. 2 Q. B. 37.

(t) *Rance's case*, 6 Ch. 104.

(u) As to the liquidator's affidavit, see *Mutual Society*, 22 Ch. D. 714; he will not, except under special circumstances, be ordered to make an affidavit of documents, ib.

(c) Including a policy-holder, *British Guardian Life Assurance Co.*, 14 Ch. D. 335.

(y) A bankrupt contributory has no right to make the application, *Cape Breton Co.*, 19 Ch. D. 77. And a contributory who is the holder of fully paid-up shares must show that there is some probability if his application is successful, of there being assets to be divided amongst the shareholders, *Cavendish Bentinck v. Fenn*, 12 App. Ca. 652.

(z) *National Funds Ass. Co.*, 10

Ch. D. 118; but see *Corentry and Dixon's case*, 14 Ch. D. 660. In *British Guardian Life Assurance Co.*, ib. 335, the summons was taken out in the first instance by the liquidator and a creditor.

(a) *Cavendish Bentinck v. Fenn*, 12 App. Ca. 652; *Flitcroft's case*, 21 Ch. D. 519; *Corentry and Dixon's case*, 14 Ch. D. 660, and the concluding remarks in *Forest of Dean Coal Mining Co.*, 10 Ch. D. 450.

(b) See words "in relation to the company" and *Ambrose Lake Tin Mining Co.*, 14 Ch. D. 390; *British Seamless Paper Box Co.*, 17 Ch. D. 467.

(c) *Cavendish Bentinck v. Fenn*, 12 App. Ca. 652; *Corentry and Dixon's case*, 14 Ch. D. 660, where it was decided that for a director to act without holding the necessary share qualification is not a misfeasance under this section.

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Orders under
§ 165.

to refund dividends and bonuses improperly declared and received by him (*d*), or improperly paid out of capital (*e*), or out of monies borrowed for the purpose (*f*); to refund sums improperly paid out of the company's monies to a promoter for preliminary expenses (*g*), to a stockbroker for placing the company's shares (*h*), or to himself for remuneration for his services, or for commissions on purchases and sales (*i*); to make good losses occasioned by the non-investment of funds which ought by the company's regulations to have been invested (*k*); to pay calls made on shares improperly procured by him to be allotted to his infant children (*l*); to pay the full value of paid-up shares given him as a qualification or as bribe (*m*); or if he paid anything for them, to pay the difference between the price which he did pay and their full value (*n*); and a secretary has been ordered to pay the full value of paid-up shares given to him by a vendor of property to the company (*o*).

The section, however, has been held not to apply where it is sought to charge the estate of a deceased director (*p*); neither is a banker (*q*) nor a solicitor (*r*), as such within it.

The Court cannot commit a director to prison for non-payment of money which he has been ordered to pay under this section unless the case can be brought within § 4 of the Debtors act, 1869 (32 & 33 Vict. c. 62) (*s*).

(*d*) *Rance's case*, 6 Ch. 104.

(*e*) *Oxford Benefit Building Soc.*, 35 Ch. D. 502; *Denham & Co.*, 25 Ch. D. 752; *Flitcroft's case*, 21 Ch. D. 519; *Alexandra Palace Co.*, ib. 149; *National Funds Assurance Co.*, 10 Ch. D. 118.

(*f*) *Alexandra Palace Co.*, 21 Ch. D. 149. Compare *Stringer's case*, 4 Ch. 475.

(*g*) *Englefield Colliery Co.*, 8 Ch. D. 388; *Ex parte Pelly*, 21 Ch. D. 492.

(*h*) *Faure Electric Accumulator Co.*, 40 Ch. D. 141. This case also decided that in the absence of dishonesty a director could not be made liable under this section for sanctioning a transfer to a person who subsequently turned out to be

insolvent.

(*i*) *Oxford Benefit Building Soc.*, 35 Ch. D. 502.

(*k*) *British Guardian Life Assurance Co.*, 14 Ch. D. 335.

(*l*) *Ex parte Wilson*, 8 Ch. 45.

(*m*) *Carriage Co-operative Supply Assoc.*, 27 Ch. D. 322; *Mitcalfe's case*, 13 Ch. D. 169; *Pearson's case*, 5 Ch. D. 336, and 4 ib. 222.

(*n*) *Weston's case*, 10 Ch. D. 579.

(*o*) *McKay's case*, 2 Ch. D. 1; *De Rucigne's case*, 5 Ch. D. 306.

(*p*) *Felton's Executors' case*, 1 Eq. 219; *British Guardian Life Assurance Co.*, 14 Ch. D. 335.

(*q*) *Re National Bank*, 10 Eq. 298; ante p. 694, note (*p*).

(*r*) *Curter's case*, 31 Ch. D. 496.

(*s*) *Mitcalfe's case*, 13 Ch. D. 815.

A director cannot set-off a debt due to him from the company against a claim made by the liquidator under this section (t). Bk. IV. Chap. 1.
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Lastly, the Court may order any past or present director, manager, officer, or member of a company ordered to be wound up by the Court, or subject to its supervision, or being wound up voluntarily, to be criminally prosecuted, at the expense of the company, if it shall appear that he has been guilty of any offence in relation to the company for which he is criminally responsible (u). Power to order
prosecution.

3. Mode of enforcing orders and appeals from them.

By the Companies act, 1862, provision is made for enforcing the orders of the English, Irish, and Scotch courts in those parts of the United Kingdom which are out of their respective jurisdictions (x).

Orders made by the Chancery Division of the High Court are enforced in the same way as orders made in an action in that division are enforced (y). Orders to pay money may be enforced by the ordinary writs of *fiari facias*, *levari facias*, *elegit*, and, if necessary, by sequestration (z); also by charging orders (a); and by attachment of debts (b). Where it is desired to issue a *fi. fa.*, an order should be obtained for payment to the liquidator himself, and not for payment into the Bank to his account (c).

Orders and decisions of the Court may be appealed from in Appeals.

(t) *Carriage Co-operative Supply Assoc.*, 27 Ch. D. 322; *Ex parte Pelly*, 21 Ch. D. 492; *Pearse's case*, ib. 498, n.; *Fliteroff's case*, ib. 519; and see *Ex parte Theys*, 25 Ch. D. 587.

(u) §§ 167, 168, and see rule 51.

(x) §§ 122 and 123. See *Hollyford Copper Mining Co.*, 5 Ch. 93, as to orders made by an Irish Court of Bankruptcy. To enforce in Ireland an English order to pay calls, it is not necessary that it should be made an order of the Chancery Division of the High Court in Ireland by

formal order. See *Hercules Ins. Co.*, Ir. Rep. 6 Eq. 207.

(y) § 120.

(z) See as to persons abroad, *Re William Hall*, 2 Dr. & Sm. 284.

(a) As to which see *ante*, p. 460.

(b) R. S. C. Ord. xlv. r. 1, which renders *Re Frankland*, L. R. 8 Q. B. 18; *Best v. Pembroke*, ib. 363; and *Cremetti v. Crom*, 4 Q. B. D. 225, no longer applicable.

(c) *Leeds Banking Co.*, 1 Ch. 150. See, also, *Waterloo Life Assurance Co.*, 4 N. R. 207.

Bk. IV. Chap. 1. the ordinary way ; but notice of appeal must be given within
 Sect. 7. — three weeks after the making of the order complained of (*d*),
 and the time is calculated in the case of an appeal from an
 order in chambers from the time when the order was pro-
 nounced, or when the appellant first had notice thereof, and
 in all other cases from the time when the judgment or order is
 signed, entered, or otherwise perfected, or, in the case of a
 refusal of an application, from the date of such a refusal (*e*).
 The court of appeal, however, has power to extend the
 time (*f*).

Rehearing. A judge of the High Court cannot now rehear an order
 made by himself or any other judge (*g*). But an order ob-
 tained *ex parte* or one which is in truth a nullity, may perhaps
 even now be discharged by the Court which made it, although
 three weeks have elapsed (*h*).

The application for leave to appeal after the three weeks
 have expired ought not to be made *ex parte* (*i*). The Court
 refuses leave unless some good reason for the delay is
 given (*k*) ; even where an order has been made on the authority
 of a recent decision which has been reversed, leave to appeal
 against such order will not necessarily be granted (*l*).

(*d*) § 124. See R. S. C. Ord. lviii.
 rules 9 and 15 ; *National Funds Ass.*
Co., 4 Ch. D. 305.

(*e*) R. S. C. Ord. lviii. r. 15.

(*f*) § 124. *New Callao*, 22 Ch.
 D. 484 ; *Manchester Economic Build-
 ing Society*, 24 Ch. D. 488 ; *Madras
 Irrigation and Canal Co.*, 23 Ch. D.
 248 ; *Banner v. Johnston*, L. R. 5
 H. L. 157. Under the older acts
 the time could not be extended ;
Ex parte Sanderson, 1 Mac. & G.
 396 ; *Re Green*, 1 Jur. N. S. 33 ;
 but see *Ex parte Besley*, 3 Mac. & G.
 287.

(*g*) *St. Nazaire Co.*, 12 Ch. D. 88.
 As to rehearing an order made in
 chambers, see *Ex parte Charlesworth*,
 36 Ch. D. 299.

(*h*) *Ex parte Turnley and Oliver*,
 8 Eq. 227. See, also, *Hopkins' Ex.
 case*, 4 De G. J. & Sm. 342 ; *Sander-*

son's case, 3 De G. & S. 66 ; *Ex parte
 Besley*, 3 Mac. & G. 287.

(*i*) *Lama Italian Coal Co.*, W. N.
 1867, 119 ; but see *Hull Forge Co.*,
 15 W. R. 388.

(*k*) See, as to extending time for
 a cross-appeal, *Ex parte Kiverton Coal
 Co.*, 7 Ch. 730. In contributory cases
 leave to appeal, after three weeks
 had expired, was given in *Ex parte
 Holroyd*, 15 Jur. 696, and in *Ex parte
 Day*, 3 Jur. N. S. 1016, in both of
 which cases the appellant had paid
 calls. In *Ex parte Holroyd*, the
 appellant was put under terms not
 to disturb the payment he had made.
 In *Ex parte Day*, the Court refused
 to impose any such terms.

(*l*) Compare *Ebbw Vale Co.'s case*,
 5 Ch. 112, with *Esdaile v. Payne*, 40
 Ch. D. 526.

Fresh evidence may be used on an appeal, even from a final order, by special leave, which, however, is only given where the Court sees that no injustice will be done by admitting it (*m*). Bk. IV, Chap. 1.
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An order made in chambers cannot be appealed from unless the judge certifies that the matter was fully argued before him (*n*). Nor is there any appeal from an order made by a judge whom the parties have treated as an arbitrator (*o*); nor will an appeal be entertained on a mere matter of judicial discretion (*p*).

Winding-up orders themselves cannot be appealed from, without special leave, after three weeks from their date (*q*). Appeals from
winding-up
orders.

The Judicature act, 1873, has vested the appellate jurisdiction of the Lord-Warden of the Stannaries in the Court of Appeal (*r*). Appeals from
the Stannaries.

SECTION VIII.—THE LIQUIDATORS OF THE COMPANY.

The actual management of the winding up of a company is entrusted to persons called liquidators, whose powers and duties are extremely important. Liquidators.

Liquidators are of two different kinds: the one called provisional liquidators, who are merely temporary officers in the nature of receivers and are appointed in order to protect the assets of the company until other liquidators are appointed (*s*); whilst the other kind of liquidators, called official liquidators,

(*m*) See *Weston's case*, 10 Ch. D. 579; *Ex parte Pearson*, 3 Ch. 443. See, also, R. S. C. Ord. lviii. r. 4.

(*n*) *Warrant Finance Co.'s case*, 5 Ch. 88.

(*o*) See Jud. act, 1873, § 49. *Ex parte Wilson*, 7 Ch. 45.

(*p*) *Thames Plate Glass Co. v. Land and Sea Telegraph Co.*, 6 Ch. 643; and see the cases on the appointment of liquidator, and *ante*, p. 690.

(*q*) *Ante*, p. 662.

(*r*) 36 & 37 Vict. c. 66, § 18 (3). The deposit of 20*l.* required by the Stannaries act, 1869, 32 & 33 Vict. c. 19, § 32, must still be paid, *West Devon Great Consols Mine*, 38 Ch. D. 51.

(*s*) *Dry Docks Corporation of London*, 39 Ch. D. 306. See *Brettell v. Daves*, 7 Ex. 307, as to the distinction between an interim and an official manager under the Winding-up acts of 1848–49.

Bk. IV. Chap. 1. or simply liquidators (according as the company is being wound
Sect. 8. — up compulsorily or otherwise), are the persons who have the
actual management of the winding up.

1. *Provisional liquidators.*

Appointment of
provisional liqui-
daters.

A provisional liquidator may be appointed by the Court as soon as a petition for winding up has been presented (*t*). The application for his appointment is made by summons, without advertisement or notice to any person, unless the judge shall otherwise direct (*u*). A provisional liquidator may be appointed without security (*x*); but the other rules relating to official liquidators apply to those provisionally appointed, so far as such rules are applicable and subject to any directions which may be given in any case by the judge (*y*). A form of order appointing a provisional liquidator is given in the rules (*z*).

It is not usual to appoint a provisional liquidator before the hearing of the petition, unless the company is the petitioner, or the petition is unopposed (*a*); and where a creditor who had presented a petition to wind up a company had obtained *ex parte* an order appointing a provisional liquidator, the order was afterwards discharged on the application of the company (*b*).

A provisional liquidator will not be appointed on a petition to wind up an insurance company until it is shown to be within 33 & 34 Vict. c. 61 (*c*).

The appointment of a provisional liquidator is not necessary in order to invalidate dealings with the company's property since the commencement of the winding up (*d*); nor to stay actions, &c., by creditors (*e*).

(*t*) § 85, and see §§ 196, 199, 204.

(*u*) Rule 15.

(*x*) *Ib.* See *Langham Skating Rink Co.*, 6 Ch. D. 102; *Hammer-smith Town Hall Co.*, *ib.* 112.

(*y*) Rule 59.

(*z*) Schedule 3, No. 9.

(*a*) *Cilfoden Benefit Building Soc.*, 3 Ch. 462, and see Lord Romilly's

observation in *Emmerson's case*, 2 Eq. 236, and *Hammersmith Town Hall Co.*, 6 Ch. D. 112.

(*b*) *Railway Finance Co.*, W. N. 1866, 196.

(*c*) *London and Manchester Industrial Association*, 1 Ch. D. 466.

(*d*) *Ante*, p. 666.

(*e*) *Ante*, p. 669, *et seq.*

Neither the act nor the rules specify with any particularity what the duties of a provisional liquidator are. But the order appointing him usually removes all ambiguity on this point, by stating explicitly what he is to do (*f*). Speaking generally, his duty is to act as a receiver and to protect the assets of the company.

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Duties of
provisional
liquidators.

A provisional liquidator ought to be served with notice of any application to discharge or stay proceedings under a winding-up order (*g*).

2. *Official liquidators.*

For the purpose of conducting the proceedings in winding up a company, and assisting the Court therein, the Companies act, 1862, empowers the Court to appoint one or more official liquidators (*h*), and to remove them for due cause (*i*).

Appointment
of official
liquidator.

For the position, powers, and duties of the registrar of the Court of the Vice-Warden of the Stannaries when a company is being wound up in that court, and no official liquidator has been appointed, see 32 & 33 Vict. c. 19, § 33.

The appointment of the official liquidators lies with the judge, and is to be made by a distinct order (*k*); and the practice is to make the order in chambers, and not on the hearing of the petition (*l*). The appointment may be made without previous advertisement or notice to any one (*m*); but the judge may, by advertisement, fix a time and place for the appointment. He is not, however, bound to appoint the person who may be nominated by those who attend pursuant to the advertisement (*n*).

The appointment of any particular person as liquidator is so

(*f*) See the form, schedule 3, No. 9.

(*g*) *Ex parte Coleman*, 3 De G. & S. 139. As to his costs, see *ante*, p. 659.

(*h*) § 92.

(*i*) § 93, and in voluntary winding up, §§ 141 and 150.

(*k*) Rules 8, 11, and schedule 3, No. 8.

(*l*) *General Financial Bank*, 20 Ch. D. 276. The liquidator was appointed on the hearing of the petition in *Commercial Discount Co.*, 32 Beav. 198, and *London, Bombay and Mediterranean Bank*, 1 Ch. 525.

(*m*) Rule 8.

(*n*) See rules 8 and 9, and schedule 3, Nos. 6-8.

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entirely a matter for the discretion of the judge, that the court of appeal will not review his decision (*o*); except under very special circumstances, or unless it can be shown that the judge has acted upon a wrong principle (*p*). But the same rule does not apply to appointments by the judge's chief clerk; the parties interested are entitled to have the appointment considered and determined by the judge himself; and if he declines to reconsider an appointment by his chief clerk, an appeal lies (*q*).

In order to put a stop to contests for the appointment of liquidator, the person nominated by the petitioner is usually preferred, unless some good reason can be adduced for not appointing him (*r*); and where several amalgamated companies are being wound up, the same person is preferred as liquidator in them all (*s*).

Security.

The official liquidators are required to give security, by entering into a recognizance, with two or more sureties, in such sum as the judge may approve (*t*). When the proper security has been given, a certificate to that effect is to be made by the chief clerk (*u*). Fresh securities may from time to time be required (*x*).

Advertisement
of appointment.

As soon as an official liquidator has been appointed, and has given security, his appointment is to be advertised (*y*).

Vacancies.

In the case of the death, removal, or resignation of an official liquidator, another is to be appointed in his room in

(*o*) *London Quays, &c., Co.*, 3 Ch. 394; *Northern Assam Tea Co.*, 5 Ch. 644; *Albert Average Ass. Ass.*, 5 Ch. 597; *International Contract Co.*, 1 Ch. 523; *London, Bombay, and Mediterranean Bank*, ib. 525. See, also, *Merchant Traders' Ship Loan and Association Co.*, 15 Jur. 981, and compare this with the case cited *infra* in note (*q*).

(*p*) *Albert Average Ass. Ass.*, 5 Ch. 597.

(*q*) *Agriculturist Cattle Insurance Co.*, 3 De G. F. & J. 194. See the observations in this case as to the employment of accountants.

(*r*) See *Albert Average Ass. Ass.*, 5 Ch. 597; *Northern Assam Tea Co.*, ib. 644.

(*s*) *Western Life Ass. Soc.*, 5 Ch. 396. See, also, 35 & 36 Vict. c. 41, § 4.

(*t*) See § 92 and rule 10, and the forms 10 and 11 in schedule 3. The appointment is operative before the security is given, *Ex parte Charlesworth*, 36 Ch. D. 303.

(*u*) Rule 12.

(*x*) Rule 13.

(*y*) Rule 14, and see schedule 3, No. 15.

the same manner as in the case of a first appointment, and the proceedings for the purpose may be taken by such person interested as may be authorised by the judge to take the same (z). Bk. IV. Chap. 1.
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The power to remove a liquidator is exercisable not only if the liquidator is personally unfit to act, but also whenever it is shown that it is for the general advantage of those interested in the assets that he should be removed (a), *e.g.*, where the principal creditors of an insolvent company offered to pay the other creditors in full if the winding up was entrusted to their own nominee (b); so where the great bulk of the unsecured creditors were not satisfied with the liquidator originally appointed (c). Personal unfitness includes favouritism to persons whose interests are opposed to those of others (d). The same principles apply to the removal of liquidators where the winding up is voluntary (e), or subject to the supervision of the Court (f). The wishes of the persons interested are always considered in these cases, although they cannot always be complied with.

A liquidator can appeal from an order removing him (g).

The remuneration of the official liquidator is fixed by the judge (h): and is payable out of the assets of the company next after the costs of the winding up, including therein the costs of his own solicitor (i). Remuneration.

The official liquidator may, with the sanction of the judge, appoint a solicitor to assist him in his duties (k). The solicitor's duty is to conduct all such proceedings as are ordina- Solicitor.

(z) Rule 16.

(a) *Ex parte Charlesworth*, 36 Ch. D. 299, explaining *Sir John Moore Gold Mining Co.*, 12 Ch. D. 325.

(b) *Ex parte Charlesworth*, *ubi supra*.

(c) *Association of Land Financiers*, 10 Ch. D. 269.

(d) *Sir John Moore Gold Mining Co.*, *ubi supra*.

(e) *British Nation Life Ass. Assoc.*, 14 Eq. 492.

(f) *Marseilles, &c., Land Co.*, 4 Eq. 692.

(g) *Ex parte Charlesworth*, 36 Ch. D. 299.

(h) See § 93 and rule 18, and the order of May, 1868, in 7 Eq. 105, note, and 3 Ch. lxiv., and *Curran's claim*, 7 Eq. 102; *North of England Banking Co.*, 3 Mac. & G. 362, note, and *Mysore Reefs Gold Mining Co.*, 34 Ch. D. 14.

(i) *Dronfield Silkstone Coal Co.* (No. 2), 23 Ch. D. 511; *Re Massey*, 9 Eq. 367.

(k) § 97. See *Bass's case*, 1 De G. & S. 722.

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rily conducted by solicitors of the court (*l*). If necessary, separate solicitors may be appointed to attend to conflicting interests (*m*). The solicitor is entitled to payment of his costs (*n*) out of the assets of the company, in priority to payment of the liquidator's remuneration (*o*), but not in priority to the payment of expenses, which the liquidator has properly incurred (*p*). The solicitor has no lien on the file of proceedings in the winding up, nor on the documents relating thereto (*q*); nor has he any right to payment by the liquidator personally (*r*).

Passing accounts.

Official liquidators are required to pass their accounts like receivers (*s*), and to pay all monies which they may receive into the Bank of England (*t*); and to deposit all bills, notes, and other securities payable to the company in the bank, for the purpose of being presented by it for acceptance and payment (*u*).

Books of the
company.

It is the duty of the official liquidator to take possession of all the company's books and accounts (*v*), and to make up and rectify the books of the company, and to keep books showing its debts and credits, and also a ledger, containing the separate accounts of the contributories (*x*).

Inspection.

The right of the creditors and contributories of the company to inspect its books and papers depends upon the order which the Court may think fit to make upon the subject (*y*). The general rules direct all documents relating to the winding up of a company to be filed and entitle every contributory and creditor whose debt has been proved to inspect and have copies of such documents (*z*). This rule, however, does not

(*l*) Rule 68.

(*m*) See *Western Life Ass. Society*, 5 Ch. 396.

(*n*) See as to a solicitor demanding more than the scale fee, *United Kingdom, &c. Building Association*, 40 Ch. D. 471.

(*o*) *Re Massey*, 9 Eq. 367.

(*p*) *Dominion of Canada Plumbago Co.*, 27 Ch. D. 33.

(*q*) *Ex parte Pulbrook*, 4 Ch. 627.

(*r*) *Ex parte Watkin*, 1 Ch. D. 130; *Re Trueman's Estate*, 14 Eq. 278.

(*s*) Rule 19.

(*t*) Rules 11 and 36. They have no business to lend money in their hands even for short periods and on good security. See Lord Romilly's observations in *W. N.* 1866, 327.

(*u*) Rules 37 & 41.

(*v*) See §§ 94 and 100. See, under the old acts, *Pell's case*, 3 De G. & Sm. 170.

(*x*) Rule 17. See *Wright's case*, 5 Ch. 437.

(*y*) § 156. *Ex parte Walker*, 15 Jur. 853.

(*z*) Rule 58.

in terms apply to the books of the company. If an inspection of them is desired, an application must be made to the judge under § 156 of the act (*a*). An order for inspection will be made if the Court is satisfied that the inspection is wanted for a proper purpose (*b*); and liberty will be given to an accountant to attend if there are complicated accounts to be investigated (*c*). Inspection will only be allowed for the purposes of the winding up (*d*); and the liberty to inspect must not be abused; and the Court will interfere to prevent an improper disclosure of the contents of the books (*e*). The rules of the company as to inspection do not apply to a winding up (*f*).

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As between contributories and alleged contributories, the books, accounts, and documents of the company and of the liquidators are *prima facie* evidence of the truth of all matters purporting to be therein recorded (*g*). This is a very important provision, and one of which unfair use might be made if there were no means of compelling liquidators to expunge from their books matters improperly inserted in them. But a liquidator is not entitled to charge a person with money without notice, and then require him to show that he does not owe it; and if any attempt to do so is made, the Court will order the entry to be removed, and throw upon the liquidator the onus of showing that such entry ought to be restored (*h*).

Official liquidators' books evidence against contributories.

Under the Winding-up acts of 1848 and 1849, the property of the company vested in the official manager (*i*); and all actions and suits by or against the company had to be brought by or against him as its representative (*k*). He, however, only

Extent to which the liquidator represented the company under Acts of 1848 and 1849.

(*a*) As to summoning the liquidator as a witness, see *Burned's Banking Co.*, 2 Ch. 350.

(*b*) As to the extent of production, and the affidavit which a liquidator can be required to make, see *Gooch's case*, 7 Ch. 207, and *Mutual Society*, 22 Ch. D. 714, and the cases in the next notes.

(*c*) *Ib.*

(*d*) *North Brazilian Sugar Factories*, 37 Ch. D. 83, and see *Morgan's case*, 28 Ch. D. 620; and under the Stau-

naries act, *West Devon Great Consols Mine*, 27 Ch. D. 106.

(*e*) See cases in note (*b*).

(*f*) *Yorkshire Fibre Co.*, 9 Eq. 650.

(*g*) § 154, and see *Arnot's case*, 36 Ch. D. 702.

(*h*) *Ex parte Chadwick*, 15 Jur. 597.

(*i*) 11 & 12 Vict. c. 45, §§ 29 and 30.

(*k*) *Ib.* §§ 50 and 51. See, on this subject, *Grand Trunk Rail. v.*

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represented the company which was being wound up; and consequently, actions in which it was sought to charge, not the company, but one or more of its contributories, individually, had to be brought against him or them, and not against the official manager (*l*). Moreover, where the company being wound up could not have been sued at law, either as a company or by a public officer, there an action against the official manager as the representative of the company could not be sustained. The acts in question did not confer on companies any capacity of suing and being sued, but simply declared that companies having that capacity were to sue and be sued by their official manager (*m*). Consequently, a company, not registered or in any way incorporated, but being a mere association of individuals, could not sue or be sued by its official manager (*n*).

Under the Act
of 1862.

In the foregoing respects the Companies act, 1862, is very different from the older winding-up acts. It is the duty of the official liquidator to take into his custody the property and effects of the company (*o*): and if no liquidator is appointed, or during any vacancy in his appointment, the property of the company is in the custody of the Court (*p*); but the property of a company registered under the act does not vest in the

Brodie, 3 De G. M. & G. 146; *Riddick v. Deposit, &c., Association Co.*, 9 Ir. Com. Law Rep. 84; *McDowell v. Davis*, 8 ib. 42. As to the mode of describing him, see *Re Heritage*, Kay, App. 29. The official manager only represented the company if his appointment was valid. See *Official Manager of Plumstead Water Co. v. Davis*, 28 Beav. 545, and 2 De G. F. & J. 20, where the winding-up order and all the proceedings under it were invalid, the order having been made by the wrong Court.

(*l*) *Beardshaw v. Lord Londesborough*, 11 C. B. 498; *McDowell v. Doyle*, 7 Ir. Com. Law, 598; *Armstrong v. Normandy*, 7 Ex. 409.

(*m*) *Pritchard v. London and Birmingham, &c., Rail. Co.*, *Re*

Weiss, 15 C. B. 331; *Ernest v. Weiss*, 2 Dr. & Sm. 561.

(*n*) *Ib.*, and see *Russell v. Croysdill*, 11 Ex. 123, and *Ernest v. Croysdill*, 2 De G. F. & J. 175, where the plaintiff represented one provisionally registered company, and the defendant another.

(*o*) § 94. The doctrines of reputed ownership are not applicable to companies which are being wound up, *Crumlin Viaduct Works Co.*, 11 Ch. D. 755; *Gorringe v. Irwell India Rubber Works*, 34 Ch. D. 128.

(*p*) § 92. The liquidator is himself in the nature of a receiver, and a receiver will not therefore be appointed of assets in his hands. *Perry v. Oriental Hotel Co.*, 5 Ch. 420. Compare *Boyle v. Bettus Llantwit Co.*, 2 Ch. D. 726.

liquidator, and all actions are taken and continued by and against the company in its corporate name (*q*). In the case, however, of an unregistered company, the Court has power to make an order vesting its property in the liquidator; and, if such an order is made, he may sue and be sued in his official name, or in such other name as the Court may direct, as the representative of the company (*r*). Bk. IV. Chap. 1.
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As regards unregistered companies, therefore, the decisions on the acts of 1848 and 1849 may still be usefully referred to (*s*); but it must not be overlooked that the language of the 203rd section of the Companies act, 1862, differs materially from that of the acts on which those decisions turned; and it was held that the sanction of the Court to sue, warranted a suit in equity, in the name of the official liquidator, without any vesting order (*t*).

The official liquidators are to be described by their style of office, and not by their individual names (*u*); and they are to perform such duties in reference to the winding up of the company as may be imposed by the Court (*x*). Duties of
liquidators.

Their duties, so far as they relate to the investigation of claims against the company, to settling the list of contributories, to making calls and distributing the assets of the company, will be noticed in the subsequent sections of this chapter. In the present section it is proposed to notice those general powers and duties which do not relate to these matters.

Where more official liquidators than one are appointed, it is for the Court to declare whether any act authorised or required by the statute to be done by the official liquidator is to be done by all or any one or more of the persons so appointed (*y*). Power of liqui-
dators where
there is more
than one.

(*q*) See §§ 94 and 95, and 195, 196. A bill of sale given by the company, and not within the Bills of sale act, 1882, is valid as against the liquidator, although not registered, *Marine Mansions Co.*, 4 Eq. 601.

(*r*) See § 203. *Hercules Ins. Co.*, 11 Eq. 321, where the company was registered after the petition was presented. Liquidators are not personally liable to pay charges on property

vested in them under this section, *Graham v. Edge*, 20 Q. B. D. 683.

(*s*) They are collected, *ante*, notes (*i*) to (*n*).

(*t*) See *Turquand v. Kirby*, 4 Eq. 123; *Turquand v. Marshall*, 6 Eq. 112, reversed, but not on this point, 4 Ch. 376. *Quære* these decisions.

(*u*) § 94. See, also, § 203.

(*x*) § 94.

(*y*) § 92, and see the rules, schedule 3, No. 8. As to the validity

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Powers of
liquidator.

The official liquidator has power to do the following things with the sanction of the Court, or without it, if previously authorised by the Court to act without consulting it (z).

1. To institute or defend legal proceedings in the name and on behalf of the company (a).

2. To carry on the business of the company so far as may be necessary for the beneficial winding up of the same (b).

3. To sell the property and claims of the company by auction or otherwise (c).

4. To do all acts, and to execute in the name and on behalf of the company all deeds, receipts, and other documents, and for that purpose to use the company's seal (d).

5. To prove as a separate creditor against the estate of a bankrupt contributory for money due from him to the company (e).

6. To draw, make, accept, and indorse bills of exchange

of the acts of one out of several liquidators, see *Ex parte Agra and Masterman's Bank*, 6 Ch. 206, and cases there cited. See, under the older acts, *Bass's case*, 1 De G. & Sm. 722.

(z) § 96. For form of order, see *Rochdale Property, &c., Co.*, 12 Ch. D. 775.

(a) § 95. See, as to unregistered companies, *ante* (t). A liquidator may serve a bankruptcy notice on a judgment debtor of the company, *Ex parte Winterbottom*, 18 Q. B. D. 446. The Court has no power to allow the solicitor of a creditor to institute proceedings in the name of the company to get in assets in order to pay his own costs, *Cape Breton Co. v. Femm*, 17 Ch. D. 193. As to examining directors in actions against them, see *Madrid Bank v. Bayley*, L. R. 2 Q. B. 37.

(b) § 95. *British Waggon Co. v. Lea & Co.*, 5 Q. B. D. 149, and *Ex parte Emmanuel*, 17 Ch. D. 35, a decision under the Bankruptcy act, 1869. The onus of proving that a

particular contract is not beneficial for the winding up of the company lies on the person making the assertion, *Hire Purchase Co., Limited v. Richens*, 20 Q. B. D. 387.

(c) § 95. *Park Gate Waggon Co.*, 17 Ch. D. 234, claims against directors for misfeasance under § 165. See, as to sales, rule 32, and as to transferring the business of the company, *infra*, p. 711. As to opening biddings, see *Northumberland and Durham Banking Co.*, 9 W. R. 584; and as to getting in the legal estate, *Sheerness Waterworks Co. v. Polson*, 3 De G. F. & J. 36, and 29 Beav. 70; as to selling, subject to alleged incumbrances, *Radley v. Bramall*, 12 Eq. 472; as to purchases by old directors, and irregular proceedings, at the sale, see *Alexandra Hall Co.*, W. N. 1867, 67.

(d) § 95.

(e) § 95. As to his power to petition for an adjudication of bankruptcy against a contributory, see *Williams v. Harding*, L. R. 1 H. L. 9.

and promissory notes in the name and on behalf of the company, and to raise money upon the security of its assets (*f*). Bk. IV. Chap. 1
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7. To take out, if necessary, in his official name, letters of administration to any deceased contributory, and to do in his official name any other act that may be necessary for obtaining payment of any monies due from a contributory or his estate, and which cannot be conveniently done in the name of the company (*g*).

8. To do and execute all such other things as may be necessary for winding up the affairs of the company and distributing its assets (*h*).

When the company being wound up is a cost-book mining company governed by the Stannaries act, 1887, it is the duty of the purser or other person having possession of the club funds of the mine to account for them to the liquidator, who is empowered to recover them and whose duty it is to apply them in accordance with the rules of the club (see 50 & 51 Vict. c. 43, § 13 (2)). Cost-book
company.

The official liquidator is further empowered, with the sanction of the Court, to make arrangements with creditors and contributories, and to compromise all claims whether by or against the company (*i*). A proposed compromise will not be sanctioned by the Court in the absence of sufficient information as to the grounds on which the compromise is to be entered into (*k*). Nor will the Court compel a liquidator to enter into a compromise which he, on behalf of the company, opposes (*l*). A compromise entered into by an official liqui- Compromises.

(*f*) § 95. The Court will not allow a liquidator to give acceptances which are valueless, *Contract Corporation, Ebbw Vale Company's claim*, 8 Eq. 14. The liability of the company upon such bills or notes is the same as if the company had issued them in the course of its business: see the section. As to negotiating bills in order to avoid a set-off, see *Smith, Fleming & Co.'s case*, and *Gledstones & Co.'s case*, 1 Ch. 538, noticed in the next section.

(*g*) § 95.

(*h*) *Ib.* But as to reconstructing the company, see *Wreck Recovery Salvage Co.*, 15 Ch. D. 353.

(*i*) §§ 159 and 160, and see rule 61.

(*k*) *Ex parte Totty*, 1 Dr. & Sm. 273, and on appeal, 6 Jur. N. S. 849.

(*l*) *Pearson's case*, 7 Ch. 309. But this assumes that the liquidator is not himself opposing the wishes of those whom he represents.

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— dator, and approved by a chief clerk, does not require the personal sanction of a judge to make it binding. But any person aggrieved by it is entitled to have it considered by the judge in whose chambers the winding up proceeds (*m*).

A compromise with the sanction of the Court is binding on all parties, including creditors (*n*), unless appealed against in due time (*o*).

But notwithstanding a compromise with a contributory, who is a transferee of shares, he remains liable to indemnify his transferor from all calls which may be made on him as a past member (*p*).

If it can be shown that the sanction of the Court was obtained by the misrepresentation or improper concealment of material facts, the compromise will be set aside by the Court which sanctioned it, although the time for appeal has passed (*q*).

Limit of power
to compromise.

The power of the Court to sanction compromises under the above section is confined to claims by or against the company, and does not extend to claims by individual shareholders against the directors personally (*r*).

Opinions differed respecting the power of the Court to bind dissentient creditors or contributories by sanctioning arrangements approved by majorities of them (*s*).

33 & 34 Vict.
c. 104.

The power of the Court in this respect has, however, been

(*m*) *Ex parte Garstin*, 10 W. R. 457.

(*n*) See *Cleave v. Harwar*, 6 H. & N. 22, where proceedings by *sci. fa.* against a shareholder were stayed, a compromise having been entered into between him and the official manager under 20 & 21 Vict. c. 78, and see as to enforcing a compromise, *Gaudet Frères Steamship Co.*, 12 Ch. D. 882.

(*o*) *Lucy's case*, 4 De G. M. & G. 356; *Underwood's case*, 5 ib. 677; *Garstin's case*, 10 W. R. 457. See, also, *Hughes's case*, 1 De G. & Sm. 606, and 13 Jur. 530.

(*p*) *Roberts v. Crowe*, L. R. 7 C. P.

629; *Kellock v. Enthoven*, L. R. 9 Q. B. 241, and 8 ib. 458.

(*q*) *Central Darjeeling Tea Co.*, W. N. 1866, 361; *Clarke's case*, ib. 254; *Garstin's case*, 10 W. R. 457.

(*r*) *Ex parte Hankey*, W. N. 1869, 226.

(*s*) See *Albert Life Ass. Co.*, 6 Ch. 381; and compare *Risca Coal and Iron Co.*, 30 Beav. 528 (an appeal was dismissed, on the ground that it was made too late. See 8 Jur. N. S. 900). *Commercial Bank Corporation of India and the East*, 8 Eq. 241. See, also, *Bank of Hindustan, &c. v. Eastern Financial Assoc.*, L. R. 2 P. C. 489.

enlarged by the Joint Stock Companies arrangement act, 1870 (33 & 34 Vict. c. 104), which (§ 2) enacts that,

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“Where any compromise or arrangement shall be proposed between a company, which is, at the time of the passing of this act or afterwards, in the course of being wound up, either voluntarily or by or under the supervision of the Court, under the Companies acts, 1862 and 1867, or either of them, and the creditors of such company, or any class of such creditors, it shall be lawful for the Court, in addition to any other of its powers, on the application in a summary way of any creditor or the liquidator, to order that a meeting of such creditors or class of creditors shall be summoned in such manner as the Court shall direct, and if a majority in number representing three-fourths in value of such creditors or class of creditors present either in person or by proxy at such meeting shall agree to any arrangement or compromise, such arrangement or compromise shall, if sanctioned by an order of the Court, be binding on all such creditors or class of creditors, as the case may be, and also on the liquidator and contributories of the said company.”

Where compromise proposed the Court may order a meeting of creditors, &c., to decide as to such compromise.

The order in which the sanctions required are obtained is immaterial (*t*). The sanction of three-fourths of those present is sufficient (*u*). Unanimity is not required, and the opposition of some creditors is not fatal (*x*). But schemes for arrangement under this act have failed because of the impossibility of ascertaining and valuing the claims of the creditors (*y*); and because those who voted for it had voted in respect of debentures payable to bearer and not produced, and had not voted *bonâ fide* in the interest of the company (*z*). So where a company induced a judgment creditor not to issue execution against it, and petitions by a creditor and the company were then presented for winding up the company, and a scheme of arrangement was proposed and assented to by all the creditors except the judgment creditor who opposed it, the Court declined to sanction the scheme (*a*).

The assets of the company may be sold and realised in the ordinary way by auction or private contract as may be thought

Transfer of business.

(*t*) *Dynevor, &c. Collieries Co.*, 11 Ch. D. 605.

(*u*) *Bessemer Steel and Ordnance Co.*, 1 Ch. D. 251.

(*x*) *Tunis Rail. Co.*, 10 Ch. D. 270, note; aff. on appeal, W. N. 1874, p. 165.

(*y*) *Albert Life Ass. Co.*, 6 Ch. 381.

(*z*) *Wedgwood Coal and Iron Co.*, 6 Ch. D. 627.

(*a*) *Richards & Co.*, 11 Ch. D. 676.

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best. Doubts have been expressed as to the power of the Court in a compulsory winding up to sanction a sale of a company's assets *en masse* to a new company formed to carry on its business (*b*). It is, however, to be remembered that the Court can stay the winding-up proceedings altogether on such terms as it thinks proper (*c*); and this power, coupled with that of selling the assets of the company (*d*), and of compromising with the creditors and contributories (*e*) is, it is conceived, sufficient to give the Court jurisdiction to sanction such a sale as that under consideration upon any terms the Court may judicially approve (*f*).

Albert Life
Assurance Com-
pany's case.

But in the case of the *Albert Life Assurance Company* (*g*), which had absorbed several other companies, the Lord Justice James considered that a majority of creditors could not bind a minority to accept a composition; and he refused to sanction a scheme for reconstructing the Albert Company, and for paying its creditors and the creditors of the absorbed companies a composition, by calls, and for transferring to another company the assets of the Albert, and the monies proposed to be raised by calls.

Acts done with-
out sanction of
Court.

Liquidators who act without the sanction of the Court in matters requiring such sanction, expose themselves to serious risks; for if loss ensues to the company the liquidators may be compelled to make it good, and if they sue or defend an action unsuccessfully, they may have to pay the costs personally (*h*). But an order made in an action and directing a liquidator to pay the costs personally does not necessarily preclude him from afterwards obtaining such costs out of the assets of the company (*i*). The consequences of not obtaining

(*b*) See §§ 89, 91, 95, 159, and 160. The doubt has arisen by reason of § 161 being in terms only applicable to a voluntary winding up. The act 31 & 32 Vict. c. 68, only applies to companies being wound up when it passed.

(*c*) § 89, *ante*, p. 663.

(*d*) § 95.

(*e*) *Ante*, p. 709.

(*f*) See, as to winding up, subject

to supervision, *Ex parte Poole's Executors*, 8 Ch. 702; *Imp. Merc. Credit Ass.*, 12 Eq. 504; *Agra and Masterman's Bank*, 12 Eq. 509, note.

(*g*) 6 Ch. 381, and see *General Exchange Bank*, W. N. 1867, 63.

(*h*) *Grand Trunk, &c., Rail. Co. v. Brodie*, 9 Ha. 823, and 3 De G. M. & G. 146; *Cuthwell v. Ernest*, 27 Beav. 39 and 42.

(*i*) *Ib.* See, on this subject,

the sanction of the Court where such sanction is required, Bk. IV. Chap. 1. Sect. 9. may, moreover, in some cases invalidate the liquidator's proceedings; but it is apprehended that if he sues without leave the want of leave affords no defence to the action (*k*).

SECTION IX.—PROOF AND PAYMENT OF DEBTS.

1. *General observations.*

The Court is empowered to fix a time within which creditors Time for proof. are to prove their debts, or be excluded from the benefit of any distribution made before such debts are proved (*l*). For the purpose of ascertaining the debts of the company, and of requiring creditors to come in and prove their debts, an advertisement is to be issued at such time as the judge may direct (*m*). The advertisement fixes a time for the creditors to send the particulars of their demands, and the names and addresses of themselves and their solicitors (if any) to the official liquidator, and appoints a day for adjudicating thereon (*n*).

The creditors need not attend the adjudication, nor formally Mode of proof. prove their debts, unless required so to do by notice from the official liquidator: but, upon such notice being given, they are to come in and prove their debts within the time specified in the notice (*o*). It is the duty of the official liquidator to investigate the claims sent in, and, so far as he is able, to separate

Consols Insurance Co. v. Wood, 2 Dr. & Sm. 353, and *infra*, § 12.

(*k*) See the analogous cases in bankruptcy, *Lee v. Sangster*, 2 C. B. N. S. 1; *Piercy v. Roberts*, 1 M. & K. 4; *Ex parte Magnus*, 3 M. D. & D. 693; *Jones v. Yates*, 3 Y. & J. 373.

(*l*) § 107. *Kit Hill Tunnel*, 16 Ch. D. 590. If a liability contingent at the commencement of a winding up ripens into a debt before

its termination it may be proved, though the time fixed has passed, *Macfarlane's claim*, 17 Ch. D. 337.

(*m*) Rule 20.

(*n*) *Ib.*, and see the form in schedule 3, No. 16.

(*o*) Rule 21. As to what is putting in a claim, see *Forwood's claim*, 5 Ch. 18. Probate in this country cannot be dispensed with where a claim is made by the legal personal representatives of a deceased creditor, *Fernandes' Ecs. case*, 5 Ch. 314.

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— those which ought to be allowed without further proof from those which ought not, and to set forth the former in an affidavit, giving the reasons why, in his opinion, they ought to be at once allowed (*p*). In adjudicating upon the debts the judge may either allow them upon the official liquidator's affidavit, or require them to be further proved (*q*). Notice of allowance or disallowance, as the case may be, is to be given to the creditors by the official liquidator (*r*); and those creditors whose claims have not been allowed are to have notice to come in and prove by a day named in the notice (being not less than four days after the notice), and to attend at a time to be therein mentioned, being the time for adjudication (*s*).

Creditors' claims
to be investi-
gated.

Under the acts of 1848 and 1849, it was held that the master or judge acting in the winding up must examine into every claim brought in before him, and either allow it or disallow it, or allow it as a claim only; and must do this after hearing such evidence as the claimant might be able to adduce; and must not allow a claim as a claim only, in order to avoid the consideration of the more difficult question, whether the claim ought to be allowed as a debt of the company (*t*). These rules are as applicable under the act of 1862 as under those of 1848 and 1849. If the claimant refuses to produce what evidence he has relating to his claim, it may be disallowed (*u*). Interrogatories may be administered to him (*x*).

Costs of proof.

Creditors coming in and proving their debts, pursuant to notice from the official liquidator, are entitled to their costs of proof (*y*).

(*p*) Rule 22, and see the form of affidavit in schedule 3, No. 17.

(*q*) Rule 23.

(*r*) Rules 23 and 24.

(*s*) Rule 24, and see the forms in schedule 3, Nos. 20 and 21.

(*t*) See *Prichard's case*, 5 De G. M. & G. 495; and *Terrell v. Hutton*, 4 H. L. C. 1091. As to bringing actions to try a disputed debt, see *East of England Banking Company's case*, 5 De G. M. & G. 505,

and 13 Beav. 426; *Ex parte Gwyn*, 1 Jur. N. S. 300; *Ex parte Higgins*, 2 ib. 178. As to enabling a creditor to prosecute his claim *in forma pauperis*, see *Ex parte Fry*, 1 Dr. & Sm. 318.

(*u*) *Constantinople and Alexandra Hotel Co.*, 35 Beav. 349.

(*x*) *Alexandra Palace Co.*, 16 Ch. D. 58.

(*y*) Rule 27.

The result of the adjudication upon debts and claims is to be stated in certificates to be made by the chief clerk. The certificates are to state whether the debts or claims are allowed or disallowed, and whether allowed as against any particular assets, or in any other qualified or special manner (z). Bk. IV. Chap. 1.
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Certificate of
debts.

A creditor whose debt is allowed is informed by notice when and where he will be paid (a). The sum payable to him by the company is a debt due to him and can it seems be attached in the hands of the liquidator under a garnishee order (b). Notice of
payment.

If the judge acting in the winding up disallows a claim brought in before him, the creditor may appeal from the decision (c); he can also, where necessary, apply for leave to take such proceedings as he may be advised, for the purpose of establishing his case by action (d); but it is now seldom if ever necessary to do this. Appeal by
creditor.

On the other hand, if the official liquidator or the contributories, or, it is presumed, the other creditors where they are prejudiced, are dissatisfied with the allowance of a debt, they can appeal (e); but if the official liquidator appeals, the contributories or other creditors are not usually heard with him (f). Appeal by
official liqui-
dator.

The time for appeal is the same in this as in other cases (g).

Debts contracted by the liquidators in winding up the company must not be confounded with debts contracted by the company, and provable against it (h). Debts properly contracted by the liquidator are part of the expenses of the winding up, and are payable in full out of the assets of the company in priority to the other unsecured debts of the company (i). Debts contracted
by the liqui-
dator.

(z) Rule 28.

(e) In *Ex parte Gwyn*, 1 Jur. N. S. 300, a contributory appealed.

(a) See the rules, schedule 3, No. 23.

(f) *Re Norwich Yarn Co.*, 13 Beav. 428, note, where, however, the contributories were heard. See, too, *Bodmin United Mines*, 23 Beav. 385.

(b) *Prichard's claim*, 2 De G. F. & J. 354. Compare *Cowan's estate*, 14 Ch. D. 638; *Re Hunter*, L. R. 8 C. P. 24; *Dawson v. Malley*, Ir. Rep. 1 Com. L. 207.

(g) *Ante*, pp. 697, 698.

(c) *Ernest v. Nicholls*, 6 H. L. C. 401.

(h) See *Ex parte Clark*, 7 Eq. 550; *Ex parte Smith*, 3 Ch. 125, both of which were cases of set-off.

(d) As in *Armstrong's case*, 3 De G. & S. 140.

(i) See, as to distresses for rent and

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2. Debts provable.

Debts provable.

Contingent debts
and claims to
damages.

The Companies act, 1862, has for one of its primary objects the ratable payment *pari passu* of all creditors and others having claims against the company (*k*); and not only all debts actually payable, but all debts of the company payable on a contingency, and all claims against it, present or future, certain or contingent, ascertained or sounding only in damages, are admissible to proof against it (*l*). The value of those debts or claims which are subject to any contingency, or sound only in damages, or which, for some other reason, do not bear a certain value, is to be estimated as justly as possible (*m*), according to the value thereof at the date of the winding-up order (*n*). But this last rule does not apply to cases of continuing damage (*o*), and has not been always regarded even in other cases, the date of the making of the claim having been preferred (*p*). A claim which is contingent at the commencement of the winding up may be proved for in the ordinary way if it ripens into a debt during the continuance of the winding up, whether the time limited for sending in claims has expired or not (*q*).

Priorities of
debts.

The Companies act, 1862, authorises liquidators to pay any creditors in full under certain special circumstances mentioned in the act (*r*), but contains no provision to the effect that one class of creditors is to be in any better position than any others. The general scheme of the act is that all shall be paid out of the assets of the company *pari passu* (*s*). Thus a landlord has no priority for arrears of rent unless he is in a

rates, *ante*, p. 678 *et seq.* and as to secured debts, *Ex parte Grissell*, 3 Ch. D. 411, and *infra*, § 12, under the head Costs.

(*k*) *Ante*, p. 666, note (*c*).

(*l*) § 158: see, too, §§ 159, 160. See, as to remoteness of damage, *Johnston's claim*, 6 Ch. 212.

(*m*) § 158. The valuation of annuities and future and contingent liabilities is in the case of insolvent companies now governed by the

rules in bankruptcy, Jud. act, 1875, § 10, *infra*, p. 719.

(*n*) Rule 25.

(*o*) *Cambrian Steam Packet Co.*, 4 Ch. 112, and 6 Eq. 396.

(*p*) See *Kellock's case*, 3 Ch. 769; *Craig's Executor's case*, 9 Eq. 706.

(*q*) *Macfarlane's claim*, 17 Ch. D. 337.

(*r*) § 159.

(*s*) *Ante*, p. 666, note (*c*).

position to distrain (*t*), nor have persons paying money into a bank which stops immediately afterwards (*u*), or into the branch office of a bank in ignorance that the head office has already stopped (*x*); nor are policy holders whose policies are actually payable (*y*) in any better position as regards priority than other creditors.

This general rule, however, is subject to the right of the Crown to be paid in priority to other persons (*z*); and is also subject to the following statutory exceptions.

By the Preferential Payments in Bankruptcy act, 1888 (*a*), which applies only to windings up commenced after the 31st December, 1888, priority is given to,

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Preferential
Payments in
Bankruptcy
Act, 1888.

(*a*) All parochial or other local rates due from the company at the commencement of the winding up, and having become due and payable within twelve months next before that time (*b*), and all assessed taxes, land tax, property or income tax assessed on the company up to the fifth day of April next before the commencement of the winding up, and not exceeding in the whole one year's assessment;

(*b*) All wages or salary of any clerk or servant in respect of services rendered to the company during four months (*c*) before the commencement of the winding up, not exceeding fifty pounds (*d*); and

(*c*) All wages of any labourer or workman not exceeding twenty-five pounds, whether payable for time or for piece-work, in respect of services rendered to the company during two months before the commencement of

(*t*) *Thomas v. Patent Lionite Co.*, 17 Ch. D. 250; *Bridgewater Engineering Co.*, 12 Ch. D. 181; *Coal Consumers' Association*, 4 Ch. D. 625, and *ante*, p. 678 *et seq.* as to distress.

(*u*) *Ex parte Waring*, W. N. 1866, 399.

(*x*) *Ex parte Guillemin*, 28 Ch. D. 634.

(*y*) *McIver's claim*, 5 Ch. 424. And where a company's contracts are reduced under a scheme in accordance with § 22 of the Life Assurance Companies act, 1870, see *Great Britain Mutual Life Ass. Soc.*, 20 Ch. D. 351.

(*z*) *Henley & Co.*, 9 Ch. D. 469; *Oriental Bank Corporation*, *Ex parte The Crown*, 25 Ch. D. 643; and *West London Commercial Bank*, 38

Ch. D. 364. A surety to the Crown who has paid his principal's debt, is entitled to the Crown's priority, *Manisty v. Churchill*, 39 Ch. D. 174.

(*a*) 51 & 52 Vict. c. 62. This act repealed the Companies act, 1883, by which servants, clerks, and others were given a priority for salary and wages, except as to Ireland, to which country this act does not apply (§ 4).

(*b*) As to rates before this act, see *ante*, p. 681.

(*c*) *I.e.*, four months next before, see *Ex parte Fox*, 17 Q. B. D. 4.

(*d*) As to the old law, see *Chapman's case*, 1 Eq. 346; and *Association of Land Financiers*, 16 Ch. D. 373.

Bk. IV. Chap. 1. the winding up : Provided that where any labourer in husbandry has entered into a contract for the payment of a portion of his wages in a lump sum at the end of a year in hiring, he shall have priority in respect of the whole of such sum, or a part thereof as the Court may decide to be due under the contract proportionate to the time of service up to the date of the commencement of the winding up.

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The foregoing debts rank equally between themselves and are payable in full, unless the assets of the company are insufficient to meet them, in which case they must abate in equal proportions between themselves (*e*). Moreover, subject to the retention of such sums as may be necessary for the costs of administration or otherwise, the foregoing debts are payable at once, so far as the assets of the company are sufficient to meet them (*f*).

In the event of a distress on the company's goods within three months next before the date of the winding-up order, the above-mentioned debts are a first charge on the goods distrained on, or the proceeds of sale thereof (*g*); but the person distraining has the same right of priority in respect of any money paid under any such charge, as the person to whom such payment is made (*h*).

Stannaries
Act, 1887.

Again by the Stannaries act, 1887 (*i*), (which is not affected by the last mentioned act (*k*)), miners are given a first charge for three months' wages upon the mining effects, and the money and other assets of the company in connection with the mine, having priority, subject to the provisions of the tenth section of the act, over all claims by the lessors of the mine or by mortgagees or judgment execution or other creditors (*l*); and on the company being wound up these wages are to be paid by the liquidator forthwith in priority to all other costs, except the costs properly incurred of making the winding-up order, and, subject to the tenth section of the act, to all claims by any person whatsoever; and the court has power to charge the whole or any part of the assets of the company with a sum

(*c*) 51 & 52 Vict. c. 62, § 2.

(*f*) *Ib.*, § 3.

(*g*) *Ib.*, § 4.

(*h*) As to distresses after the commencement of the winding up, see *ante*, p. 678 *et seq.*

(*i*) 50 & 51 Vict. c. 43, § 14.

(*k*) 51 & 52 Vict. c. 62, § 2 (2).

(*l*) See § 4; for other advantages conferred on miners for their wages before the company is being wound up, see §§ 5-8.

sufficient to pay these wages with interest at 5 per cent. per annum in favour of any person willing to advance the requisite amount or any part thereof (*m*). By section 10, the right conferred upon clerks and servants by the Companies act, 1883, to be paid in the winding up of a company in priority to other creditors *pari passu* with labourers and workmen out of such assets only as are distributable by the liquidator is preserved, except that such priority is limited to three months' wages, and does not extend to the principal agent or manager, purser or secretary (*n*).

By the 10th section of the Judicature act, 1875, it is enacted (*inter alia*) that—

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Judicature act,
1875, § 10

“In the winding up of any company under the Companies acts, 1862 and 1867 (*o*), whose assets may prove insufficient for the payment of its debts and liabilities and the costs of winding up (*p*), the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively as may be in force for the time being under the law of bankruptcy” (*q*).

This enactment has given rise to much discussion and to some conflict of judicial opinion, but it appears now to be settled that the bankruptcy rules which it has introduced into the winding up of insolvent companies, are confined to those relating to (1) the respective rights of secured and unsecured creditors, (2) to the debts and liabilities provable, and (3) to the valuation of annuities and future and contingent liabilities (*r*). The section does not affect priorities (*s*), nor the funds out of which debts are to be paid. The bankruptcy rules which under certain circumstances deprive execution creditors of the fruits of their executions (*t*), allow the

(*m*) See § 9.

(*n*) 46 & 47 Vict. c. 28, § 4.

(*o*) The enactment does not apply to any winding up commenced before it came into operation, *Joseph Suche & Co.*, 1 Ch. D. 48.

(*p*) This must be assumed to be the case until the contrary is proved, *Ex parte Theys*, 25 Ch. D. 587.

(*q*) Notice the words are “as may be in force for the time being,”

Mersey Steel and Iron Co. v. Naylor, Benzon & Co., 9 App. Ca. 434.

(*r*) As to what future and contingent liabilities may be valued, see *Hardy v. Fothergill*, 13 App. Ca. 351.

(*s*) See *infra*, and p. 685, note (*h*).

(*t*) *Withernsea Brickworks*, 16 Ch. D. 340; *Richards & Co.*, 11 Ch. D. 676; *Railway Steel and Plant Co.*, 8 Ch. D. 183. *Printing and Nu-*

Bk. IV, Chap. 1. trustee in bankruptcy to disclaim onerous property (*u*), and
 Sect. 9. — the doctrines relating to reputed ownership (*x*), and fraudulent preferences (*y*) (except so far as introduced by the Companies act, 1862, § 164), are not introduced into the winding up of companies.

Effect on secured With regard to the respective rights of secured and un-
 creditors. secured creditors (*z*), it must be remembered that previously to the Judicature act, 1875, by the rules in Chancery a secured creditor was allowed to prove in the winding up of an insolvent company, for the full amount of his debt and to realize his security afterwards (*a*). The abolition of this rule was one of the chief objects of the section, and by it the rights of secured and unsecured creditors in the winding up of insolvent companies, are in this respect made the same as their rights in bankruptcy (*b*). But the rule in bankruptcy which prevents a fully secured creditor, who retains his security, from presenting a petition in bankruptcy, does not prevent a secured creditor from presenting a petition for a winding-up order (*c*).

As to debts provable.

With respect to the bankruptcy rules relating to “debts and liabilities provable,” it has been decided that the rules intended to be introduced by this clause, are the rules which determine what debts or liabilities may be proved in bankruptcy and these rules only (*d*). Thus it has been held that the rule in

merical Registering Co., 8 Ch. D. 535, is overruled, *ante*, p. 678.

(*u*) *Westbourne Grove Drapery Co.*, 5 Ch. D. 248.

(*c*) *Gorringe v. Irwell Rubber Works*, 34 Ch. D. 128; *Crumlin Viaduct Works Co.*, 11 Ch. D. 755.

(*y*) See *Withernsea Brickworks*, 16 Ch. D. 340; *Winehouse v. Winehouse*, 20 Ch. D. 545.

(*z*) The class of secured creditors must be determined by the creditor's position at the commencement of the winding up, and by the definition of “secured creditors,” contained in the Bankruptcy act. See § 168 of the Bankruptcy act, 1883, *Thomas v. Patent Lionite Co.*, 17 Ch.

D. 250; *Coal Consumers' Association*, 4 Ch. D. 625. See also *Printing and Numerical Co.*, 8 Ch. D. 535, and Buckley on the Companies Acts, 5th ed., p. 346.

(*a*) *Mason v. Bogg*, 2 My. & Cr. 443; *Kellock's case*, 3 Ch. 769.

(*b*) *Winehouse v. Winehouse*, 20 Ch. D. 545; *Williams v. Hopkins*, 18 Ch. D. 370; *Withernsea Brickworks*, 16 Ch. D. 337; *Kit Hill Tunnel*, *ib.* 590; *Lee v. Nuttall*, 12 Ch. D. 61; *Coal Consumers' Association*, 4 Ch. D. 625; *Joseph Suche & Co.*, 1 Ch. D. 48.

(*c*) *Moor v. Anglo-Italian Bank*, 10 Ch. D. 681.

(*d*) *West of England Bank, Ex*

bankruptcy which allows any liability contingent at the date of adjudication to be proved if it ripens into a debt during the bankruptcy, is introduced *mutatis mutandis* into the winding up of insolvent companies (*e*); and that the bankruptcy rules as to interest (*f*), and as to set-off between the company and non-contributories, are also introduced (*g*).

A creditor who has priority over others apart from the bankruptcy laws, is not deprived of such priority by the enactment in question; nor does the enactment confer any priority upon a creditor who, apart from the bankruptcy law, has no priority (*h*). For example, the Crown is not deprived of its right to issue process for the recovery of a debt due to it (*i*); nor is a creditor, who is a shareholder and has paid all calls made upon him, deprived of his right to prove for his debt *pari passu* with any other creditor (*j*). Nor is a savings bank deprived of the priority to which it is entitled under the Savings Bank act, 1863, in respect of monies due to it from any of its officers in their official capacity (*k*). On the other hand, a landlord is not entitled to any priority in respect of a year's arrear of rent (*l*).

Passing now to the general question, what debts are provable

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Effect on priorities.
What debts, &c.
are provable.

parte Brown, 12 Ch. D. 823; *Albion Steel Wire Co.*, 7 Ch. D. 547.

(*e*) *Macfarlane's claim*, 17 Ch. D. 336. This is irrespective of the question whether such a debt is or is not provable under § 158 of the Companies act, 1862; and see *Hill v. Bridges*, 17 Ch. D. 342, an administration case.

(*f*) *Boswell v. Gurney*, 13 Ch. D. 136, and see *infra*, pp. 724 *et seq.*

(*g*) See *infra*, p. 738, as to set-off.

(*h*) The decision of V.-C. Malins, as to servants' wages in the *Association of Land Financiers*, 16 Ch. D. 373, is not consistent with the text. But that case is not consistent with more recent decisions. See as to judgment creditors and the assets of deceased persons, *Winehouse v. Winehouse*, 20 Ch. D. 545; *Smith*

v. Morgan, 5 C. P. D. 337. See also as to an executor's right of retainer, *Lee v. Nuttall*, 12 Ch. D. 61.

(*i*) *Ante*, p. 717, note (*z*).

(*j*) *West of England Bank, Ex parte Brown*, 12 Ch. D. 823. The debt must not be a debt due to him in his character of member, see § 38, sub-s. 7 of the Companies act, 1862.

(*k*) 26 & 27 Vict. c. 87, § 14. Bankruptcy act, 1883, § 40, *Jones v. Williams*, 36 Ch. D. 573.

(*l*) *Thomas v. Patent Lionite Co.*, 17 Ch. D. 250; *Bridgewater Engineering Co.*, 12 Ch. D. 181; *Coal Consumers' Assoc.*, 4 Ch. D. 625. *Stockton Iron Furnaces Co.*, 10 Ch. D. 335, so far as it is an authority to the contrary, must be considered as overruled.

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and what not, the guiding principle is that those claims only are provable on the winding up of a company which are or will become enforceable against the company which is being wound up. So long as an order exists for winding up a company the Court cannot hold that there is no company against which debts can be proved (*m*). Demands against the promoters or directors, or other persons, but not against the company itself, cannot be proved against it either as a debt (*n*) or a claim (*o*). On the other hand, debts of the company can be proved against it although some of the shareholders may be entitled to an indemnity in respect of them from other shareholders (*p*).

What is, and what is not, a debt of the company, must be determined upon the principles discussed in an earlier portion of the present treatise (*q*); and in this place it is proposed merely to notice some general points of practical importance, and continually arising in the winding up of companies.

A debt may be proved in the winding up, although an action has been previously brought against the company to recover it, and such action has been dismissed for want of prosecution (*r*).

Equitable debts.

Equitable debts are clearly provable (*s*); but a debt contracted under seal by a trustee for the company is not provable against the company (*t*); nor are claims founded on agreements fraudulently concealed from the members, even though payment is stipulated for in the articles of association (*u*). Nor can moneys subject to a fraudulent trust be treated as trust moneys and be paid as such (*x*).

Debts contracted
ultra vires.

Nor are claims, founded on contracts which are *ultra vires*,

(*m*) *Arthur Average Assoc.*, 3 Ch. D. 522; *Ex parte Hargrove*, 10 Ch. 542.

(*n*) *London Marine Ins. Assoc.*, 8 Eq. 176; *Ex parte Lloyd*, 1 Sim. N. S. 248, as explained in 2 De G. M. & G. 640.

(*o*) See *Wryghte's case*, 2 De G. M. & G. 636, and *Prichard's case*, 4 De G. & S. 328, and 5 De G. M. & G. 484. See, too, *Ex parte Briggs*, 8 W. R. 110.

(*p*) *Shaw's claim*, 10 Ch. 177.

(*q*) See book ii.

(*r*) *Orrell Colliery and Fire Brick Co.*, 12 Ch. D. 681.

(*s*) See *Terrell v. Hutton*, 4 H. L. C. 1091.

(*t*) *Pickering's claim*, 6 Ch. 525.

(*u*) *Ex parte Williams*, 2 Eq. 216, where the articles of association were vitiated by a concealed agreement. See, also, *Hereford and South Wales Waggon Co.*, 2 Ch. D. 621.

(*x*) *Great Berlin Steamboat Co.*, 26 Ch. D. 616.

provable against the company (*y*). Moreover, solicitors who, on behalf of the company conduct legal proceedings arising out of transactions which are *ultra vires*, and are known by them to be so, are not entitled to be paid for their services by the company (*z*). Nor can brokers claim in respect of purchases of shares in the company being wound up unless the company has power to buy its own shares (*a*). But money borrowed *ultra vires*, but proved to have been expended in paying debts for which the company was liable, or for other legitimate purposes of the company, is provable as a debt against it (*b*). In connection with this subject, it should be remembered that creditors may be able to dispute claims which would be binding on the company by the law of estoppel (*c*).

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A debt of the company bought up for less than its full amount can be proved for the full amount even by a member (*d*); but a director who knows that a debt has been improperly contracted on behalf of the company, cannot buy it up cheap and make a profit, by proving for its full amount against the company (*e*).

Debts bought up
for less than
their amount.

Debts barred by the Statutes of Limitations at the date of the winding-up order cannot be proved (*f*). But debts not then barred are provable, although no claim may be made in respect of them until after the expiration of the time which but for the winding-up order would have barred them (*g*). A creditor, however, who neglects to carry in his claim for an unreasonable time will not be allowed to disturb dividends already paid (*h*); and he will entirely lose his right to prove if all the assets have been distributed and the affairs of the company practically wound up before he has brought in his claim.

Statutes of Limi-
tations.

Laches in carry-
ing in claim.

(*y*) *Ante*, p. 162.

(*z*) *Howard and Dollman's case*,

1 Hem. & M. 433.

(*a*) *Zulueta's claim*, 5 Ch. 444, reversing S. C., 9 Eq. 270. See *ante*, p. 206.

(*b*) *Ante*, p. 237 *et seq.*, *Cork and Youghal Rail. Co.*, 4 Ch. 748.

(*c*) *Mowatt v. Castle Steel and Iron Works Co.*, 34 Ch. D. 58.

(*d*) *Humber Iron Works Co.*, 8 Eq. 122.

(*e*) *Ex parte Larking*, 4 Ch. D. 566.

(*f*) *Mitchell's claim*, 6 Ch. 822.

(*g*) *Joint Stock Discount Co.'s claim*, 7 Ch. 646; *Wryght's case*, 5 De G. & Sm. 244; and see *Ex parte Higgins*, 2 Jur. N. S. 178; *Warwick and Worcester Rail. Co.*, 27 L. J. Ch. 735; *Gloucester, Abergystwith, &c., Rail. Co.*, 2 Giff. 47.

(*h*) See the last note, and *Kit Hill Tunnel*, 16 Ch. D. 590.

Bk. IV. Chap. 1. Thus where a solicitor's bill has been taxed, and ordered to
Sect. 9. be paid out of the first funds of the company which should come to the hands of the official liquidator, and the solicitor took no steps to obtain payment for more than six years, and in the meantime the affairs of the company were settled by compromise, it was held that the solicitor was not entitled to have a call made for his payment (*i*). Again, in *Ex parte Forest* (*k*), a debt was due from a company ordered to be wound up. No claim was made by the creditor until more than nine years had elapsed since the debt became due and the winding-up order was made; nor until all the other debts of the company had been paid and the surplus assets had been distributed amongst the shareholders. The debt was held to be barred by the laches of the creditor, and by the Statute of Limitations. As regards the statute, the decision cannot now be relied upon; but as regards the effect of laches, coupled with an alteration in the position of others which would render a proof unjust to them, the case may, it is conceived, be still considered sound (*l*).

Ex parte Forest.
Solicitor's bills. A claim by a solicitor for costs is subject to taxation (*m*); but if at the date of the winding up the company could not have taxed the bill, it is not taxable at the instance of the liquidators (*n*); but if it is then taxable, the liquidator can have it taxed even after the lapse of twelve months from the delivery of the bill (*o*). The bill, however, may be allowed as a debt subject to taxation (*p*).

Interest. By the rules and orders issued under the act of 1862, interest on debts allowed is to be computed, as to such of them as carry interest, after the rate they respectively carry. According to the rule, creditors whose debts do not carry interest are entitled to interest, after the rate of 4*l.* per centum per annum, from the date of the winding-up order; but only out of any

(*i*) *Ex parte A'Beckett*, 2 Jur. N. S. 684. Compare *Gloucester, Aberystwith, &c., Rail. Co.*, 2 Giff. 47.

(*k*) 2 Giff. 42.

(*l*) See *Joint Stock Discount Co.'s claim*, 7 Ch. 646, where no injustice was done to any one in admitting the claim.

(*m*) *Ex parte Quilter*, 4 De G. & S. 183.

(*n*) *Ex parte Quilter*, 4 De G. & S. 183.

(*o*) *Ex parte Evans*, 11 Eq. 151.

(*p*) *Terrell v. Hutton*, 4 H. L. C. 1091.

assets which may remain after satisfying the costs of the winding up, the debts and claims established, and the interest of such debts and claims as by law carry interest (*q*). But the validity of this part of the rule is very questionable (*r*); and notwithstanding the rule, interest on a debt not bearing interest cannot be allowed at all (*s*), unless the debt is one in respect of which interest in the shape of damages would be given by a jury under 3 & 4 Wm. 4, c. 42 (*t*). Even if a debt bears interest, the interest stops at the commencement of the winding up if the company is insolvent (*u*). And if a creditor, whose debt carries interest at a higher rate than 4 per cent., obtains a judgment for his principal and interest, he will only be allowed to prove for his judgment debt and interest on it at the rate of 4 per cent., for the original debt will have merged in the judgment (*x*). If the debt is payable by two companies, the creditor can prove against each for the principal and interest up to the date of its winding up, and can receive dividends from each until each has paid twenty shillings in the pound on the debt proved against it, or until both companies together have paid the whole principal and interest up to the date of payment (*y*). A dividend paid in respect of principal and interest is first to be attributed to the interest and then to the principal (*z*).

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(*q*) Rule 26. The act is silent on the subject of interest. See 3 & 4 Wm. 4, c. 42, §§ 28, 29; 1 & 2 Vict. c. 110, §§ 17, 18; *Dornford v. Dornford*, 12 Ves. 129; *Mildmay v. Methuen*, 3 Drew. 91.

(*r*) In truth it seems *ultra vires*, see the next note.

(*s*) *Ex parte Greenwood*, 9 Jur. N. S. 997. *East Holyford Mining Co.*, Ir. Rep. 9 Eq. 327; *East of England Banking Co.*, 4 Ch. 14; and *Herefordshire Banking Co.*, 4 Eq. 250.

(*t*) *State Fire Insurance Co.*, *Times Assurance Co.'s case*, 2 Hem. & M. 722. In this case the company was being wound up under the act of 1848, but the reasoning applies to companies which are being wound up under the act of

1862. Compare *Sargood's claim*, 15 Eq. 43, where a surety, who paid off a debt bearing interest at 4 per cent., was allowed to prove for the principal and interest at 5 per cent.

(*u*) See Jud. act, 1875, § 10, *ante*, p. 719 *et seq.* *Warrant Finance Co.*, 4 Ch. 643; *Ebbw Vale Co.'s case*, 5 Ch. 112; *Ex parte Colborne and Strawbridge*, 11 Eq. 478; *Hughes' claim*, 13 Eq. 623, the case of a surety.

(*x*) *Ex parte Oriental Financial Corporation*, 4 Ch. D. 33; *Ex parte Hughes*, *ib.* 34 n.; *Ex parte Fewings*, 25 Ch. D. 338.

(*y*) *Warrant Finance Co.*, 5 Ch. 86.

(*z*) *Warrant Finance Co.* (No. 2), 10 Eq. 11.

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Position of
secured cre-
ditors.

Secured creditors cannot prove for their debts without giving up their securities on the property of the company (*a*). But they need not give up other securities (*b*).

Although interest accruing after the commencement of the winding up is not provable against an insolvent company (*c*), yet a creditor who holds a security for principal and interest can only be redeemed on being paid principal and interest in full up to the time of payment and his costs (*d*). A creditor who holds two securities of the same company for one debt can only prove for that debt; he cannot prove in respect of each security (*e*). The holder of a debenture containing a covenant for the repayment of the principal sum on a certain day and charging property of the company is entitled to enforce his security—*i.e.*, to be paid out of the assets charged, although the day for payment has not arrived and no interest is in arrear (*f*).

Whether a mortgage is binding on the company, and the extent of the assets covered by it, depends not only on its terms but also on the nature of the company and on the powers of its directors (*g*). A security of a limited company not registered as required by § 43 of the Companies act, 1862, is nevertheless provable as against other creditors, even although given to the directors or solicitors of the company (*h*). A bank, with which a company had deposited its deeds as a security for bills under discount, was held entitled to apply the proceeds of the sale of its security, not only to meet bills under discount, but all other moneys due to it from the company (*i*).

Vendor's lien for
unpaid purchase
money.

The ordinary lien which a vendor of land has for his unpaid purchase-money (*k*), the right of an unpaid vendor of goods to

(*a*) Jud. Act, 1875, § 10. See *ante*, p. 719 *et seq.*

(*b*) See Partn. p. 714 *et seq.*, where the rules in bankruptcy are referred to.

(*c*) *Ante*, pp. 724, 725.

(*d*) *Warrant Finance Co.* (No. 2), 10 Eq. 11.

(*e*) In *Metropolitan and Provincial Bank*, W. N. 1869, 148, the creditor had a bill and a bond; and see *Ex parte European Bank*, 7 Ch. 99.

(*f*) *Hodson v. Tea Company*, 14 Ch. D. 859. As to debentures charging the undertaking, see *ante*, p. 197.

(*g*) See *ante*, pp. 186 *et seq.*

(*h*) *Wright v. Horton*, 12 App. Ca. 371. See *ante*, p. 203 n. (*u*).

(*i*) *Ex parte National Bank*, 14 Eq. 507. See, also, *Agra Bank's claim*, 8 Ch. 41.

(*k*) See, as to the lien of a vendor who sells for cash and shares, and

stop them *in transitu* in the event of the insolvency of the buyer, and maritime liens (*l*) are all available against companies which are being wound up (*m*). Bk. IV. Chap. 1.
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The rule in *Ex parte Waring* (*n*), by which, if both the drawer and acceptor of a bill of exchange become bankrupt, the holder of the bill is entitled to have any securities held by the acceptor for the bill applied in taking it up, applies where the drawer and acceptor are companies in liquidation, at all events if they are insolvent; but, it has been said, not otherwise (*o*). The rule, however, has no application unless there is a double forced liquidation (*p*). Whilst the drawer and acceptor are solvent they can deal with the securities as they please, and release them altogether (*q*); and the transferee of the bill acquires no right to have securities pledged to meet it applied in taking it up, unless that right has been conferred upon him by some special contract with himself or its equivalent (*r*); and where the security consists of a guarantee, the bill-holder acquires no rights as against the guarantor or his estate, even although all parties are insolvent (*s*). Rule in *Ex parte Waring*.

A person who holds shares as a trustee for a company being wound up is entitled to prove against it, not only for calls already made on him, but also in respect of his liability to Trustees for the company.

the company becomes wholly abortive, *Brentwood Brick and Coal Co.*, 4 Ch. D. 562. The vendor not being a creditor at law until a conveyance has been executed, never was entitled in equity to prove for the whole purchase-money, and to retain his security. See *Rome v. Young*, 3 Y. & C. Ex. 199, and 4 ib. 204.

(*l*) *Australian Steam Nav. Co.*, 20 Eq. 325; *Rio Grande do Sul Steam Ship Co.*, 5 Ch. D. 282.

(*m*) See, as to the lien of a vendor of a patent, *Gore and Durant's case*, 2 Eq. 349.

(*n*) 19 Vesey, 345. For a fuller account of this rule, see Partn. p. 712, and Eddis on *Ex parte Waring*.

(*o*) *Hickie & Co.'s case*, 4 Eq. 226, *sed quære*, see *Powles v. Hargreaves*, 3 De G. M. & G. 430; *Ex parte Alliance Bank*, 4 Ch. 423; *Bank of Ireland v. Perry*, L. R. 7 Ex. 14.

(*p*) The rule does not apply when one of the parties, though insolvent, remains master of his own property, *Ex parte General South American Co.*, 10 Ch. 635.

(*q*) *Ex parte Lambton*, 10 Ch. 405.

(*r*) Compare *Inman v. Clare*, Johns. 769, and *Agra and Masterman's Bank*, 2 Ch. 391, where he had acquired the right, with *Ex parte Stephens*, 3 Ch. 753, and *Banner v. Johnston*, L. R. 5 H. L. 157, where he had not.

(*s*) *Ex parte Stephens*, 3 Ch. 753.

Bk. IV. Chap. 1. future calls (*t*); and his proof is not to be rejected simply
Sect. 9. because he may be indebted to the company on another
account (*u*).

Indemnity.

So other claims against the company for indemnity by it can be proved against it, *e.g.*, a claim by a surety for the company (*x*), or a claim arising from an undertaking by the company to pay a bill accepted by the claimant, and not due at the commencement of the winding up (*y*). But as in bankruptcy so in winding up companies, the same debt cannot be proved twice over; and if in the last case the holder of the bill has proved, the acceptor cannot prove also without giving credit for the dividend received by the holder.

Winding up
no breach of
contract.

Although future claims, and claims for unliquidated damages are provable against the company, a company neither rescinds its contracts, nor is necessarily guilty of a breach of contract, by being wound up. Hence current engagements to accept bills, supply goods, &c., are not broken by a winding-up order; and no claim for damages can be allowed, on the theory that the winding up was *per se* a breach of contract, if the liquidators are ready to perform the contract. But if they are not the case will be otherwise. The point to determine is whether what has taken place renders performance by the company of its contract impossible, or amounts to a refusal by the company to perform it.

Mersey Steel
and Iron Com-
pany v. Naylor
& Company.

The principles applicable to this subject were much discussed in *The Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (*z*). There a company had agreed to sell 5000 tons of steel and to deliver them by instalments of 1000 tons per month. The company delivered some of the steel, and a petition to wind it up was then presented. The buyer refused to pay for the steel delivered without the sanction of the Court (*a*), and the company treated his refusal to pay as a

(*t*) *Ex parte Oriental Commercial Bank*, 3 Ch. 791.

(*u*) *Ib.*

(*x*) See, as to sureties, *Hughes' claim*, 13 Eq. 623.

(*y*) *Oriental Commercial Bank*, 7 Ch. 99, reversing 12 Eq. 501. See, further as to the rights of sureties,

Gray v. Seckham, 7 Ch. 680.

(*z*) 9 App. Ca. 434, and 9 Q. B. D. 648.

(*a*) This was held not to be an absolute refusal to perform the contract so as to entitle the company to treat it as rescinded.

breach of his contract and as exonerating the company from further deliveries. A winding-up order was then made, and the company brought an action for the price of the steel delivered, and the buyer counterclaimed for damages for non-delivery of the rest of the steel. It was held (1) that the company was entitled to be paid for the steel delivered; (2) that the buyer was entitled to damages for non-delivery of the rest of the steel; (3) that these damages could be set off against the price. The breach of contract which rendered the company liable in this case was the refusal to make further deliveries of steel, not the winding-up of the company.

So an order to wind up a company under supervision was held to afford no defence to an action by the company for the breach of an agreement which the liquidators had performed and were ready to continue to perform (*b*). So where a bank had agreed to accept bills against bills of lading, and the bank was ordered to be wound up, and the liquidators were ready to carry out the agreement, a claim for damages for its breach was disallowed (*c*); and sureties for the bank were held not discharged (*d*).

On the other hand, as the winding up of a company renders it impossible to place shares in it, a person who has agreed with the company to place them is entitled to damages for the loss which the winding up has caused him (*e*).

Similar principles were applied by V.-C. Wood to the dismissal of servants in *Ex parte Harding* (*f*). There a clerk to a company was engaged on the terms that he should not be dismissed without three months' notice. The company was ordered to be wound up; but its business was continued by the liquidator for a time, and the clerk was not dismissed, but he continued in his employment. He was then discharged by the liquidator without notice. The Court

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Dismissal of
servants.
Ex parte
Harding.

(*b*) *British Waggon Co v. Lea & Co.*, 5 Q. B. D. 149, the liquidators had assigned the contract, and the assignees carried it out.

(*c*) *Ex parte Tondeur*, 5 Eq. 160.

(*d*) *Barber & Co.*, 9 Eq. 725.

(*e*) *Inchbald v. Western Neilgherry*

Coffee Co., 17 C. B. N. S. 733.

(*f*) 3 Eq. 341. Compare the next three notes; and as to the effect of a transfer of the company's business, see *Stirling v. Mailland*, 5 B. & Sm. 840.

Bk. IV. Chap. 1. decided that the winding-up order did not operate as a discharge of the clerk, and that he was entitled to his salary up to the time of his dismissal and the damages in lieu of notice (*g*).

Discharge of
servants by
winding-up
order.

But on grounds of convenience it has been held in other cases that a compulsory winding-up order operates as a discharge of the company's servants, and entitles them to damages as for wrongful dismissal on that day, even if they are not in fact dismissed but assist the liquidator in winding up the company.

The general doctrine that a compulsory winding-up order operated as a discharge of the company's servants was laid down by Lord Romilly in *Chapman's case* (*h*); and in *Shirreff's case* (*i*) the same judge held that a resolution to wind up voluntarily had the same effect on a manager who was appointed liquidator. In *Mac Dowall's case* (*k*) the liquidator issued a circular (in effect) treating the winding-up order as a discharge of the company's clerks, but saying that he should require the services of some of them, and should reduce the staff as little as possible. A clerk who was entitled by his agreement with the company to three months' notice continued to be employed by the liquidator for more than three months, and afterwards received notice to leave at the end of the then current month (*l*), which he did. He was paid for his services up to that time. He claimed three months' salary in lieu of notice, after giving credit for what he received after the notice to leave; but it was held that he was not entitled to this. He was treated as having been discharged by the winding-up order, and on this footing he had sustained no damage, having been paid more than three months' wages (*m*).

The last case on this subject is *Reid v. Explosives Co.* (*n*), where it was held by the Court of Appeal that a winding-up

(*g*) Observe that if the order had dismissed him he would have been entitled to damages, but they would have been reduced by the subsequent payments to him. See *Reid v. Explosives Co.*, *infra*.

(*h*) 1 Eq. 346. See, also, *Forster & Co.*, 19 L. R. Ir. 241.

(*i*) 14 Eq. 417.

(*k*) 32 Ch. D. 366.

(*l*) The notice was given on the 19th August.

(*m*) See the next case.

(*n*) 19 Q. B. D. 264. A receiver and manager had been appointed, and this was held to have discharged the plaintiff. *Sed quære*.

order operated as a wrongful dismissal of the plaintiff, but that he suffered no damage, as he had been employed and paid by the liquidator for the period of the notice to which he was entitled. Bk. IV. Chap. 1.
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It must therefore be treated as practically settled that the principle acted on in *Ex parte Harding* is not applicable to clerks and servants unless the company's business is continued without break as it was there.

A servant engaged for an unexpired term and discharged before its expiration, is entitled to prove for the present value of all the future payments which would accrue to him if he continued to serve the whole time, and to add to that the pecuniary value of any other benefits to which he would have been entitled under his contract; and then to deduct a proper sum for the chance of death and bad health, and for his liberty to obtain fresh employment (*o*); or if he has obtained fresh employment what he has been paid for it (*p*). If the contract mentions the sum to be paid in case of dismissal, no deduction from it will be made (*q*). On the other hand, nothing is provable in respect of loss of commission on business which might or might not have been transacted (*r*). Damages in
these cases.

As to the priority of wages, see *ante*, p. 717.

Where the company is lessee for an unexpired term of years the lessor is entitled to have a claim entered for the full amount of the rent which will become due under the lease; and he is further entitled to prevent the company from being dissolved without notice to him. But where the lease has been assigned, the lessor is not entitled to receive more from the company than it may ultimately become liable to pay under the covenants contained in the lease (*s*). And the lessor is not entitled to a dividend on his claim until something becomes payable to him; nor is he entitled as against the other creditors to stay a dividend, nor to have any sum impounded Future rent.

(*o*) *Yelland's case*, 4 Eq. 350; *Ex parte Clark*, 7 Eq. 550. but see the last note.

(*r*) *Ex parte Maclure*, 5 Ch. 737.

(*p*) *Reid v. Explosives Co.*, 19 Q. B. D. 264; *Shirreff's case*, 14 Eq. 417.

(*s*) See *Haytor Granite Co.*, 1 Ch. 77, reversing 1 Eq. 11, and see the next two notes.

(*q*) *Ex parte Loggan*, 9 Eq. 149;

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to meet future possible demands (*t*). He must trust to his power of distress and entry, and to his rights against the assignee if the lease is assigned. But where a company seeks to reduce its capital, it must make provision for meeting the lessor's future demands (*u*); and the shareholders are not entitled to divide the assets amongst themselves without making similar provision (*x*). The same rule applies to the voluntary winding up of a solvent company (*y*).

Subsisting
policies and
annuities.

Annuitants, and policy-holders whose policies are not yet due, are entitled to prove for the values of their respective annuities and policies (*z*): and the amount to be proved for is to be ascertained as at the date when the claim is made (*a*): but if a claim contingent at the commencement of the winding up ripens into a debt during its continuance the whole may be proved for, whether the day fixed for sending in claims has, or has not, passed (*b*). Moreover, it is not necessary in order to prove in respect of a policy to keep it up after the commencement of the winding up (*c*); and as between policy-holders, those whose policies have dropped are not entitled to payment in priority to the others (*d*).

How annuities
and policies are
to be valued.

The proper method of valuing subsisting policies gave rise to considerable difference of opinion; the Court of Chancery holding that the amount to be proved in respect of such a policy is the sum which would be required by a solvent office to effect a new policy of the same amount on the same conditions and at the same premium as the policy in respect of

(*t*) *Westbourne Grove Drapery Co.*, 5 Ch. D. 248; *Horsey's claim*, 5 Eq. 561; *Ex parte Lord Elphinstone*, 10 Eq. 412. As to the proof and discharge of such claims in bankruptcy, see *Hardy v. Fothergill*, 13 App. Ca. 351.

(*u*) *Telegraph Construction Co.*, 10 Eq. 384.

(*x*) *Oppenheimer v. British and Foreign Exchange, &c., Bank*, 6 Ch. D. 744.

(*y*) *Lord Elphinstone v. Monkland Iron Co.*, 11 App. Ca. 332; *Gooch v. London Banking Assoc.*, 32 Ch. D.

41.

(*z*) *Hunt's case*, 1 Hem. & M. 79; *Teete's case*, 4 N. R. 48, and see *infra*.

(*a*) *Craig's Executors' case*, 9 Eq. 706.

(*b*) *Macfarlane's claim*, 17 Ch. D. 337; and *Hill v. Bridges*, *ib.* 342, an administration action. Dividends already paid are of course not disturbed.

(*c*) *Cook's policy*, 9 Eq. 703, where the days of grace had not then expired.

(*d*) *McIver's claim*, 5 Ch. D. 424.

which the proof is made (e) ; and this principle has the advantage of doing justice to all parties so far as circumstances admit. But the practical difficulty of applying the rule induced Lord Cairns as arbitrator in the winding up of the Albert Life Assurance Company, to adopt a different rule, and to hold that the sum to be proved for was the difference between the present value of the sum insured and the present value of the premiums which the insured would have to pay in order to keep the policy on foot (f). The legislature has, in substance, adopted Lord Cairns' rule, for by 35 & 36 Vict. c. 41, it is enacted as follows :—

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“§ 5. Where a life assurance company is being wound up by the Court, 35 & 36 Vict. or subject to the supervision of the Court, or voluntarily, the value of every c. 41. life annuity and life policy requiring to be valued in such winding up shall be estimated in manner provided by the first schedule to this Act ; but this section shall not apply to any company the winding up of which has commenced before the passing of this Act, unless the Court having cognizance of the winding up so order, which order that Court is hereby empowered to make if it think expedient so to do, on the application of any person interested in the winding up of such company.”

FIRST SCHEDULE.

Rule for valuing an annuity.

An annuity shall be valued according to the tables used by the company which granted such annuity at the time of granting the same, and where such tables cannot be ascertained or adopted to the satisfaction of the Court, then according to the table known as the Government Annuities Experience Table, interest being reckoned at the rate of four per centum per annum.

Rule for valuing a policy.

The value of the policy is to be the difference between the present value of the reversion in the sum assured on the decease of the life, including any bonus or addition thereto made before the commencement of the winding up, and the present value of the future annual premiums.

In calculating such present values, the rate of interest is to be assumed as being four per centum per annum, and the rate of mortality as that of the tables known as the Seventeen Offices' Experience Tables.

(e) *Holdich's case*, 14 Eq. 72; (f) See *Lancaster's case*, 14 Eq. 72, note, and Lord Romilly's observations on it in *Holdich's case*, ib. *Bell's case*, *Kerr's and Stubb's case*, *Bleackley's case*, *Craig's Executors' case*, and *Wilson's case*, 9 Eq. 706.

- Bk. IV. Chap. 1. The premium to be calculated is to be such premium as according to
 Sect. 9. the said rate of interest and rate of mortality is sufficient to provide for the
 risk incurred by the office in issuing the policy, exclusive of any addition
 thereto for office expenses and other charges.

SECOND SCHEDULE.

Where an assurance company is being wound up by the Court or subject to the supervision of the Court, the official liquidator in the case of all persons appearing by the books of the company to be entitled to or interested in policies granted by such company, for life assurance, endowment, annuity, or other payment, is to ascertain the value of such policies, and give notice of such value to such persons, and any person to whom notice is so given shall be bound by the value so ascertained unless he gives notice of his intention to dispute such value in manner and within a time to be prescribed by a rule or order of the Court.

Debts of amal-
gamated com-
panies.

Where one company has transferred its assets and liabilities to another company, and both or either of such companies are afterwards wound up, questions of some perplexity arise with reference to the debts to which they are respectively liable. In the first place it is necessary to ascertain whether the amalgamation itself was *intra vires* and binding on both companies, or *ultra vires* and binding on neither (*g*). Assuming the amalgamation to have been *intra vires*, then it will follow from the principles investigated in an earlier part of the treatise (*h*)—

1. Where the
amalgamation is
intra vires.

1. That a creditor of the company which has sold its business can prove against that company unless he has in some way released it, or unless his debt is barred by the Statute of Limitations (*i*).

2. That such creditor can prove against the purchasing company, if, but only if, that company has become liable to him by reason of some agreement, express or tacit, between it and him (*k*).

(*g*) See, on this subject, *ante*, pp. 183, 322.

(*h*) *Ante*, pp. 258 *et seq.*

(*i*) *Family Endowment Soc.*, 5 Ch. 118; *Manchester and London Life Ass., &c., Assoc.*, 9 Eq. 643, and 5 Ch. 640; *Griffith's case*, 6 Ch. 374; *National Provincial Life Ass. Soc.*, 9 Eq. 306; *Hunt's case*, 1 Hem. &

M. 79. Compare *Carr's case*, 33 Beav. 542, which turned on the terms of the policy and the company's deed of settlement.

(*k*) *Commercial Bank Corporation of India and East*, 16 W. R. 958, and W. N. 1868, 166; *Ex parte Gibson*, 4 Ch. 662; *National Provincial Life Ass. Soc.*, 9 Eq. 306; *Ex*

3. That if there has been a complete novation of his contract, the creditor has discharged the selling company, and can only prove against the purchasing company (*l*). Bk. IV. Chap. 1.
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4. That the selling company is entitled to be indemnified by the purchasing company against all the liabilities of the former agreed to be taken over and discharged by the latter (*m*); but is not entitled to a lien as for unpaid purchase-money, nor to the benefit of securities effected by the purchasing company to cover the debts it had taken over (*n*).

Where, however, the amalgamation is *ultra vires*, and invalid, the company which has assumed to take upon itself the liabilities of the other, cannot be made to discharge those liabilities, either by the other company or by its creditors (*o*) and the company which has assumed to transfer its debts, remains liable to pay them, even though its creditors may have taken securities from the other company (*p*). In order to replace both companies in their former position, it would be necessary to restore to the transferring company all its assets, and to the company taking the liabilities of the other, all moneys paid in discharge of those liabilities. But it does not necessarily follow, from the mere fact that the companies have acted beyond their powers, that they are entitled to be restored to the position in which they would have been, had they never amalgamated; and it was held that a company which had taken the assets and liabilities of another, was not entitled to rank as a creditor against that other, in respect of the excess of its liabilities which had been discharged, over its assets which had been taken (*q*). 2. Where amal-
gamation is
ultra vires.

parte Blood, 9 Eq. 316; *Teete's case*, 164.
and *Rumney's case*, 4 N. R. 48,
V.-C. K.

(*l*) *Merchants and Tradesmen's Ass. Soc.*, 9 Eq. 694; *Times Life Ass., &c., Co.*, 5 Ch. 381; *Anchor Ass. Co.*, 5 Ch. 632; *Spencer's case*, 6 Ch. 362; *Fleming's case*, 6 Ch. 393, and see the last two notes.

(*m*) *British Provident and Anglo-Australian Assurance Cos.*, 4 N. R. 48.

(*n*) *Western Life Ass. Soc.*, 11 Eq.

(*o*) See *The Era Assurance Soc., Williams's case*, and *Anchor's case*, 2 J. & H. 400.

(*p*) See *The Saxon Assurance Society, Anchor's case*, 2 J. & H. 408. See, too, *Hardinge v. Webster*, 1 Dr. & Sm. 101.

(*q*) See *The Saxon Life Assurance Society, Era case*, 2 J. & H. 408, and 1 De G. J. & Sm. 29. Compare *Wood's claim*, and *Brown's claim*, 9 W. R. 366, and 10 ib. 662.

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Sect. 9.

Debts due to
members.

A debt due from a company to one of its own members in his character of member by way of dividends, profits, directors' fees (*r*), or otherwise, cannot be proved against the company in competition with creditors who are not members; but such a debt must be taken into account in adjusting the rights of the members *inter se* (*s*).

But debts due to members not as such, but in respect of matters in which they have acted as strangers, may be proved against the company in competition with other debts (*t*).

A person who has taken shares in a company and has effectually repudiated them before the winding up has commenced, or who has been decided not to be a shareholder, may prove as a creditor for what he has paid to the company in respect of them (*u*); but a person induced by the fraud of the company to take shares in it, and who is a shareholder when the winding up of the company commences, cannot prove for the damages he has sustained; for such a claim is inconsistent with his position as a member of the company (*x*).

Cost-book mine.

A shareholder in a cost-book company who has relinquished his shares and paid his share of the expenses up to the date of his retirement can prove for the value of his share, even in competition with the other creditors (*y*).

Insurance
societies.

Insurance societies (not limited) almost invariably issue their policies and grant their annuities on terms which render their funds alone liable to pay the policies and annuities. The efficacy of such stipulations in limiting the liability of the

(*r*) *Ex parte Cannon*, 30 Ch. D. 629.

(*s*) See 25 & 26 Vict. c. 89, § 38, cl. 7, and § 101. See also, *Addlestone Linoleum Co.*, 37 Ch. D. 191, and *Exchange Drapery Co.*, 38 Ch. D. 171, where some shares had been paid up in advance.

(*t*) *Grissell's case*, 1 Ch. 528; *Ex parte Brown*, 12 Ch. D. 823, *infra*, p. 742, and *ante*, p. 727.

(*u*) See *Alison's case*, 9 Ch. 1, and 15 Eq. 394, and compare *Campbell's case* and *Hippisley's case*, 9 Ch. 1,

and 16 Eq. 417.

(*x*) *Houldsworth v. City of Glasgow Bank*, 5 App. Ca. 317; *Addlestone Linoleum Co.*, 37 Ch. D. 191, in which *Mudford's claim*, 14 Ch. D. 634, and *Ex parte Appleyard*, 18 Ch. D. 587, are doubted. And compare *Gibson & Co.*, 5 L. R. Ir. 139, where the action was brought before the winding up, but *quære* if this is consistent with *Houldsworth v. City of Glasgow Bank*, *ubi supra*.

(*y*) *Ex parte Palmer*, 7 Ch. 286, and see *ante*, p. 524.

shareholders has been already seen (z); but such societies often have other creditors, and their policies and annuities are frequently held by their own members. The conflicting rights of these various persons have all to be adjusted when such societies are wound up; and after considerable difference of opinion, the following rules appear now to be settled:—

A. In the case of an incorporated company with a share capital:

Incorporated
proprietary
companies.

1. The policy-holders and annuitants, whether members of the company or not, are entitled to be paid *pari passu* with the other creditors out of the funds of the company, including therein all uncalled-up capital (a).

2. The policy-holders and annuitants are not entitled to be paid out of these funds in priority to the other creditors; nor to throw those creditors on what may be raised by calls beyond the nominal capital (b).

3. The policy-holders and annuitants can only obtain payment out of such funds; but the other creditors, whether members or not, are entitled to be paid, not only out of those funds, but also by calls beyond the amount of the nominal capital (c).

4. The costs of winding up are also payable out of the funds of the company, and so far as they may be insufficient by calls beyond the share capital (d).

B. In the case of an incorporated company without any capital agreed to be subscribed by the members, the same principles would, it is conceived, be applicable: subject, of

Incorporated
mutual com-
panies.

(z) *Ante*, p. 246.

(a) *English and Irish Church and University Assurance Society*, 1 Hem. & M. 79; *State Fire Insurance Co.*, 1 Hem. & M. 457, and 1 De G. J. & Sm. 634; *Professional Life Assurance Co.*, 3 Eq. 668, and 3 Ch. 167. See, further, *Winstone's case*, 12 Ch. D. 239; *Albion Life Ass. Soc.*, 15 Ch. D. 79, & 16 ib. 83; and *Sander's case*, 20 ib. 403, as to the position of policy-holders who are members in a registered unlimited company with

two classes of shareholders.

(b) *International Life Ass. Soc.*, 2 Ch. D. 476; *State Fire Insurance Co.*, and *Professional Life Ass. Co.*, *ubi supra*.

(c) See the cases in the last two notes, which remove the doubts expressed on this point in *Athenæum Life Assurance Society*, Johns. 633.

(d) *Agriculturist Cattle Ins. Co.*, 10 Ch. 1; *Professional Life Ass. Co.*, 3 Ch. 167, and 3 Eq. 668.

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Sect. 9.

Unincorporated
companies.

course, to this modification—that the members could not be compelled to contribute anything in respect of uncalled-up capital.

C. In the case of an unincorporated company, whether proprietary (*i.e.*, with a share capital) or mutual (*i.e.*, where the insured look only to their own premiums), the rights of the various claimants against the funds of the company (*i.e.*, whatever can be got at without making a call) will be the same as before ; but the members of the company cannot compete with their own creditors against the funds raisable by calls (*e*). But the holders of policies in such companies are not liable to contribute to the debts of the company (*f*).

A provision that policies shall be paid only out of the funds of a company does not entitle the holder of a policy which has become payable to any priority over the holders of policies which are still subsisting (*g*). The only difference between the two cases is in the amount provable against the company.

3. *Set-off.*

a.) As between the company and strangers.

Set-off between
non-members
and the com-
pany.

As between a company being wound up on the one hand, and non-contributories on the other, when the company is insolvent the rules applicable in bankruptcy to cases of mutual credit are introduced by the Judicature act, 1875 (*h*). Before that act was passed the ordinary rules of set-off were applicable (*i*), nor was it essential that both debts should have been actually due before the winding-up order was made (*j*). Since the Judicature act a debtor to the company can set off a claim for unliquidated damages for a breach of contract by

(*e*) See, on this subject, *The Law of Mutual Life Assurance*, by Thomas Brett.

(*f*) *Great Britain Mutual Life Ass. Soc.*, 16 Ch. D. 246. For the rights of policy-holders when the company's contracts are reduced, see *Great Britain Mutual Life Ass. Soc.*, 19 Ch. D. 39, & 20 Ch. D. 351.

(*g*) *McIcgr's claim*, 5 Ch. 424.

(*h*) ~~37 & 38~~³⁹ Vict. c. 75, § 10, *ante* p. 719, and Partn. 654 *et seq.*

(*i*) *Anderson's case*, 3 Eq. 337 ; and see *Mersey Steel and Iron Co. v. Naylor & Co.*, 9 Q. B. D. at p. 667.

(*j*) *Ib.*, and see *Ex parte James*, 8 Eq. 225.

the company (*k*). But a creditor of the company cannot set off a debt due to him from the company against a claim made by the liquidator in respect of a distinct contract entered into with him (*l*). There can be no set-off when the claims on each side do not result in pecuniary liabilities, *e.g.*, a debt cannot be set-off against a claim for the return of goods (*m*). It has moreover been decided that a person who has accepted bills in favour of the company is not entitled to restrain the liquidator from negotiating them before they are due, although the result of such negotiation may be to deprive the acceptor of his right to set-off against those bills a debt owing to him by the company (*n*).

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Sect. 9.

It is a common practice for the debtors of a company which is being wound up to buy up bills of the company in order to set such bills off against what the purchasers themselves owe to the company. The legality of this practice has been questioned, and has not yet been settled by decision. The general scope of the Companies act, 1862, is hardly consistent with any device by which one creditor obtains a preference over others after the winding up has commenced; but it is doubtful whether the language of the act is sufficiently clear to defeat the practice in question (*o*). The effect of the 10th section of the Judicature act, 1875, on this point has not been determined (*p*).

Buying up debts
in order to set
them off.

The principles by which rights of set-off are regulated have been already noticed (*q*).

As regards debts which have been assigned it is settled that a debtor cannot set off against the assignee of a debt due from him, any claim against the assignor which has arisen

Set-off against
assignees.

(*k*) *Mersey Steel and Iron Co. v. Naylor & Co.*, 9 App. Ca. 434, affirming 9 Q. B. D. 648, *ante*, p. 728; and see *Lee and Chapman's case*, 30 Ch. D. 216.

(*l*) *Ince Hall Mills Co. v. Douglas Forge Co.*, 8 Q. B. D. 179; and *Sankey Brook Coal Co. v. Marsh*, L. R. 6 Ex. 185, explained in 9 Q. B. D. at p. 669.

(*m*) *Eberle's Hotels, &c., Co. v. E. Jonas & Bros.*, 18 Q. B. D. 459.

(*n*) *Smith, Fleming, and Co.'s case* and *Gledstan's Co.'s case*, 1 Ch. 538.

(*o*) See the case in the last note.

$\frac{1}{2}$ (*p*) As to the rule in bankruptcy, see *In re Gillespie*, 14 Q. B. D. 963; *Dickson v. Evans*, 6 T. R. 57, which show that rights of set-off depend on the state of things at the date of the bankruptcy; see, also, *Ex parte Theys*, 25 Ch. D. 587.

(*q*) *Ante*, p. 273; and Partn. p. 290 *et seq.*

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Sect. 9.

Set-off against
holders of
debentures, &c.

since the assignment was completed unless such claim arises out of the same contract from which the debt assigned arose, and is intimately connected with it (*r*); and this rule applies to debts proved against a company and afterwards assigned, and prevents the liquidator from setting-off against the assignee a claim against the assignor founded on a breach of trust (*s*); but not from setting off calls in respect of the assignor's shares (*t*). Again, a debtor may by contract or otherwise preclude himself from disputing a given debt when the debt is assigned, and from bringing it into account with cross demands which he may have against his creditor; and where ever this has been done (*u*) the assignee of the debt so isolated can sue the debtor for it and obtain payment notwithstanding any cross demands which he may have against the original creditor. Advantage of this principle is constantly taken by companies who issue under seal promises to pay the assign, or holder, or bearer of the instrument. A promise by a company to pay A. B. or order, or bearer, if properly stamped has been held to be a promissory note, although under the seal of the company (*x*); and the *bonâ fide* holder for value of such an instrument can, if it is not altogether *ultra vires*, prove against the company in his own name, and he will not be affected by any equities or rights of set-off which may exist between the company and the original payee (*y*). And even where the instrument cannot be treated as a promissory note, yet if its form and the circumstances under which it was issued are such as to show that the company intended that the payee should be able to raise money on

(*r*) *Government of Newfoundland v. Newfoundland Rail. Co.*, 13 App. Ca. 199 and cases there cited.

(*s*) *Ex parte Theys*, 25 Ch. D. 587, and 22 ib. 122. Compare *Ex parte Mackenzie*, 7 Eq. 240.

(*t*) *Ex parte Mackenzie*, 7 Eq. 240, but see the last case.

(*u*) As a rule, assignees of debts are in no better position than their assignors, unless, by reason of special circumstances, *Athenæum Life Ass. Soc. v. Pooley*, 3 De G. & J. 294;

Financial Corporation's claim, 3 Ch. 355; *Ex parte Mackenzie*, 7 Eq. 240, and Judicature Act, 1873, § 25 (6). Compare *Bruntton's claim*, 19 Eq. 302.

(*x*) *Ex parte City Bank*, 3 Ch. 758; *Ex parte Colborne and Strawbridge*, 11 Eq. 478. Bills of Exchange act, 1882, § 91, cl. 2. See as to Negotiability by usage, *Goodwin v. Roberts*, L. R. 10 Ex. 337 & 1 App. Ca. 476, and *ante*, p. 474.

(*y*) *Ib.*

it, and that the transferee should take it without reference to the state of accounts subsisting between the payee and the company, the transferee is entitled to prove on the instrument in his own name, and his proof will not be subject to any set-off by reason of claims which the company may have against the transferor. A leading case on this subject arose on a debenture of the *Blakely Ordnance Company* (z). There the debenture was payable to bearer, and the bearer was authorised to give a receipt for the money; the debenture was issued to a promoter of the company, pursuant to a prior agreement with him, and the agreement was confirmed by the company's articles of association. It was held that the bearer could prove in his own name without being subject to any equities between the company and the promoter, to whom the debenture had been given. *A fortiori* will the company be precluded from availing itself as against the transferee of any rights of set-off which the company may have against the transferor, if the company has induced the transferee to act on the assumption that he would become the company's creditor (a), or has recognised and treated him as such (b).

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Blakely Ordnance Company's case.

b.) *As between the company and contributories*

The right of a member of a company which is being wound up to set-off what is owing to him by the company against what is owing by him in respect of calls, or otherwise, does

Set-off between members and the company.

(z) *Ex parte New Zealand Banking Corporation*, 3 Ch. 154. Compare *Financial Corporation's claim*, ib. 355, where the debenture was payable to A., his executors, administrators, or transferees, and the person presenting it was empowered to give receipts; but there was no agreement to give them in this form, and the consideration for the debentures had failed. The case was not one of set-off at all; and see *Romford Canal Co.*, 24 Ch. D. 85.

Co., L. R. 4 Q. B. 44, debenture issued on purpose to enable the taker to raise money on it.

(b) *Brunton's claim*, 19 Eq. 302; *Higgs v. Northern Assam Tea Co.*, L. R. 4 Ex. 387; *Ex parte Universal Life Ass. Co.*, 10 Eq. 458. In both of these the claimant had been registered as proprietor. See, also, *Woodhams v. Anglo-Australian Ass. Co.*, 3 Giff. 238, where he was told all was right. *Ex parte Chorley*, 11 Eq. 157, where the company had allowed the transferee to obtain judgment. See, also, *Hullett's case*, 2 J. & H. 306.

(a) *Ex parte Asiatic Banking Corporation*, 2 Ch. 391, a case of a letter of credit shown to the claimant. *Dickson v. Swansea Vale Railway*

Bk. IV. Chap. 1. not depend simply on the general principles applicable to set-off, but also on the special enactments contained in § 38, Sect. 9. cl. 7, and § 101 of the Companies act, 1862. These are not affected by § 10 of the Judicature act, 1875 (*c*). By reference to these sections, it will be seen—

1. That whether a company is limited or unlimited, money due to a contributory in his character of member, is not to be treated as a debt of the company payable to him in competition with creditors who are not members (*d*).

2. That where a company is limited no set-off whatever against an order for payment is allowed in favour of a contributory indebted to the company, except when the rights of the contributories *inter se* come to be adjusted (*e*).

3. That where a company is unlimited, money due to a contributory, not as a member, but on some independent dealing or contract, may be set off as if such money were owing to a person unconnected with the company (*f*).

4. That in adjusting the rights of contributories *inter se*, monies due to contributories from the company on any account may be set off against money due from them to the company in respect of calls or otherwise; and that in such cases there is no difference between limited and unlimited companies (*g*).

Grissell's case.

The whole subject now under consideration was carefully considered in *Grissell's case* (*h*), in which it was held—1. That

(*c*) See *Gill's case*, 12 Ch. D. 755; *Ex parte Brown*, ib. 823; *Re Whitehouse & Co.*, 9 ib. 595.

(*d*) § 38, cl. 7; *Ex parte Cannon*, 30 Ch. D. 629, and see *Addlestone Linoleum Co.*, 37 Ch. D. 191; and § 101. Observe that the word member is used in § 38, and contributory in § 101.

(*e*) § 101. See *Gill's case*, 12 Ch. D. 755; *Re Whitehouse & Co.*, 9 ib. 595. This differs from the rule which prevailed under the acts of 1856–58. See 21 & 22 Vict. c. 60, § 17, and *Garnet and Moseley Gold Mining Co. v. Sutton*, 3 B. & Sm. 321; *Barrett's case*, 4 De G. J. & Sm. 416 and 756.

(*f*) § 101. See *Ex parte Brown*, 12 Ch. D. 823; *Professional Life Ass. Co.*, 3 Ch. 167; *Gibbs and West's case*, 10 Eq. 312; a case of an insurance company, with the usual restriction as to liability being confined to the funds of the company.

(*g*) § 38, cl. 7, and § 101.

(*h*) 1 Ch. 528, and see *Black & Co.'s case*, 8 Ch. 254; *Barnett's case*, 19 Eq. 449; *Calisher's case*, 5 Eq. 214, as to calls made before the winding up, and *Ex parte Mackenzie*, 7 Eq. 240. The Judicature act has not altered the law as laid down in this case, see *ante*, note (*c*).

a creditor of a limited company, who was also a contributory in it, was not bound to pay the full amount remaining unpaid on his shares before receiving any dividend on his debt ; 2. That he was not entitled to deduct the calls made or to be made upon him from his debt and to receive a dividend on the balance ; 3. That he was entitled to prove his whole debt, and to receive a dividend on it *pari passu* with other creditors, and was liable, on the other hand, to pay all calls upon him in full as they might be made.

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It might be inferred from this decision that the only right to set off in such cases is to deduct sums actually due and payable by the contributory in respect of calls from the amount of dividend actually payable to him in respect of his proof. But it has since been held that where a debt is proved by a contributory, the company is entitled to set off all calls due from him and actually in arrear at the time of proof (*i*), just as it could set off any other debt due by the contributory to the company against a debt due by the company to him.

The provisions of the act and the above decisions do not, however, apply to debts or costs which have become due to contributories from the company acting by its liquidators in the course of the winding up (*k*) ; nor where the contributory is bankrupt, or his estate is being administered under the bankruptcy acts ; for then, whether the liquidator proves against the bankrupt's estate (*l*), or whether the trustee in bankruptcy proves against the company (*m*), the balance due from the one estate to the other, after setting off all mutual debts and credits, is all that can be proved. Moreover, if two debts have been actually set off before the winding up commenced, the liquidator cannot disturb the set-off so made (*n*) ; but agreements as to set-off made when the company is in difficulties, are regarded very suspiciously, and may be altogether

Exceptions to
this rule.

(*i*) See *ante*, p. 557. See, also, *Ex parte Mackenzie*, 7 Eq. 240, where the proof was by the assignee of a debenture.

(*k*) See *Ex parte Clark*, 7 Eq. 550 ; see, also, *Ex parte Smith*, 3 Ch. 125 ; *General Exchange Bank*, 4 Eq. 138.

(*l*) *Re Duckworth*, 2 Ch. 578 ; *Ex parte Strang*, 5 Ch. 492.

(*m*) *Carralli and Haggard's claim*, 4 Ch. 174, and the last note.

(*n*) *Habershon's case*, 5 Eq. 286, and see *Spargo's case*, 8 Ch. 407, and others of that class.

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void as against creditors on the ground of fraudulent preference; and in a case where the agreement was with a director and related to a debt secured by a debenture not then payable, the agreement was held invalid (o).

Indeed, the better opinion seems to be, that agreements for paying calls by setting off debts, which may afterwards become due from the company, are not binding on the company, at least when it is being wound up (p).

Observations
on § 101.

It is worthy of remark, that § 101, which prevents set-off in favour of the contributories of limited companies, applies in terms only to cases in which a summary order is made upon a contributory for payment of money due by him to the company; and in one case it was held that where a company was being wound up voluntarily, and the liquidator brought an action for calls made in the winding up, a plea of set-off afforded a good defence to the action (q). But this decision has been justly criticised, and cannot be relied upon (r). The mode of winding up is immaterial with respect to the right of set-off; and in no case can a contributory defeat an action by a limited company in liquidation by a set-off, unless he can show that all the creditors are paid, and that as between himself and the other contributories, the set-off ought to be allowed.

Proceedings
under § 169 of
the Companies
act, 1862.

A director has no right to set off a debt due to him from the company against a claim made by the liquidator under § 169 (s).

Companies act,
1867.

The right of a contributory to set off a debt due to him from the company against calls made on him is very materially affected by the Companies act, 1867 (t); and if, in a case to

(o) *Habershon's case*, 5 Eq. 286.

(p) See *Pellatt's case*, 2 Ch. 527; *Calisher's case*, 5 Eq. 214; *Barge's case*, ib. 420; 30 & 31 Vict. c. 131, § 25.

(q) *Brighton Arcade Co. v. Dowling*, L. R. 3 C. P. 175.

(r) *Whitehouse & Co.*, 9 Ch. D. 595; *Black & Co.'s case*, 8 Ch. 254; *Sankey Brook Coal Co. v. Marsh*, L. R. 6 Ex. 185; and see 10 Eq.

330, *per V.-C. Malins* in *Gibbs and West's case*.

(s) *Carriage Co-operative Supply Association*, 27 Ch. D. 322; *Ex parte Pelly*, 21 Ch. D. 492; *Pearse's case*, ib. 498, n.; *Fliteroft's case*, ib. 519. And see *Ex parte Theys*, 25 Ch. D. 587, where the director had assigned the debt due to him before an order was made against him.

(t) § 25.

which that act applies, a holder of nominally paid-up shares has a call made on him in respect of them, he cannot avail himself of a set-off, agreed upon when the shares were issued, unless the agreement has been duly registered (*u*). But it is conceived that the act in question does not preclude a set-off against a call in any other case in which such set-off is admissible under the Companies act, 1862.

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SECTION X.—CONTRIBUTORIES.

1. *The list of contributories.*

The persons who, on the winding up of a company, are compellable to pay its debts by contribution amongst themselves, are termed *contributories* (*x*); and one of the first duties of the Court, after making a winding-up order, is to settle the list of contributories (*y*). Who are the persons to be put on the list will be examined presently. With respect to settling the list, it is to be observed—1. That the Court has power to rectify the company's register of members (*z*); 2. That persons who are contributories in their own right are to be distinguished from persons who are contributories as the representatives or as being liable to the debts of others; and 3. That where the personal representative of a deceased contributory is placed on the list, it is not necessary to add his heirs or devisees, although they may be added if the Court thinks fit (*a*).

List of contributories.

It is the duty of the official liquidator to prepare the list of contributories, and to leave it with the judge at chambers (*b*). The list is to be verified by affidavit, but it may, from time to time, be varied or added to by the official liquidator by leave of the judge (*c*). Upon the list being left with the judge, the

(*u*) *Cleland's case*, 14 Eq. 387; § 98.

Pagin and Gill's case, 6 Ch. D. 681. (*z*) § 98 and § 35.

(*a*) § 99.

(*c*) This word was introduced by (*b*) Rule 29.

11 & 12 Vict. c. 45, § 3.

(*c*) *Ib.*, and see the forms in the schedule to the Rules, Nos. 24 to 32

(*y*) See the Companies act, 1862,

Bk. IV. Chap. 1. official liquidator obtains an appointment to settle the same ;
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and it is his duty to give notice in writing of the appointment to every person included in the list, whether resident within the jurisdiction of the Court or not (*d*), stating in what character and for what number of shares or interest he is included (*e*). Similar notices are to be given when any variation or addition is made to the list (*f*). The notices must be served four clear days before the day appointed for settling (*g*). The result of the settlement of the list is certified by the chief clerk ; and certificates may be made from time to time for the purpose of stating the result of the settlement down to any particular time, or as to any particular person or variation (*h*).

A person may be summoned to be sworn and examined in chambers, in order to determine whether he ought to be a contributory or not, although the list may have been already settled (*i*).

Forms of lists.

Forms of lists of contributories are given in the schedule to the rules issued under the Companies act, 1862 (*k*).

Attendance on settling list.

Every contributory on the list, and every creditor whose debt or claim is allowed, is entitled to attend the winding-up proceedings at his own expense (*l*) ; and therefore to attend on the settlement of the list of contributories. The judge, moreover, can appoint persons to represent contributories and

(*d*) See *Nathan, Newman & Co.*, 35 Ch. D. 1, as to service abroad.

(*e*) Rule 30.

(*f*) *Ib.*

(*g*) *Ib.* See the forms of notice and affidavit of service in schedule 3, Nos. 26 and 27. As to notices under the older acts, see 12 & 13 Vict. c. 108, §§ 26 and 32, which altered the law as to notices laid down in *Gluholme's case*, 1 De G. & S. 583, and *Hutchinson's case*, *ib.* 563.

(*h*) Rule 31.

(*i*) See *Re The Esgair Mwyn Mining Co.*, 8 W. R. 660, and *ante*, p. 689 *et seq.*

(*k*) See Forms Nos. 24, 29, 31.

For the form under the older winding-up acts, see 1 De G. & S. 548.

(*l*) Rule 60. This rule does not give a creditor the right to be heard in argument, nor to his costs if his attendance is unnecessary, *Lord R. Montagu's case* and *Grey's case*, W. N. 1888, 137, nor to attend proceedings under § 115, see *ante*, p. 691. As to his right of cross-examination, see *Brampton v. Longtown Rail. Co.*, 11 Eq. 428. See, also, *Bugg's case*, 2 Dr. & Sm. 452, where some of the contributories sought to put on the list a person omitted by the liquidator, and see *infra*, note (*z*).

creditors to attend the settlement of the list of contributories as well as other matters arising on the winding up (*m*). Bk. IV. Chap. 1.
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With respect to the power of the liquidator to vary the list after it has been once settled, it is to be observed—1. That this can only be done by leave of the judge; and 2. That no time is limited after which it may not be varied with such leave (*n*). It therefore seems that even after a person has been settled on or off the list, and the time for applying to vary the certificate has expired, the judge has still power to vary the list if, in his judgment, it ought to be varied. But it need hardly be said that this power is exercised with great caution; and only under special circumstances, and when there are good reasons for not having made the application sooner. Resettling the
list.

As instances in which the power to vary and re-settle the list was exercised on the discovery of material facts, reference may be made to *Alexander's case* and *Shewell's case*. In *Alexander's case* (*o*), shares had been transferred, *malâ fide*, by A. to B.; before the facts were known B. was put on the list, and actually attached for non-payment of calls upon him; but that was held not sufficient to prevent A. from being placed on the list after the invalidity of the transfer had been discovered. Alexander's
case.

In *Shewell's case* (*p*) the shares of the company were transferable to bearer, and a broker had purchased shares for his own solicitor, and was improperly put on the list, and calls were made on him. He referred the matter to the solicitor, who paid the calls out of his own money, and the broker heard no more about them. The solicitor died, and further calls were made on the broker, and he then applied to have his name removed from the list of contributories, and his name was removed accordingly. Shewell's case.

(*m*) Rule 61. See *McIver's claim*, 5 Ch. 424, and *Ex parte Oakes and Peek*, 3 Eq. p. 634. The creditor's representative appointed under 20 & 21 Vict. c. 78, had a right to attend at the settling of the list, *Mexican and South American Mining Co.*, 26 Beav. 172, and see *infra*, note (*c*).

(*n*) Rule 29.

(*o*) 9 W. R. 410.

(*p*) 2 Ch. 387. For other instances, see *Hopkin's case*, 4 De G. J. & Sm. 342; *Ex parte Curzon*, 3 Drew. 508; *Crosfield's case*, 4 De G. & S. 338, and 2 De G. Mc. & G. 128; *Ex parte Best*, 1 Sim. N. S. 193; *Ex*

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Laches.

This case is valuable as showing that mere laches on the part of a contributory in allowing his name to remain on the list does not necessarily preclude him from having it removed if the company has not been damnified by his delay.

As a rule, however, where a person has been settled on the list in chambers, he must apply to the judge within three weeks if he desires to question the decision (*q*). Moreover, a judge of the High Court cannot now rehear his own decision; if not acquiesced in it must be appealed against in proper time (*r*). But where there are several cases of the same kind, all determined alike, and one of them is selected as a test case and is successfully appealed, the decisions in the others may, it is conceived, be rectified by the Court below without separate appeals (*s*).

Power to rectify
the register of
members.

In order to settle the list of contributories properly the Court has power to rectify the company's register of members (*t*): and where a company is being wound up by the Court, the Court, when settling the list of contributories, will rectify the register without any special application for that particular purpose (*u*); but the power to rectify the register cannot, it is conceived, be exercised by the liquidators of a company which is being wound up voluntarily or subject to the supervision of the Court; and where in such cases rectification is necessary the Court must be applied to (*x*).

Appeals, &c.

The practice with respect to certificates settling the list of contributories, and to applications to vary them, and to appeals from orders settling persons on or off the list of contributories,

parte Kelly's Executors, 9 W. R. 329, and *Re The Esgair Mwyn Mining Co.*, 8 ib. 660.

(*q*) *Dickson's case*, 12 Ch. D. 298.

(*r*) *St. Nazaire Co.*, 12 Ch. D. 88. see *ante*, p. 698.

(*s*) See *Ex parte Munday*, 31 Beav. 206. But see the last note. Where no test case has been selected, see *Esdaille v. Payne*, 40 Ch. D. 520.

(*t*) See §§ 98 and 35, and *ante*, p. 120, and *infra*, p. 755.

(*u*) See § 98, *Breckenridge's case*,

2 Hem. & M. 642; *Whittell's case*, 2 De G. & J. 577; *Birch's case*, ib. 10.

(*x*) Power to rectify the register may at first sight be supposed to be given by § 133, cl. 8, taken in connection with § 98. But a closer examination of the words of those sections, and of § 35, will, it is conceived, show that this is not so. See *Gilbert's case*, 5 Ch. 559; but see *Brighton Arcade Co. v. Dowling*, L. R. 3 C. P. p. 187.

is the same as in other cases (*y*). An appeal from the decision of the judge acting in the winding up, may be made not only by a person who contends that he is wrongly put on, or excluded from the list, and by the official liquidator on behalf of the company, but also by any other contributory (*z*), or (it is presumed) by any creditor who, under the same act, is a party to the winding up. The question on the appeal being simply whether a given individual ought or ought not to be on the list, it is not requisite to bring before the Court another person who will have to be put on the list, if the individual in question is struck off (*a*). And an appeal cannot be objected to on the ground that there is no means of settling the person, who is liable for the shares if the appeal is successful, on the list of contributories (*b*). The usual parties to the appeal are the alleged contributory and the official liquidator (*c*).

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No person ought to be settled on the list of contributories until his liability to contribute to some debt, liability, or loss of the company being wound up has been ascertained: he ought not, for example, to be put on the list "in respect of any expenditure which he may be proved to have authorised" (*d*).

No person to be on the list until his liability to contribute is established.

Under the acts of 1848—49, it was ultimately held that if there were two classes of persons liable to creditors, but one of those classes was bound to indemnify the other against all demands, the persons composing the class secondarily

As regards persons secondarily liable.

(*y*) See § 124 and rule 56, *Dickson's case*, 12 Ch. D. 298, and *ante*, p. 697 *et seq.*

(*z*) See *Bush's case*, 6 Ch. 246; *Ship's case*, 2 De G. J. & S. 544, and *Downes v. Ship*, L. R. 3 H. L. 343, where a contributory obtained leave to intervene. See, also, *Blackburn's case*, 3 Drew. 409, and 8 De G. M. & G. 177. In *re Bodmin United Mines*, 23 Beav. 385, the official manager contended that a person ought to be on the list; some contributories applied to be heard on the same side, but the Court declined to hear them. See *Re Norwich Yarn Co.*, 13 Beav. 428, note; and see *Re Etna Ins. Co.*,

Ir. Rep. 7 Eq. 362.

(*a*) See *Curtis's case*, 6 Eq. 455; *Sanderson's case*, 3 De G. & S. 66; *Hall's case*, *ib.* 80.

(*b*) *Duchess of Westminster Silver Lead Ore Co.*, 10 Ch. D. 307.

(*c*) The creditor's representative appeared in *Nicol's case*, 3 De G. & J. 387, but was not allowed to be heard. In *Ex parte Finlay & Co.*, 27 L. J. Ch. 658, his costs were allowed, and see *ante*, note (*m*). As to the costs of the liquidator, see *Musgrave and Hart's case*, 5 Eq. 193.

(*d*) *Ex parte Riddell*, 1 Sim. N. S. 402.

Bk. IV. Chap. 1. liable ought not to be on the list until it became necessary
 Sect. 10. to put them there, in order that justice might be done as
 between themselves (e).

Past members. So, under the Companies act, 1862, past members are only
 liable to contribute in the event of the present members being
 unable to discharge their liabilities; and until there is evidence
 to show that recourse must be had to the past members, they
 are not put on the list at all (f).

2. Who are contributories.

General observations.

1. Under acts
 of 1848-49.

Under the Winding-up acts of 1848-49 (g), the contributories
 were—

1. Persons entitled to shares of the assets or accruing profits
 of the company at the time of the presentation of the petition
 for winding it up; and,

2. Other persons liable to contribute to the payment of any
 of the debts, liabilities, or losses of the company.

But with respect to both classes, it was held that the obligation to contribute with others was the real test of liability to be put on the list of contributories. There might, therefore, be shareholders who were not contributories; *e.g.*, shareholders entitled to be indemnified by the company against all losses: and there might be contributories who were not shareholders, *e.g.*, persons who had simply agreed to take shares from the company. Direct liability to creditors was not, however, the test whereby to determine whether a person was or was not a contributory under the acts of 1848-1849: for a person may be liable to creditors, and yet not be liable to contribute with other persons to the payment of those creditors; and a person may not be liable to the creditors at all, and yet may, as between himself and others who are liable to them, be bound to contribute with those others to the discharge of the creditors' demands (h).

(e) See *infra*, class B.

(g) 11 & 12 Vict. c. 45, § 3.

(f) See *infra*, class B. This
 practice is warranted by § 38, cl. 3,
 and § 74.

(h) The dictum to the contrary in
 1 Mac. & G. 315, is opposed to later
 views. See 1 De G. & S. 560, 563;

The Companies act, 1862, draws a distinction between,

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1. Companies formed and registered under the act, or under the repealed acts of 1856—1858 (*i*).

2. Under the Companies act, 1862.

2. Companies registered under the act, or the acts of 1856—1858, but not formed under it or them (*k*).

3. Unregistered companies (*l*).

1. With reference to companies of the first class, the act declares that the term contributory shall mean every person liable to contribute to the assets of a company under the act in the event of the same being wound up (*n*). In order to ascertain what persons are thus liable, recourse must be had not only to § 74 but also to sections 38 and 76—78, the effect of which is apparently to make the following persons, and those only, contributories in the companies now under consideration, viz.,

1.) Companies formed under act.

1. Existing members (*n*), *i.e.*, members at the time of the commencement of the winding up (*o*).

2. Past members, *i.e.*, persons who were members and who have not ceased to be members for one year prior to the time above mentioned (*p*).

3. The legal personal representatives of such members and past members (*q*).

4. Their heirs and devisees (*r*).

5. Their assignees in bankruptcy (*s*).

6. Their husbands (*t*).

The third, fourth, and fifth classes are only liable to be put on the list in their representative capacities, unless they themselves fall within one of the two first classes. The position of husbands has been greatly modified by the Married women's property act, 1882, as will be seen hereafter.

Former members who have ceased to be members for a year or more before the presentation of the winding-up petition are not contributories at all. Former members who have ceased

3 ib. 223, 265 ; 3 Mac. & G. 187 ; 1 De G. M. & G. 576, and 3 De G. & J. 421.

(*n*) § 38.

(*o*) See §§ 84 and 153.

(*p*) §§ 38 and 84.

(*i*) See §§ 74 and 176.

(*q*) § 76.

(*k*) See §§ 177 and 196.

(*r*) Ib.

(*l*) § 200.

(*s*) § 77.

(*m*) § 74.

(*t*) § 78.

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Observation on
word "mem-
bers."

2.) Companies
registered but
not formed
under the act.

3.) Unregistered
companies.

to be members within that time are liable to be made contributories in the event of the existing members being unable to satisfy their contributions (*u*); but even then past members are only liable in respect of debts and liabilities of the company contracted before they ceased to be members (*x*).

From the above remarks it will be seen that in order to understand the exact signification of the term "contributory" as used in § 74, it is indispensable to understand accurately the meaning of the word "member" as used in § 38. To do this, however, will be found extremely difficult; for not only is the description of a member given in § 23 open to the remarks made upon it in an earlier part of this treatise (see p. 119), but the register, which that description assumes to be correct, is liable to be rectified when the question of contributory or no contributory has to be determined (*y*).

2. As regards companies registered under the act of 1862, or under the acts of 1856—1858, but not formed under it or them, it seems, 1, that all persons are contributories who come within the meaning of that word as applied to companies formed and registered under the act of 1862; 2, that all other persons are contributories in respect of the debts and liabilities of the company contracted prior to registration, who are liable at law or in equity to pay or contribute to the payment of any of such debts or liabilities, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members amongst themselves in respect thereof, or to pay or contribute to the payment of the costs of winding up, so far as relates to such debts or liabilities (*z*). The provisions already noticed respecting representatives, heirs, devisees, assignees, and husbands, also apply to this last class of contributories (*a*).

3. With respect to unregistered companies, the act declares

(*u*) § 38, cl. 3.

(*x*) Ib. cl. 2.

(*y*) §§ 98 and 45. *Ante*, p. 60 *et seq.*, 120 *et seq.* And see *Arnot's case*, 36 Ch. D. 702; *Winstone's case*, 12 Ch. D. 239, and compare *Sander's case*, 20 Ch. D. 403, and *Great Britain Mutual Life Assurance Society*, 16

Ch. D. 246.

(*z*) § 196, cl. 5. See, as to the application of the older authorities to this class of cases, *Luard's case*, 1 De G. F. & J. 533; *Ex parte Dixon's Executors*, 1 Dr. & Sm. 225.

(*a*) Ib., and §§ 74-78.

that every person shall be a contributory who is liable at law Bk. IV. Chap. 1.
Sect. 10. or in equity to pay or contribute to the payment of any debt or liability of the company, or of any sum for the adjustment of the rights of the members amongst themselves, or of the costs of winding up (b). The representatives, heirs, devisees, assignees, and husbands of such persons are also contributories as above (c).

Notwithstanding the words "liable at law or in equity to pay," &c., which occur in §§ 196 and 200, a transferor of shares who may be a debtor to the company in respect of calls due before the transfer, is not a contributory as a present member. Such a person ought not to be on the register of members; he is a mere debtor to the company (d).

Although the above are the main provisions of the Companies act, 1862, bearing directly on the question who are contributories and who not, that question by no means depends solely on the sections referred to. Distinctions between the Acts of 1848-49 and the Act of 1862.

In the first place, it must be borne in mind that creditors of companies registered under the act of 1862, have no remedy against the members individually, except under the winding-up provisions of that act. This circumstance at once goes far to destroy the analogy between contributories under the act of 1862, and contributories under the acts of 1848-1849; for although it might be very proper, under the last-mentioned acts, to hold that liability to creditors was no test of liability to be put on the list of contributories, the same doctrine cannot be applied under the act of 1862 without placing the creditors in a much worse position than the act itself contemplates. Effect of rights of creditors.

This has been decided by the House of Lords in *Overend and Gurney's Company, Limited* (e), where it was held that persons, assumed to have been induced by fraud imputable to the company to take shares in it, and having therefore on this assumption, and as between themselves and the company, rights of rescission and indemnity, but who had not exercised Oakes v. Turquand

(b) § 200. See the last note but one. L. 325, affirming 3 Eq. 576. See, also, *Tennent v. City of Glasgow Bank*, 4 App. Ca. 615; *Stone v. City and County Bank*, 3 C. P. D. 282.

(c) §§ 200 and 74-78.

(d) *Ex parte Littledale*, 9 Ch. 257.

(e) *Oakes v. Turquand*, L. R. 2 H.

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those rights before the winding up commenced, ought to be on the list of contributories, in order that the creditors of the company might be paid. To this extent, therefore, the creditors of a company being wound up have greater rights against the contributories than the company itself has before it is wound up (*f*).

Houldsworth v.
City of Glasgow
Bank.

Again, in *Houldsworth v. City of Glasgow Bank* (*g*), a shareholder induced to become such by the fraud of the company, and who on the authority of the last case was settled on the list of contributories, was held not entitled to prove for the damages he had sustained by reason of the fraud. It was assumed that he might have maintained an action for damages against the company if it had not been wound up.

Liability of
members after
winding up.

It has, indeed, been said by very high authority, that even after a winding-up order the creditors of a company formed and registered under the act of 1862, are creditors of the company only, and not of the contributories individually, and that the creditors can only reach the contributories through the company (*h*). But this view, if logically carried out, involves as a consequence that the creditors can have no greater rights against the contributories than the company in its corporate capacity itself has. This consequence is not consistent with the decisions above referred to, nor with other cases in which persons entitled to indemnity from the company may nevertheless be contributories for the payment of its debts (*i*). Whether, however, the true view is, that after a winding-up order the creditors have against the individual members rights which cannot be enforced before the winding-up order; or whether the true view is, that after a winding-up order the company, as a trustee for its creditors, has greater rights against its contributories than it had before, is not perhaps

(*f*) See, further, on this point, *Wiltshire Iron Co. v. Great Western Rail. Co.*, L. R. 6 Q. B. 101 and 776; and as to set-off, *ante*, p. 741 *et seq.*, and fraudulent preferences, *ante*, p. 668, and under § 165, *ante*, p. 693 *et seq.*

(*g*) 5 App. Ca. 317. See, also, *Addlestone Linoleum Co.*, 37 Ch. D. 191.

(*h*) See *Ship's case*, 2 De G. J. & Sm. 544; *Re Duckworth*, 2 Ch. 578; *Webb v. Whiffin*, L. R. 5 H. L. p. 734, *per* Lord Cairns.

(*i*) See Lord Selborne's observations in *Black & Co.'s case*, 8 Ch. 254 (at pp. 261, 262), and *Chapman and Barker's case*, 3 Eq. 361.

very material. But one or other of these views must, it is submitted, be correct; any other appears inconsistent with the decisions before referred to, with the course of legislation on the subject of Joint Stock Companies, and with those provisions of the act of 1862, which are introduced expressly for the benefit of creditors, *e.g.*, those provisions which relate to the register of shareholders, the rights of creditors to obtain winding-up orders, the effect of such orders, the rights of creditors under them, fraudulent preference and set-off.

Nay, more, the position of shareholders in companies, whether solvent or insolvent, is very different after an order to wind up from what it was before the order. This was pointed out by Jessel, M. R., in an admirable judgment in *Burgess's case* (*k*), and must never be lost sight of.

Another circumstance which renders it important to be careful before relying on the older decisions on the question of contributories, as authorities under the act of 1862, is the power given to the Court to rectify the company's register of members (*l*). This power renders the actual state of the company's register of little or no consequence if it is shown to be wrong.

A third point which it is necessary to bear in mind when applying the older decisions to modern cases, is the power of the Court to sanction the registration of transfers after the commencement of the winding up. This subject will be considered hereafter, when treating of the position of persons who have ceased to hold shares in the company, and it will then be seen that under the older acts, sellers of shares were held to be contributories under circumstances which, if they were now to occur, would render the buyers contributories in their stead.

(*k*) *Burgess's case*, 15 Ch. D. 507, where shares had been taken on the faith of a fraudulent prospectus, and their holders were held to be contributories, although the assets exceeded the debts and costs.

(*l*) See §§ 98 and 35, and *ante*, p. 120. This power was first conferred by 19 & 20 Vict. c. 47, § 25. See as to mandamus, &c., *ante*, pp. 61 and 603.

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Effect of power
to rectify the
register.

Alterations in
status after
commencement
of winding up.

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CLASSIFICATION OF CONTRIBUTORIES.

Contributories are primarily divisible into three classes, viz. : 1, contributories as present members ; 2, contributories as past members ; 3, their respective representatives.

Present mem-
bers.

Persons who are contributories as present members are divisible into four classes, viz. :—

1. Duly constituted shareholders.
2. Persons who are estopped from denying that they are shareholders.
3. Persons who are bound by agreement to become shareholders.
4. The representatives of persons belonging to one or other of these classes.

Past members.

Persons who are contributories as past members are those who would have been contributories as present members if they or those whom they represent had not ceased to hold shares before the commencement of the winding up.

A. list.

B. list.

In practice, the contributories as present members are settled on what is called the A. list ; whilst the contributories as past members are settled on what is called the B. list.

As regards present members there does not appear to be any substantial difference between companies formed and registered under the Companies act, 1862, and other companies (*m*) ; but as regards past members there is a very material difference, as will be seen hereafter.

It is proposed first to investigate the general principles applicable to the first three classes and then to notice their application to special cases of difficulty. The 4th class, and lastly Past members, will follow and complete the subject.

A. CONTRIBUTORIES AS PRESENT MEMBERS.

1. *Duly constituted shareholders.* (See Bk. I., cc. 2 and 4.)

Subject to one or two exceptions all persons who, at the time of the commencement of the winding up of a company (*n*), are duly constituted shareholders therein, are contributories in

(*m*) See *Ex parte Littledale*, 9 Ch. 257. (*n*) *Ante*, p. 664.

it. It is immaterial whether the persons in question were the original founders of the company, or whether they have become shareholders by a direct allotment of shares to themselves, or whether they have become shareholders by a transfer of shares previously held by some one else. These general propositions require no comment. They apply to persons who are made shareholders by special acts of Parliament (*o*); to all classes of members and shareholders where there are several in the same company (*p*). The particular cases in this class will be found under the heads 5 to 11, and under head B.

The exceptions are persons under disability and persons like ambassadors (*q*), and holders of fully paid-up shares, who are not liable to any call or contribution and who therefore cannot be settled on the list against their will although they are entitled to be on the list to obtain their share of any ultimate surplus there may be.

2. *Persons who are estopped from denying that they are shareholders.*

It has been already seen that persons who have not complied with all prescribed formalities may be estopped from denying that they are shareholders (*r*).

Persons estopped from denying that they are shareholders.

Even before there was any power given to the Court to rectify a company's register of shareholders, it was settled that all persons who, when a petition for winding up a company was presented, were estopped from denying that they were shareholders in that company, were also contributories in it, unless they could show good reason to the contrary. It is wholly immaterial whether such persons are or are not properly described in the company's register of shareholders (*s*), or whether they are or are not shareholders in

(*o*) *Kincaid's case*, 11 Eq. 192; *Forbes' case*, 19 ib. 353; *O'Brien's case*, Ir. Rep. 11 Eq. 422.

(*p*) *South London Fish Market Co.*, 39 Ch. D. 324; *Winstone's case*, 12 Ch. D. 239. Compare *Great Britain Mutual Life Assurance Society*, 16 ib. 246.

(*q*) See *Magdalena Steam Co. v. Martin*, 2 E. & E. 94; of course, they can receive nothing without being charged in account with calls.

(*r*) See, on this subject, *ante*, pp. 48 *et seq.*

(*s*) *Yelland's case*, 5 De G. & S.

Bk. IV. Chap. 1. the strict sense of the term, and, as such, liable, in the case
 Sect. 10. of an unregistered company, to be sued by creditors of the
 company.

Straffon's Executors' case (t) is a leading authority on this head. There the provisions of a company's deed of settlement required that all transfers of shares should be made in a particular manner, with the consent of the directors testified in a particular manner, and that the transferee should execute the company's deed of settlement. It was also expressly declared that no transferee should be entitled to any of the privileges of a shareholder until he had executed the deed of settlement. A Mr. Straffon bought various shares which were, in fact, transferred to him, and in respect of which certificates and dividends were, in fact, given and paid to him. The shares had never been transferred to him in the manner prescribed by the company's deed of settlement; nor had he ever executed that deed. He had, however, executed a sufficient deed in respect of some of the shares, but not in respect of the others; and his executors had been returned to the stamp office as shareholders in respect of all his shares. On the winding up of the company after his death, his executors were made contributories in respect of all his shares; it being perfectly clear that, although the prescribed formalities had not been rigorously complied with, enough had been done to estop both the company and Mr. Straffon from denying that he was virtually a shareholder in the company in respect of them all.

Persons who have acted and been treated as shareholders, although they have not complied with formalities.

So an irregularity in a transfer of shares will not preclude the transferee from being a contributory if the transfer has been registered (u). Indeed, it is now clearly settled, as a general

395, and others of that class noticed under the next head (3).

(t) 1 De G. M. & G. 576, and 4 De G. & S. 256. See, also, *Ex parte Dixon's Executors*, 1 Dr. & Sm. 225; *Maguire's case*, 3 De G. & S. 31; *Sanderson's case*, ib. 66, and 3 H. L. 698; *Gordon's case*, 3 De G. & Sm. 249; and the following cases arising in the liquidation of the City of Glasgow Bank, *Bell and Lang's case*, 4 App. Ca. 547; *Ker's case*, ib.

549 and 598, and *Cunninghame v. City of Glasgow Bank*, ib. 607.

(u) *Weikersheim's case*, 8 Ch. 831, where the registration was somewhat irregular. See, also, *Bush's case*, 6 Ch. 246, and *Murray v. Bush*, L. R. 6 H. L. 37, where a person who had irregularly transferred his shares was held not to be a contributory, and compare that case with *Keene's Executors' case*, 3 De G. M. & G. 272; *Brown's case*, 19 Beav. 97;

rule, that where a person has acted, and been treated as a shareholder, he will be a contributory, notwithstanding the non-observance of those formalities which, according to the strict letter of the company's deed or articles of association, ought to be complied with before a person is entitled to share profits, or enjoy the other rights or privileges of a shareholder (*x*). Bk. IV. Chap. 1.
Sect. 10.

In applying this principle, however, care must be taken to ascertain whether the conduct relied upon is referable to an agreement to take shares or not; for whilst on the one hand if there be an agreement binding or entitling a person to take shares, his conduct will effectually preclude him from taking advantage of any informalities or irregularities, and even from repudiating the agreement if it be voidable at his option; yet if he has neither become nor agreed to become a shareholder, the circumstance that he has acted as a shareholder will not necessarily render him a contributory. Thus it was decided, under the old winding-up acts, that a person who had never become a shareholder, and had never agreed to take shares, did not become a contributory in respect of shares improperly allotted to him, although he had executed the company's deed of settlement (*y*); or had attended meetings of shareholders (*z*); and even under the Companies act, 1862, a person registered as the holder of shares illegally issued pursuant to a void scheme for amalgamation has been held not to be a contributory, although he has acted as a shareholder and a director (*a*). Qualifications
of these prin-
ciples.

The application of these principles to directors who have acted as such without being properly qualified, will be examined hereafter under head (6).

Henderson's case, ib. 107, where persons who had transferred their shares irregularly were held contributories.

(*x*) See, in addition to the cases cited in the last two notes, *Ec parte Contract Corporation*, 3 Ch. 105; *Challis' case*, 6 Ch. 266; *Leishman v. Cochrane*, 1 Moore, P. C. N. S. 315; *Robinson's Executors' case*, 15 Jur. 438, and on appeal, 2 De G. Mac. & G. 517, where no shares

were really taken, but dividends were paid upon them; *Bernard's case*, 5 De G. & S. 283.

(*y*) As in *Coleman's case*, 1 De G. J. & Sm. 495, noticed *infra*, under head 4 *d*).

(*z*) As in *Bunn's case*, 2 De G. F. & J. 275, *infra*, under head 4 *d*).

(*a*) As in *Stace and Worth's case*, 4 Ch. 682, *infra*, under head 4 *b*). See, also, *Smith's case*, 4 Ch. 611.

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Sect. 10.

3. *Persons who are bound by agreement to become shareholders.*

What constitutes a valid agreement with a company to take shares, and what not, has been examined already, see Book I., c. 1.

Speaking generally, a person who has agreed to become a member of a company being wound up is a contributory whether he is actually a member or not; and, on the other hand, a person who is not a member, and has not agreed to become one, is not a contributory. This will be seen hereafter (*b*).

The position of persons who have agreed to take shares not from the company but from persons who are already shareholders will be examined under the head of Past Members. It has already been seen that transferees of shares who have been accepted by the company as shareholders, are contributories, although they may not have complied with all those formalities which ought to have been observed in the transfer (*c*): and it will be seen hereafter that transferees of shares who have not been accepted by the company as shareholders were not contributories under the older winding-up acts, and are not contributories under the Companies act, 1862, except in those cases in which there is power to rectify the company's register (*d*).

Allottees of
shares.

With respect to persons who have agreed to take shares directly from the company, it will be convenient to distinguish unconditional from conditional agreements. The latter will be separately considered hereafter (*e*).

Further, in dealing with cases resting on agreement, it is important to distinguish a concluded agreement, whether simple or conditional, from that which is in truth no agreement, in consequence of there not being a final assent by both parties to the same terms (*f*).

(*b*) *Infra*, under the head 4 *a*).

(*c*) *Ante*, p. 758.

(*d*) See *infra*, under head B.

(*e*) *Infra*, under head 4 *d*).

(*f*) See *ante*, p. 13 *et seq.* Com-

pare *Pentelov's case*, 4 Ch. 178, with *Peek's case*, *ib.* 532. And see the judgment of L. J. Cotton in *Arnot's case*, 36 Ch. D. 702.

a) Allottees of shares in formed companies.

The following are the leading older authorities for the proposition that a person who agrees to take shares from a company is a contributory :—

Yelland's case, 5 De G. & S. 395, affirmed on appeal, 16 Jur. 509, where the allottee had not executed the company's deed.

Sharpus' case, 3 De G. & S. 49.

Mansfield's case, 3 De G. & S. 58, and on appeal, 2 M. & G. 57.

In these the allotment was made before the company was completely registered. The allottees did not execute the deed, and the proposed capital was never raised. See also, *Lyon's case*, 35 Beav. 646.

Cookney's case, 26 Beav. 6, and 3 De G. & J. 170.

Barton's case, 4 Drew. 535, and on appeal, 4 De G. & J. 46.

In these the applications for shares were verbal only, and they were allotted ; but nothing more was done.

Hawkins' case, 2 K. & J. 253 (a cost-book company).

Bird's case, 1 Sim. N. S. 47.

Also illustrate the same principles.

More modern authorities to the same effect abound in the books. One of the most recent is *The Licensed Victuallers' Mutual Trading Association (g)*, where a promoter of a company who had agreed to *underwrite* 10,000 shares for a commission of 15 per cent. was held a contributory in respect of 8,500 shares which he had not been able to induce other persons to take.

Although an agreement to take shares need not (in general) be in writing, there are exceptions to this rule. By the statute 30 Vict. c. 23, relating to marine insurances, all agreements for such insurances were required to be in writing, and to be stamped ; and consequently the members of a mutual marine insurance company, which did not issue stamped policies, were not contributories (*h*).

Moreover, if a person has agreed to take shares, he will be a contributory, even although there may have been no allotment (*i*) ; or he may have no notice of it (*k*). Allotment and

(*g*) *The Licensed Victuallers' Mutual Trading Assoc.*, W. N. (1889) 71.

(*h*) *Smith's case*, 4 Ch. 611. Compare *Blyth & Co.'s case*, 13 Eq. 529 ; *Martin's claim*, 14 Eq. 148. Marine policies can now be stamped after their execution on payment of a

penalty. See 39 Vict. c. 6, § 2, but a written policy is still necessary.

(*i*) *Bird's case*, 4 De G. J. & Sm. 200.

(*k*) *Adam's case*, 13 Eq. 474 ; *Harward's case*, 13 Eq. 30 ; *Sidney's*

Agreement to take shares need not be in writing.

No allotment.

Bk. IV. Chap. 1. notice are in truth only material where there is no agreement
 Sect. 10. without them. In the ordinary case of an application for shares, there is no agreement in the absence of allotment and notice of it; but there may well be a binding agreement without either of them (*l*).

An allotment following an application for shares will, unless otherwise expressed at the time, be treated as an allotment of such shares as are applied for. Consequently, if after the application, and before the allotment, the nominal value of the shares has been altered, and the allottee has no notice of the alteration, he will be a contributory in respect of such shares as he applied for, but not in respect of them as altered (*m*).

Agreement to take fully paid-up shares.

A person who has only agreed to take fully paid-up shares cannot be treated as a contributory in respect of shares not paid up (*n*).

Agreement to take shares at a future time.

Barrett's case.

An agreement to take shares at a future time will not render a person a contributory, if the winding up of the company has commenced before that time arrives (*o*); but if shares are agreed to be taken at once, the person agreeing to take them will be a contributory, although they are not to be paid for until a future day, and the certificates for them are not to be delivered until payment (*p*).

Option to pay in cash or shares.

Again, where a person has agreed to take cash or shares at the option of the company in payment of his claims against the company, and he has not received either cash or shares, he cannot be compelled to take shares after the company has been ordered to be wound up; and he is entitled to rank as a creditor in respect of what the company may owe him (*q*).

case, *ib.* 228; *Fowler's case*, 14 *ib.* 316. See, also, *Richards v. Home Assur. Assoc.*, L. R. 6 C. P. 591, where an agent applied for shares, and was registered as their holder.

(*l*) See, as to this, *ante*, p. 13 *et seq.*

(*m*) *Gustard's case*, 8 Eq. 438, where the allottee was held to be a contributory for them. Compare this with the cases noticed *ante*,

p. 19 *et seq.*

(*n*) *Arnol's case*, 36 Ch. D. 702. See *infra*, as to paid-up shares.

(*o*) *Burrett's case*, 2 Dr. & Sm. 415, and 3 De G. J. & Sm. 30.

(*p*) *Ib.* The case turned on the true construction of the correspondence.

(*q*) *Sharon's claim*, W. N., 1866-231.

So also in winding up companies in which there are share- Bk. IV, Chap. 1.
holders and scripholders, and in which the scripholders are Sect. 19.
entitled to become shareholders, but are not bound so to do, Scripholders.
so long as they remain scripholders, as distinguished from shareholders, they are not contributors (*r*).

An agreement to take shares which has not been acted upon Agreements not
for so long that neither party can enforce it against the other acted upon.
will not render the person who agreed to take them a contributory. This follows from the ordinary doctrines applicable to the specific performance of agreements; and where a person in this position sought to be put on the list in order to obtain a share of surplus assets, he was held not entitled to be on it (*s*). So it is apprehended he could not have been made a contributory against his will if there had been a deficiency (*t*).

An agreement to take shares which has been duly rescinded Agreements
before the commencement of the winding up, will not render rescinded.
the party to it a contributory unless it be as a past member. But, *primâ facie*, directors have no more power to rescind an agreement to take shares than they have to accept a surrender of them when taken; and there are numerous authorities to show that persons who have agreed to take shares are contributors as present members, although the directors have subsequently agreed to relieve them from their obligation (*u*). These cases, however, will be more conveniently noticed when treating of persons who have ceased to be members (*x*).

An agreement which is void cannot *per se* render a person a Voidable and
contributory; but an agreement which is voidable at his option void agreements.
may do so. This subject will be alluded to hereafter (*y*).

b) Allottees of shares in contemplated companies.

An abortive company, *i.e.*, an unregistered association of Allottees of
individuals engaged in the formation of a company, and not shares and scrip
in abortive com-
panies.

(*r*) See scripholders, *infra*, head 8. five years.

(*s*) *Ex parte London Bank of Scotland*, 12 Eq. 268.

(*t*) *Nicol's case*, 29 Ch. D. 421. Compare *Sidney's case*, 13 Eq. 228,

where a person who signed a company's memorandum of association was put on the list after a delay of

(*u*) See, for example, *Adams' case*, 13 Eq. 474. And compare *Nicol's case*, *Tufnell* and *Ponsonby's case*, 29 Ch. D. 421.

(*x*) See *infra*, class B.

(*y*) See under head 4.

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Sect. 10.

succeeding in their attempts to form it, might be wound up under the acts of 1848 and 1849 (z). But persons engaged in the formation of a company are neither partners nor *quasi*-partners, nor is each the agent of the others for doing that which may be necessary to start the company (a). It follows from this, that if an abortive unregistered company is being wound up, a person who has done nothing more than act as a promoter, without rendering himself liable with the other promoters, to third parties, or to those others in respect of liabilities incurred by them, is not a contributory.

Liability of
subscribers to
contribute.

It was at one time thought that there was an equitable, as distinguished from a legal obligation on the part of every promoter of a company towards the other promoters, to contribute with them towards the discharge of debts incurred by them in the prosecution of their common design; but it has long been settled that a promoter, or subscriber, to an abortive company is not liable to contribute to the liquidation of debts or expenses which have been incurred without his authority, or which he has not agreed to share. Unless, therefore, a person has agreed to share, or has rendered himself directly liable with others to pay, the debts incurred in the attempt to form an abortive company, he will not be a contributory on the winding up of that company (b).

Uppill's case.

The non-liability of a mere promoter of a company to be made a contributory, unless he has done something besides act with others in getting up a company, was established comparatively early; but it was nevertheless decided by the House of Lords, in *Uppill's case* (c), that if a promoter of a company agreed to accept shares in the company when formed, he ought to contribute to the expenses incurred in attempting to form it. The impossibility, however, of upholding this decision was felt as soon as attention was drawn to it; and although it was followed for a time, it was repudiated by the House of Lords

(z) *Ante*, p. 623.

(a) See Partn. p. 23.

(b) See *Norris v. Cottle*, 2 H. L. C. 647, affirming *Ex parte Cottle*, 2 Mac. & G. 185; *Bright v. Hutton*, 3 H. L. C. 341; *Hutton v. Thomp-*

son, and *Norris v. Cooper*, ib. 161.

See, too, *Hamilton v. Smith*, 7 W. R. 173.

(c) *Hutton v. Uppill*, 2 H. L. C. 674.

itself in *Bright v. Hutton* (d), which has ever since been the leading authority upon the present subject. Bk. IV. Chap. 1.
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Many cases had been decided on the authority of *Upfill's case*, and they, of course, fall with it. With reference, therefore, to the subject now under discussion, it is necessary to separate the cases decided before, from those decided after the reversal of *Upfill's case*. But it is to be observed, that cases decided before such reversal, and in which promoters or subscribers were held *not to be* contributories, are still entitled to be weight. It is only those which decided such persons *to be* contributories that must now be disregarded.

The following cases must be considered as overruled (directly or indirectly) by *Bright v. Hutton*, 3 H. L. C. 341:— Cases falling
with Upfill's
case.

Upfill's case, 2 H. L. C. 674.

Besley, Ex parte, 2 Mac. & G. 176. This case occurs three times in the books. It was first decided by Vice-Chancellor Knight Bruce (*Besley's case*, 3 De G. & S. 224), who held that Besley was not a contributory. This decision was appealed against, and was reversed by Lord Cottenham (2 Mac. & G. 176). But the appeal was reheard by Lord Truro, who affirmed the decision of the Vice-Chancellor (3 Mac. & G. 287). The case, as reported in 3 De G. & S. 224, and 3 Mac. & G. 287, is still law.

Bright's case, 1 Sim. N. S. 602. This was reversed on appeal (3 H. L. C. 341).

Brittain, Ex parte, 1 Sim. N. S. 281, decided reluctantly on the authority of *Upfill's case*.

Hole's case, 3 De G. & S. 241, decided on the authority of *Ex parte Besley*, 2 Mac. & G. 176.

Markwell's case, 5 De G. & S. 528, decided on the authority of *Upfill's case*, but after the decision of *Bright v. Hutton*. It cannot, however, be considered law. See *Ex parte Capper*, 1 Sim. N. S. 178, and *Carrick's case*, 1 Sim. N. S. 505.

Morrison, Ex parte, 15 Jur. 346, and 20 L. J. Ch. 296, decided on the authority of *Upfill's case*, and in effect overruled by *Sharp and James's case*, 1 De G. M. & G. 565.

Nicholay's case, 15 Jur. 420, decided on the authority of *Upfill's case*.

Sichell, Ex parte, 1 Sim. N. S. 187, decided reluctantly on the authority of *Upfill's case*.

Studley, Ex parte, 14 Jur. 539. This case is very shortly reported, but it seems inconsistent with such cases as *Hall's* (3 De G. & S. 214), *Stock's* (22 L. J. Ch. 218) and *Carrick's* (1 Sim. N. S. 505).

Upon the principles which are now settled to be applicable Result of
authorities.

(d) 3 H. L. C. 341.

Bk. IV. Chap. 1. to the case of an abortive unregistered company, it may be
Sect. 10. taken :

Subscribers to
abortive com-
panies not con-
tributories.

1. That a mere subscriber to or allottee of scrip in an abortive company is not, by virtue of his subscription, or acceptance of scrip, a contributory on the winding up of the company, whether he has paid his deposit (*e*) or not (*f*).

Provisional
committee men
not contribu-
tories.

2. That such a person does not become a contributory by being one of the committee from which the scheme emanates, and by which it is encouraged; or, in other words, by being what is commonly called a promoter of the company (*g*). This holds, even although he may have subscribed something towards the expenses, if he did so under the erroneous supposition that he was liable for them (*h*), or merely for the sake of peace (*i*); so, although he may have concurred in the appointment of persons, and have incurred liability by so doing, if all liability on that score is at an end (*k*); so, although he may have been party to the appointment of a managing committee, by which debts still unpaid have been incurred (*l*); so, although his name may have been put on that committee, if he never assented to join it, and he never acted on it (*m*).

A fortiori,
subscribers
who have not

3. That, *a fortiori*, subscribers to and promoters of an abortive company are not, as such, liable to be made con-

(*e*) As in *Maulsley and Field's case*, 17 Sim. 157; *Ex parte Beardshaw*, 1 Drew. 226. See, too, *Ex parte Walstab*, 20 L. J. Ch. 58, where the deposit had been paid and recovered back.

(*f*) As in *Hutton v. Thompson*, and *Norris v. Cooper*, 3 H. L. C. 161; *Ex parte Copper*, 1 Sim. N. S. 178; *Carrick's case*, ib. 505; *Ex parte Hirschel*, 15 Jur. 942. See, too, the cases in the next seven notes.

(*g*) *Bright v. Hutton*, 3 H. L. C. 341, reversing *Bright's case*, 1 Sim. N. S. 602; *Norris v. Cottle*, 2 H. L. C. 647, affirming *Ex parte Cottle*, 2 Mac. & G. 185. See, too, *Maitland's case*, 3 Giff. 28; *Ex parte Roberts*, 2 Mac. & G. 192, and 14

Jur. 539; *Ex parte Clarke*, 20 L. J. Ch. 14.

(*h*) *Ex parte Besley*, 3 Mac. & G. 287, affirming *Besley's case*, 3 De G. & S. 224; *Hull's case*, 3 De G. & S. 214.

(*i*) *Ex parte Stocks*, 22 L. J. Ch. 218; *Hull's case*, 3 De G. & S. 214; *Carrick's case*, 1 Sim. N. S. 505; *Ex parte Roberts*, 1 Drew. 204; *Tanner's case*, 5 De G. & S. 182.

(*k*) *Carrick's case*, 1 Sim. N. S. 505; *Ex parte Hight*, 1 Drew. 485.

(*l*) *Tanner's case*, 5 De G. & S. 182.

(*m*) *Ex parte Roberts*, 1 Drew. 204. See, too, *Ex parte Osborne*, 15 Jur. 72. Compare *Spottiswoode's case*, 6 De G. M. & G. 345.

tributories on its winding up, if they never have, in fact, entered into a binding agreement to take shares. Even before *Upfill's case* was reversed, this proposition was well established (*n*). Bk. IV. Chap. 1.
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agreed to take
shares.

4. That if persons are actively engaged in forming a company, if they act as a body, and as a body incur debts for which they are all liable, if not directly, at all events as between each other, then they form a company or association which may be wound up, and on its winding up they will be contributories, whether they have actually subscribed for shares or not (*o*).

5. That persons who, without being actively engaged in forming a company, agree not only to take shares in it, but also to share the expenses incurred in forming the company, are, on its winding up, liable to be made contributories (*p*).

The writer is not aware of any case having arisen under the Companies act, 1862, and in which the above rules have been adverted to. The reason of this is that there is no recent instance of an order to wind up an unregistered association of promoters of a company. At the same time, such an association, at least if consisting of less than twenty persons, might be legally formed and be wound up (*q*); and if such an event should occur, the principles and rules followed under the older acts would apply; subject, however, to this qualification, that liability to creditors is now a ground for being put on the list, which was not the case under the older acts (*r*).

4. *On the repudiation of shares after the commencement of the winding up.*

A person who is sought to be made a contributory in respect of shares which he has agreed to take or which may be regis-

(*n*) See *Mathew's case*, 3 De G. & S. 234; *Carmichael's case*, 17 Sim. 163; and *Onions's case*, 1 Sim. N. S. 394.

(*o*) *Norbury's case*, 5 De G. & S. 423; *Sharp and James's case*, 1 De G. M. & G. 565; *Pearson's Executors' case*, 3 De G. M. & G. 241; *Spottiswoode and Amsinck's case*, 6 De G. M. & G. 345. See, also, *Bowen and Martin's case*, 20 L. J. Ch. 856, and *Ex parte Apps*, 18 L. J. Ch. 409.

(*p*) See the last note.

(*q*) See Companies act, 1862, §§ 4 and 199.

(*r*) *Ib.*, § 200.

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tered in his name, may be entitled to repudiate them on various grounds. But it by no means follows, that because he might have repudiated them before the winding up commenced, he can repudiate them afterwards. The leading principles applicable to this subject appear to be as follows :

1. Shares placed in a person's name pursuant to an alleged agreement, which is in truth no agreement, may be repudiated by him after the winding up has commenced, unless he has chosen to accept them on the terms on which they have been placed in his name (*s*).

2. Shares which the company has no power to issue, can be repudiated after the winding up has commenced (*t*).

3. Shares placed in his name under an agreement which is voidable, *e.g.*, on the ground of fraud (*u*), or the non-performance of a condition (*v*), cannot be repudiated after the winding up has commenced.

4. Shares which a person has agreed to take, but which have not been placed in his name, and in respect of which he is not a shareholder at the commencement of the winding up, may be repudiated by him if he can show that for any reason the agreement is not binding on him (*w*).

a) Repudiation on the ground of no agreement.

Cases in which a person has neither become nor bound himself by agreement to become a shareholder.

By way of contrast with the decisions noticed under the last head, those cases will now be adverted to, in which it has been held, that a person is not a contributory, he not having become a shareholder or agreed to become one, and there being no other grounds on which to hold him a contributory.

Sureties, &c.

Persons who are merely sureties to a company for the payment of calls by shareholders are not contributories (*x*). It will be seen hereafter that *cestuis que trustent* are not contributories (*y*). A person who has never agreed to take shares and has never acted or been treated as a shareholder, but who

Admissions.

(*s*) See *infra*, under head *a*).

(*t*) See *infra*, under head *b*).

(*u*) See *infra*, under head *c*).

(*v*) See *infra*, under head *d*).

(*w*) See *infra*, under head *d*).

(*x*) *Harrison's case*, 6 Ch. 286 ;
Lee and Moor's case, 5 Eq. 368.

(*y*) See *infra*, head 9.

by mistake has admitted, even under seal, that he is a shareholder is not a contributory (*z*). Bk. IV. Chap. 1.
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A person who agrees to place shares does not agree to take them himself and he is not a contributory (*u*).

A person who is entered on the register of shareholders without due authority is not a contributory, unless he has precluded himself from denying the propriety of the entry (*b*). This he may do by express ratification or by acting as a shareholder (*c*). Even where an applicant for shares authorised them to be registered in his name, and executed a blank transfer of them before allotment, the subsequent entry of his name in the register was held not to affect him, as he had no notice of such entry or of the allotment (*d*). Effect of being
on register.

With respect to applicants for shares, the following propositions follow, from the principles explained in Bk. I. c. 1, § 1, where the requisites of an agreement to take shares were examined (*e*). Applicants for
shares.

1. If shares have been applied for and the deposit on them has been paid, and a receipt has been given for the money, but the shares have never been allotted, the applicant will not be a contributory, although the application may have been, in form, an agreement by him to accept the shares applied for or any less number which might be allotted (*f*). If indeed there is some other evidence clearly showing that the application had been accepted, the fact that there was no formal allotment will be immaterial (*g*). 1. No allot-
ment.

2. If an application for shares is followed by allotment and entry on the register, but the allottee is not informed of these facts, he will not, without more, be a contributory (*h*). But 2. No notice of
allotment.

(*z*) *Empson's case*, 9 Eq. 597.
See, also, *Davies's case*, 4 De G. F. & J. 78.

(*u*) *Gorissen's case*, 8 Ch. 507.
Otherwise if he underwrites so many shares, *ante*, p. 761.

(*b*) See *Hallmark's case*, 9 Ch. D. 329; *Somerville's case*, 6 Ch. 266; *Gorissen's case*, 8 Ch. 507; *Wynne's case*, *ib.* 1002; *Beck's case*, 9 Ch. 392; *Pellatt's case*, 2 Ch. 527; *Baily's case*, 5 Eq. 428, and 3 Ch.

592; *Ward's case*, 10 Eq. 659.

(*c*) See the cases on the effect of varying from the prospectus, *infra*, p. 771.

(*d*) *Ward's case*, 10 Eq. 659.

(*e*) *Ante*, p. 13 *et seq.*

(*f*) *Best's case*, 2 De G. J. & Sm. 650.

(*g*) See *Adam's case*, 13 Eq. 474; *Bird's case*, 4 De G. J. & Sm. 200.

(*h*) *Gunn's case*, 3 Ch. 40; *Ward's case*, 10 Eq. 659, and others cited

- Bk. IV. Chap. 1.
Sect. 10. — direct formal notice is not necessary; and notice may be inferred from conduct, and may even be wholly dispensed with (*i*).
3. Application for shares revoked. 3. If an application for shares has been revoked before it has been accepted, the applicant will not be a contributory, although shares may afterwards be allotted to him (*k*). But revocation after notice of allotment has been posted is too late (*l*).
4. Allotment too late. 4. If an application for shares is not accepted within a reasonable time, a subsequent acceptance will not render the applicant a contributory unless he has assented to it (*m*); and this applies as well to directors and to persons who take an active part in getting up the company as to others (*n*).
5. Applicant and allottee different persons.
Mallorie's case. 5. If a person applies for shares himself and they are allotted to some one else, there is no concluded agreement, and he is not a contributory. Thus, where reserved shares were offered to old shareholders and their executors, and a person who was a relative of a deceased shareholder and acted for his executors applied for some reserved shares, and they were allotted to the executors, there being no power to allot them to the applicant himself, it was held that he was not a contributory (*o*).
6. Terms of offer not assented to. 6. If shares are applied for, or offered, on terms which are never assented to by both parties to the negotiation, the person applying for them, or to whom they are offered, will not be a contributory in respect to them (*p*).
7. No acceptance by proper authority. 7. Moreover, the conditions must be accepted by those per-

ante, p. 14; *Bloxam's case*, 4 De G. J. & Sm. 447, *contra*, turned on its own special circumstances. See *ante*, p. 15.

(*i*) See *Adam's case*, 13 Eq. 474, and the cases collected *ante*, p. 14, to which add *Richards v. Home Ass. Assoc.*, L. R. 6 C. P. 591. See, also, the cases relating to directors, *infra*, head 6, p. 790.

(*k*) *Ritso's case*, 4 Ch. D. 774, the case of a director; *Gledhill's case*, 3 De G. F. & J. 713, and others of that class noticed *ante*, pp. 13, 14.

(*l*) *Harris's case*, 7 Ch. 587;

Wall's case, 15 Eq. 18, *ante*, p. 14.

(*m*) *Mathew's case*, 3 De G. & Sm. 234, and others of that class noticed *ante*, p. 15.

(*n*) *Ritso's case*, 4 Ch. D. 774, *Carmichael's case*, 17 Sim. 163.

(*o*) *Mallorie's case*, 2 Ch. 181.

(*p*) See *Jackson v. Turquand*, L. R. 4 H. L. 305, and the other cases collected *ante*, p. 16. See, also, *Davies' case*, 4 De G. F. & J. 78, which was a case of fraud as well as of no contract; *Empson's case*, 9 Eq. 597; compare *Gustard's case*, 8 Eq. 438.

sons who are competent to bind the company by assenting to them, or the allottee will not be a contributory (*q*). The application of this principle to cases in which shares have been issued on terms which are *ultra vires* will be noticed hereafter (see sub-heads *b* and *d*, pp. 774 and 778).

A difficult class of cases arises where an application for shares is followed by an allotment, but there has been in the interval some change in the nature or objects of the company. If this change is material the allotment is no acceptance of the application, and the allottee can, at his option, accept or repudiate the shares (*r*). If, knowing the facts, he does not repudiate them before the commencement of the winding up, the inference will be that he has in fact accepted them, and he will be a contributory. If, on the other hand, he repudiates them in time, he is not a contributory (*s*). His option to accept or repudiate does not, however, necessarily continue until he knows the facts; it must be exercised, if at all, as soon as, with reasonable diligence, he might have known them (*t*). From this it follows that, as regards companies formed and registered under the Companies act, 1862, inasmuch as every person can obtain a copy of a company's memorandum of association, an applicant for shares in a projected company who neglects to inform himself in reasonable time after its formation of its nature and objects as formed, and who keeps shares which have been allotted to him until the company is wound up, will not escape from being a contributory by proving that the company as formed is materially different from that which he agreed to join.

The following are instances (under the older Winding-up acts) of persons who were held not to be contributories by reason of a change in the nature and objects of the company.

(*q*) *Howard's case*, 1 Ch. 561, and *ante*, p. 17.

(*r*) See on this subject generally *ante*, p. 19 *et seq.* The non issue of the whole number of shares promised to be issued is not sufficient. *Lyon's case*, 35 Beav. 646; *Sharpus' case*, 3 De G. & S. 49; *Mansfield's case*, *ib.*

58, and 2 M. & G. 57.

(*s*) *Smith's case*, 2 Ch. 604, and L. R. 4 H. L. 64, where the repudiation was before the winding up.

(*t*) See *Peel's case*, 2 Ch. 674; *Lawrence's case*, 2 Ch. 412; *Wilkinson's case*, 2 Ch. 536.

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Variations
between the
objects of the
company as
formed and as
projected.

Bk. IV. Chap. 1. Sect. 10. *Cox's case* and *Naylor's case* (*u*) ; persons who had taken shares in a company, the liability of the members of which was limited, were held not to be contributories in a company, the liability of the members of which was unlimited. The constitution of the company had been fraudulently altered, and they had not acquiesced in the alteration.

Goldsmid's case. *Goldsmid's case* (*x*). *Goldsmid* took, and paid for shares in a projected steam-packet company. The directors afterwards determined to abandon the scheme, and to join a company already existing; and at a general meeting of the shareholders of the projected company, it was resolved unanimously that the new scheme should be substituted for the old one, and that the capital originally contemplated should be doubled. At this meeting *Goldsmid* was present. He did not approve of the proposed departure from the original scheme, but he did not actively oppose it: he, in fact, remained passive, and never did anything more; and two years after the meeting referred to, his shares were cancelled. He was held not to be a contributory.

Meyer's case. *Meyer's case* (*y*) was the case of another allottee of shares in the same projected company. He originally had ten shares: he did not accede to the change in the scheme; but ultimately he took one share in the new company, and nine out of the ten shares which he originally agreed to take were cancelled. He was held not a contributory in respect of these nine shares.

Other cases. *Rye's case* (*z*), *Blackburn's case*, as decided by V.-C. Kindersley (*a*), *Ship's case* (*b*), *Stewart's case* (*c*), *Webster's case* (*d*), *Nichol's case* (*e*), and *Baily's case* (*f*), all of which have been already referred to, further illustrate the same principle, although in applying them to winding-up cases it is necessary to bear in mind that all of them related to companies which were not in course of liquidation.

Delay in repudiation.

Upon the subject of delay in repudiation, it is important to distinguish those cases in which there has been repudiation before any winding up has commenced, from those in which there has been no repudiation until after that time. Where a person having a right to repudiate shares has duly repudiated them before the commencement of the winding up, he will not

(*u*) 4 K. & J. 308 and 314, cited in *Richmond's case*. Compare *Sheffield's case*, Johns. 451.

(*x*) 16 Beav. 262.

(*y*) 16 Beav. 383.

(*z*) 3 Jur. N. S. 460, *ante*, p. 20.

(*a*) 3 Drew. 409, reversed on additional evidence, 8 De G. M. & G. 177. See *ante*, p. 25.

(*b*) 2 De G. J. & Sm. 544, affirmed L. R. 3 H. L. 343, under the name

of *Dornes v. Ship*. See *ante*, p. 20. N.B.—In this case, *Ship* applied for shares in one company, and was allotted shares in another company, there having been two memoranda of association.

(*c*) 1 Ch. 574, *ante*, p. 26.

(*d*) 2 Eq. 741, *ante*, p. 26.

(*e*) W. N. 1867, 77, and *ante*, p. 26.

(*f*) 3 Ch. 592, and *ante*, p. 27.

be a contributory (*g*); but where he has not he will (*h*), unless, Bk. IV. Chap. 1. Sect. 10. indeed, a reasonable time has not elapsed within which he might have ascertained the facts and repudiated the shares. That he may do so in this case follows from the hypothesis, viz., that there is no agreement between him and the company.

The decisions bearing on the right of repudiation before the winding up commenced have been noticed already (*i*).

A leading authority on the effect of repudiation after the Peel's case. winding up has commenced, is *Peel's case* (*k*), which may be usefully contrasted with them. There a person applied for shares on the day the company was registered; the application was made on the faith of a prospectus previously issued, and from which the memorandum of association materially departed; shares were allotted; the allottee paid the allotment money and a call pursuant to the prospectus; he was registered as a shareholder, and received a dividend; after the company had been ordered to be wound up he repudiated his shares, deposing that he had never seen the memorandum of association, and did not know of its departure from the prospectus. It was held, however, that as he had had ample time to ascertain the real facts, he was too late, and was a contributory.

By reason of the stringency of § 18 of the Companies act, Alteration of the memorandum and articles of association. 1862, a subscriber of the memorandum of association is a contributory, although the memorandum as registered may have been somewhat altered since he signed it (*l*). An alteration in the articles of association, not affecting the objects of the company, will not enable the allottee to escape from being a contributory, although such alteration be made after an application for shares, and before allotment (*m*).

(*g*) See *Smith's case*, 2 Ch. 604, and L. R. 4 H. L. 64. Compare *Hare's case*, 4 Ch. 503.

(*h*) See below.

(*i*) *Ante*, p. 25 *et seq.* See, also, *Wynne's case*, 8 Ch. 1002; *Beck's case*, 9 Ch. 392, where there was very little delay.

(*k*) 2 Ch. 674. See, also, *Perrett's case*, 15 Eq. 250; *Wilkinson's case*, 2 Ch. 536; *Peel's case*, 2 Ch. 674;

Hare's case, 4 Ch. 503, where the contributory remained on the register. See *Perse's case*, Ir. Rep. 6 Eq. 298, where there had been gross fraud, and an action for calls before the liquidation had failed, but the shareholder was retained on the list. Quere this case.

(*l*) See *infra*, under head 7, p. 797.

(*m*) See *Lyon's case*, 35 Beav. 646.

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b) Repudiation of illegally issued shares.

Repudiation of
illegally issued
shares.

With respect to the right to repudiate shares issued improperly, a distinction must be made between shares which the company has no power to issue, and shares which the company has power to issue, although not in the manner in which, or upon the terms upon which, they have been issued. The holders of shares which the company have no power to issue, in truth, hold nothing at all, and are not contributories. The only possible ground for holding them to be contributories would be by applying to them the doctrines by which a person who holds himself out as a partner incurs liabilities as if he were a partner (*n*). These doctrines might suffice to render an ostensible member of an unincorporated insolvent company liable as a contributory in it; but they have little, if any, bearing on the statutory liability of persons to be made contributories in incorporated companies in respect of shares which do not exist in point of law (*o*).

Illegal sub-
division of
shares.

Thus where shares had been illegally subdivided, the holders of them were held not to be contributories in respect of the reduced parts (*p*): although where such parts could be identified with the original shares which they represented, the holders of those parts were held to be contributories in respect of the original shares which the parts made up (*q*).

Stace and
Worth's case.
Amalgamation
of companies.

A much more difficult case is *Stace and Worth's case* (*r*). There company A. amalgamated with company B., under circumstances which rendered the amalgamation wholly void.

(*n*) See Partn. 40 *et seq.*, and *ante*, p. 43 *et seq.*

(*o*) See, as to the non-application in such a case of the doctrine of estoppel by conduct, *Bank of Hindustan, &c. v. Alison*, L. R. 6 C. P. 54, and 222, *ante*, p. 53; *Royal Bank of India's case*, 4 Ch. 252; *Stace and Worth's case*, 4 Ch. 682 (*infra*); *Smith's case*, 4 Ch. 611.

(*p*) See *Holmes's, Pritchard's*, and *Adam's cases*, 2 Ch. 714.

(*q*) *Feiling and Rimington's case*,

2 Ch. 714; *Sewell's case*, 3 Ch. 131.

(*r*) 4 Ch. 682. See, also, *Dougan's case*, 8 Ch. 540; *Alison's case*, 9 Ch. 1; *Alabaster's case*, 7 Eq. 273, which were decided on the same principle. *Wynne's case*, 8 Ch. 1002, and *Beck's case*, 9 Ch. 392, were somewhat similar cases, but were decided on the ground that there was no binding agreement to take shares, and nothing to prevent their repudiation.

Pursuant, however, to the scheme for amalgamation, a member in company A. exchanged his shares in it for fully paid-up shares in company B., which, however, that company had no power to issue: he was put on the register of company B. in respect of the shares taken by him, and he became a director of company B., and acted as such. The shares, if they had been legally issued, could not have been treated as fully paid up by reason of 30 & 31 Viet. c. 131, § 25. It was, nevertheless, held that he was not a contributory in company B., the issue of the shares to him being void, and all his acts being referable to these shares, and to the arrangement between the two companies and nothing else (s).

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—

But the mere circumstance that a person has become a shareholder pursuant to a scheme which is *ultra vires* will not relieve him from liability as a contributory if the shares which he has taken can be considered as legally existing.

Thus in *Challis's case* (t) and *Hare's case* (u), which were in many respects similar to *Stace and Worth's case*, the member who had exchanged his shares was held to be a contributory in the purchasing company; he having in effect entered into a distinct agreement with that company to take shares in it, and that agreement being valid, although resulting from an invalid agreement for an amalgamation (v). In *Hare's case* there was a distinct and separate application for shares which was duly accepted; and in *Challis's case*, certificates of shares in the purchasing company had been sent to and accepted by the contributory, and he had attended meetings of the shareholders. The Court of Appeal held the agreement with him was not void but was capable of ratification.

The holder of shares existing in point of law, but held upon

(s) See the importance of this, 8 Ch. 546.

(t) 6 Ch. 266. And see *Miller's Dale Lime Co.*, 31 Ch. D. 211, where there was an irregularity in the issue of the shares.

(u) 4 Ch. 503. In this case Hare had repudiated his shares, but not in time. See, also, *Campbell's case*, and

Hippisley's case, 9 Ch. 1, which were very similar to the two last, and in which the holders of shares declared by a court of law in another case to have been illegally created were held contributories.

(v) This distinguishes these cases from those cited *ante*, note (o). See 8 Ch. 546.

Bk. IV. Chap. 1. terms not binding on the company, may be a contributory in
Sect. 10. — respect of them, as will be seen presently (y).

c) *Repudiation on the ground of fraud.*

Repudiation
on the ground
of fraud.

Oakes' case and
Peek's case.

It has been already seen that fraud cannot be relied upon as a defence to a proceeding by a creditor, whether by action or by *scire facias* (z); and it follows that such fraud does not enable a shareholder in an insolvent company registered under the Companies act, 1862, to escape from being put on the list of contributories, there being no other method by which the creditors can have recourse to him. This is now completely settled by the cases which arose in winding up *Overend, Gurney, and Company*. It was there held, that where the prospectus of a company formed and registered under the Companies act, 1862, had been issued, and such prospectus was expressed in terms calculated to deceive those who read it with respect to the true position of the company, the issuing of the prospectus was in point of law a fraud on the part of the company, and that such fraud entitled persons taking shares directly from the company on the faith of such prospectus to repudiate their shares; but that they were, nevertheless, liable to be placed on the list of contributories of the company, it being proved that the creditors of the company would otherwise remain unpaid (a).

This important decision has been followed in other cases, to which it is unnecessary to refer in detail (b). Moreover it has been extended to cases of solvent companies on the ground that a winding-up order entirely alters the position of the shareholders (c).

(y) *Infra*, head d), p. 778, and the table on p. 796. *Ex parte Daniell*, 1 De G. & J. 372, and *Robinson's Executors' case*, 2 De G. M. & G. 517, illustrate the position of directors who improperly appropriate shares which the company can repudiate.

(z) *Ante*, p. 283.

(a) *Ex parte Oakes and Peek*, 3 Eq. 576, affirmed L. R. 2 H. L. 325, under the name of *Oakes v. Tur-*

quand. Oakes took his shares directly from the company. Peek bought his from a previous shareholder. Both were put on the list.

(b) See *Ashley's case*; *Kent v. Freehold Land, &c., Co.*, both cited below; *Stone v. City and County Bank*, 3 C. P. D. 282; *Tennent v. City of Glasgow Bank*, 4 App. Ca. 615.

(c) *Burgess's case*, 15 Ch. D. 507, see *ante*, p. 755.

Where, however, a person entitled to repudiate his shares on the ground of fraud has repudiated them before the commencement of the winding up, and has procured himself to be removed from the register of members, he will not be a contributory (*d*), even as a past member (*e*). And even if he has not procured himself to be so removed, still if he has instituted legal proceedings to have his name removed, that will be sufficient (*f*). So, where he has repudiated his shares, and has been guilty of no laches in obtaining the removal of his name (*g*). But laches on his part will be fatal to him (*h*). Even where only two months elapsed between the repudiation of the shares and the commencement of the winding up, the shareholder was held a contributory (*i*).

The principles on which *Oakes v. Turquand* and *Burgess's case* proceed are by no means confined to contracts which are voidable on the ground of fraud. They extend to all voidable contracts entered into by persons who are *sui juris*: but they do not extend to infants nor to contracts which are void as distinguished from voidable (*j*). Their application to conditional contracts and to shares which have been accepted will be noticed hereafter (*k*).

Further, the same principles apply to all companies wound up under the Companies act, 1862, whether formed or registered under it or not: for the winding up machinery of that act cannot be applied consistently with any other principles (*l*).

(*d*) This follows from the cases cited in the next two notes.

(*e*) *Wright's case*, 7 Ch. 55, reversing 12 Eq. 331, but *quære* whether the V.-C. Wickens was not right.

(*f*) *Reese River Co. v. Smith*, L. R. 4 H. L. 64, affirming *Smith's case*, 2 Ch. 604, where the proceedings were stayed by the winding up.

(*g*) *McNiell's case*, 10 Eq. 503; *Payle's case*, 4 Ch. 497; *Fox's case*, 5 Eq. 118. See next note but one. But in *Persse's case*, Ir. Rep. 6 Eq. 298, the name was retained on the list, although an action brought before the winding up for calls had

failed. *Sed quære*.

(*h*) *Ashley's case*, 9 Eq. 263; *Scholey v. Central Rail Co. of Venezuela*, ib. 266, note. See, also, *The Scottish Petroleum Co.*, 23 Ch. D. 413.

(*i*) *Kent v. Freehold Land and Brickmaking Co.*, 3 Ch. 493, reversing S. C. 4 Eq. 588. It is very difficult to reconcile this case with those cited in the last note but one. It was not apparently referred to in them, and *quære* whether *Smith's case* can be properly extended.

(*j*) See the last head *b*), p. 774.

(*k*) See pp. 778 and 781.

(*l*) See the judgment in *Burgess's case*, 15 Ch. D. 507.

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Repudiation
before winding
up.

Other voidable
contracts.

Companies not
formed under
the Act of 1862.

Bk. IV. Chap. 1. The older authorities on this subject will be found collected
 Sect. 10. on pp. 79 *et seq.*, but they cannot be relied upon with reference
 to the question of contributory or non-contributory.

d) Repudiation on the ground of non-performance of conditions.

Repudiation on
 the ground of
 non-performance
 of conditions.

The position of a person who has agreed to take shares upon special conditions is generally one of considerable difficulty. If the conditions have not been assented to by both parties to the agreement (*m*), or if the conditions, having been assented to in point of fact, are *ultra vires*, so that the company could not assent to them in point of law (*n*), there is in truth no concluded contract. This class of cases has been already examined. For the present, it will be assumed that there is a concluded agreement, but an agreement upon special conditions. Under such circumstances, the points to determine are—1, whether the condition is a condition precedent to the person's becoming a shareholder, or a condition subsequent; and 2, whether, assuming the condition to be precedent, it has been performed or waived.

Conditions
 precedent.

If the condition is precedent, and has not been performed, and its performance has not been waived, the applicant will not be a contributory (*o*).

Rogers' case.

Thus in *Rogers' case* (*p*), a person applied in the usual form for shares, and his application was sent to the directors with a letter stating that the application was made on condition that the applicant should be appointed agent to the company; he never obtained the agency, and had done nothing which amounted to an acceptance of the shares without it; he was held not a contributory, although the shares had been allotted to him.

Wood's case.

The following case was one of greater difficulty, but decided on the same principle. In *Wood's case* (*q*), Wood agreed to take

(*m*) *Ante*, p. 17.

(*n*) See *Pellatt's case*, 2 Ch. 527.

(*o*) See, in addition to the case referred to in the text, *Mainwaring's case*, 2 De G. M. & G. 66; *Robert's case*, 3 De G. & S. 205, and 2 Mac. & G. 192; *Austin's case*, 2 Eq. 435.

(*p*) *Rogers' case*, 3 Ch. 633. See, also, *Simpson's case*, 4 Ch. 184; *Wood's case*, 15 Eq. 236. Compare *Thomson's case*, 4 De G. J. & Sm. 749.

(*q*) 3 De G. & J. 85. See, too, *Shackleford's case*, 1 Ch. 567, *ante*,

shares upon condition that he should obtain a contract for the supply of certain goods. The shares were allotted, and Wood was informed thereof, and he was registered as a shareholder. Nothing more was done, and Wood never obtained the contract. The Court held that Wood was not a contributory, first, because the conditions on which alone he agreed to take shares had not been assented to by the company with sufficient distinctness, and secondly, because, even if they had, they were conditions precedent, which had not been performed or waived.

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Where, however, the condition is not precedent to a person's becoming a shareholder; or where if precedent he has waived its performance, either wholly or for a time subsequent to that at which he is to become a shareholder; or if the so-called condition is not in truth a condition at all, but only an agreement giving rise, in the event of its breach, to a right of action; in all such cases as these, the person who has agreed to become a shareholder will be a contributory, whatever his rights may be by reason of the breach by the company of the condition or agreement.

Conditions subsequent, &c.

The following are leading authorities on this head (*r*):—

In *Fisher's case* (*s*), an application for 700 shares was made on a specified condition. 700 shares were allotted to the applicant and were registered in his name with the word conditional against it. He did not know of this, but he afterwards sold and transferred 400 of the shares. He was held a contributory for the remaining 300 shares on the ground that the condition if precedent had been waived; and that if the condition was a condition subsequent to his becoming a shareholder, its non-performance did not entitle him to reject the shares after the winding up of the company had commenced.

Fisher's case.

In *Ex parte Burton* (*t*), a person was persuaded to apply to an insurance society for an appointment as agent, and also for shares to qualify him for the appointment. His application was apparently acceded to, but before he paid for his shares, or

Ex parte Burton.

p. 17, and *Pellatt's case*, 2 Ch. 527, *infra*, p. 781.

(*r*) See, also, *infra*, p. 780, as to conditions which are *ultra vires*.

(*s*) *Fisher's case*, and *Sherrington's*

case, 31 Ch. D. 120.

(*t*) 16 Jur. 967; and see *Harison's case*, 3 Ch. 633; *Thomson's case*, 4 De G. J. & Sm. 749.

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Payment in
shares.

Elkington's case.

Conditions
which are
ultra vires.

executed the company's deed, he relinquished the appointment, and expressed a desire to relinquish the shares. This, however, he was not permitted to do, and he was held a contributory.

So where a person agreed to supply the company with goods to the value of 3000*l.*, and to take shares in the company to half that amount in part payment, and to take cash for the residue, and he applied for the shares in the ordinary form, and paid the deposit on them, and they were allotted to him, and he received the certificates and paid the sum required upon the allotment; it was held that he was a contributory in respect of the shares, although no goods were ever ordered or supplied; and although it was contended that the agreement to take shares was conditional upon goods being required (*u*). *A fortiori* is a person a contributory who actually sells goods to a company and receives shares in part payment, and is registered in respect of them (*x*). The circumstance that the goods have not been wholly paid for is immaterial (*y*).

Similar principles apply to agreements to take shares in a company upon terms or conditions which are not binding on the company. If the person who has agreed to take shares on such terms has not, in fact, accepted them and become a shareholder in respect of them he will not be a contributory. If on the other hand he has accepted the shares and become a shareholder in respect of them he cannot repudiate them after the winding up, and will be a contributory in respect of them. Both of these propositions require illustration.

The following cases arising under the older Winding-up acts and in which persons were held not to be contributories, may be usefully referred to on the first point:—

Woodfall's case, 3 De G. & Sm. 631 (*z*).

A creditor of the company paid in scrip, which he sold. It was agreed that he should not execute the company's deed, and he did not; but his name was returned as a shareholder.

Bunn's case, 2 De G. F. & J. 275 (*a*).

(*u*) *Elkington's case*, 2 Ch. 511.
Compare *Pellatt's case*, *ib.* 527, *infra*.

(*x*) *Gore and Durant's case*, 2 Eq.
349.

(*y*) *Ib.*

(*z*) See, too, *Mowatt and Elliott's case*, 3 De G. M. & G. 254. Compare *Davidson's case*, 3 De G. & S. 21.

(*a*) See, too, *Saunders's case*, 2 De

The company agreed that Bunn should have paid-up shares transferable by delivery, but that he should incur no liability and not be required to execute the company's deed. He never did, but he attended meetings.

Coleman's case, 1 De G. J. & Sm. 495.

Coleman had executed the company's deed, but other conditions of membership had not been complied with, and his agreement to take shares contained terms not binding on the company.

Lord Westbury also held that even if Mr. Coleman had become a shareholder, the proper inference from the facts would have been that his shares had been forfeited pursuant to the promise of the managing director. The directors had power to forfeit.

Pellatt's case, 2 Ch. 527 (*h*).

Pellatt agreed to take shares on condition that goods to a certain amount should be taken of him, and that he should pay a small sum per share in cash, and that the goods should be taken in payment of the rest. He paid a deposit on his application for shares, and they were allotted to him, and he was put on the register; but he did not know of the allotment or registration. Before anything further was done, and before any goods were ordered, he withdrew from his engagement; three years afterwards the company was wound up.

Howard's case, 1 Ch. 561.

Reserved shares were accepted by Howard on conditions which were assented to by persons who had no authority to assent to them.

Upon precisely similar principles if a person agrees to take fully paid-up shares he is not a contributory in respect of shares not paid up if he has not accepted such shares and become a shareholder in respect of them (*c*).

These cases, however, must not be confounded with others which do not rest merely on agreement. If persons have become shareholders upon terms which are not binding on the company, such persons will be contributories in respect of the shares they have in fact accepted; and although they need not have taken them they cannot repudiate them after the winding-up has commenced. The following are the leading cases on this point. The reader will observe the difference between this class of cases and those discussed above (p. 774, head 4 *b*)

G. J. & Sm. 101. Bunn was held not to have accepted the shares. This circumstance distinguishes his case from *Daniell's* and others of that class noticed below.

(*b*) Compare *Elkington's case*, 2 Ch. 511, *ante*, p. 780.

(*c*) *Arnol's case*, 36 Ch. D. 702; *Carling's case*, 1 Ch. D. 115, and *infra*, head 5, p. 783, &c.

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Cases where the
shares have been
accepted.

Bk. IV. Chap. 1. where the shares were themselves illegally issued and could not
Sect. 10. be legally recognised.

Addison's case, 5 Ch. 294.

Addison paid for and accepted shares upon the terms that they should be cancelled and all money paid for them returned on his giving a certain notice. He gave the notice, received his money back, and transferred his shares to a nominee of the company. He was nevertheless held to be a contributory: the directors having had no power to bind the company by the terms mentioned nor to cancel the shares.

Bridger's case, 5 Ch. 304, and 9 Eq. 74 (*d*).

An agent of the company agreed to take shares upon the terms that he should pay for them out of his commission on shares which he might dispose of. He applied for and received an allotment of shares and certificates, and he was registered as a shareholder and acted as such, and was held to be a contributory notwithstanding the collateral agreement as to the mode of paying for them.

Ex parte Daniell, 1 De G. & J. 372, and 23 Beav. 568 (*e*).

The directors of a company allotted fully paid-up shares to themselves. Daniell was a shareholder and a director, and he took some shares under this resolution, and he obtained a certificate that they were fully paid. He was held a contributory and liable to calls as if the shares were not paid up. The importance of this case is due to the fact that the court held that although Daniell could not repudiate his shares the company was not bound by the terms on which alone he had accepted them. The shares allotted by the directors to themselves were treated as assets of the company misapplied by the directors (*f*). Lord Justice Knight Bruce dissented. See on this case *Carling's case*, 1 Ch. D. 1.

Nickoll's case, 24 Beav. 639.

Is another case in which a promoter was fixed with shares which had been issued to him as fully paid up in payment of services. He had accepted the shares, and the company was not bound by the agreement that they should be treated as fully paid up.

There are numerous other cases illustrating the same principle, but they mostly relate to paid-up shares, and will be found under the next head (see p. 787, 9).

(*d*) See, also, *Davidson's case*, 3 De G. & Sm. 21; *Chapman and Barker's case*, 3 Eq. 361.

(*e*) See, also *Daniell's case*, 22 Beav. 43, where he was held to be a contributory, although he had endeavoured to get rid of his shares. The later report relates to calls.

(*f*) See, also, *Robinson's Executors' case*, 2 De G. M. & G. 517.

5. *Holders of paid-up shares.*

With respect to holders of fully paid-up shares in a limited company, as they are not as a rule liable to calls (*k*), they cannot be placed on the list of contributories against their own consent; they are entitled to be on in order to share the surplus assets, if any; but if they disclaim all interest in this respect, they ought not to be put on the list (*l*).

Holders of fully
paid-up shares.

In order to prevent the frauds which were committed by treating shares as paid up in full when they had only been paid for in land, goods, or services of very questionable value, it is enacted by 50 & 51 Vict. c. 131, § 25, that shares in companies registered under the Companies act, 1862, are to be taken to be issued and held subject to the payment of the whole amount thereof in cash, unless there is a contract in writing to the contrary filed with the registrar of joint-stock companies at or before (*m*) the issue of such shares. This enactment applies whether a company is being wound up or not (*n*).

Payment up of
shares in cash.

This section applies to subscribers of the memorandum of association (*o*), and even a subscriber of the memorandum is protected by a duly registered agreement (*p*).

Shares are issued within the meaning of this section when they have been registered in some person's name (*q*), or when a certificate of their ownership has been given (*r*). Probably an allotment would be held to be an issue (*s*).

(*k*) There are exceptions. See, as to banking companies issuing notes, § 6 of the Companies act, 1879; and as to companies limited by shares, but the articles of which specially bind the holders of paid-up shares to pay certain specified debts. See *McKewan's case*, 6 Ch. D. 447; *Maxwell's case*, 20 Eq. 585.

(*l*) *Marlbro' Club Co.*, 5 Eq. 365; *Baglan Hall Colliery Co.*, 5 Ch. 346; *Anglesea Coll. Co.*, 1 Ch. 555, and 2 Eq. 379; *Leifchild's case*, 1 Eq. 231; *Hollyford Mining Co.*, 1r. Rep. 1 Eq. 39.

(*m*) *Pool's case*, 35 Ch. D. 579.

(*n*) For general object of the section, see *Almada and Tiritto Co.*, 38 Ch. D. 415. As to companies not being wound up, see *Burkinshaw v. Nicolls*, 3 App. Ca. 1004; *Gibson & Co.*, 5 L. R., 1r. 139.

(*o*) See *Coates' case*, 17 Eq. 169; *Fothergill's case*, 8 Ch. 270, *infra*, head 7.

(*p*) *Anderson's case*, 7 Ch. D. 75.

(*q*) *Blyth's case*, 4 Ch. D. 140; *Gibson & Co.*, 5 L. R., 1r. 139.

(*r*) *Bush's case*, 9 Ch. 554.

(*s*) But see *Clarke's case*, 8 Ch. D. 635, where the allotment was made

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The contract in writing required to be filed must be some contract distinct from the company's articles of association (*t*); and must refer distinctly to the shares in question (*u*), but need not mention their numbers (*w*).

Non-registration
by inadvertence.

The duty of registering the contract seems to be on the person seeking to enforce it (*x*), and where a company owed a person money, and he agreed to accept payment in fully paid-up shares, but none were in fact allotted to him or accepted by him, he was held not liable to be placed on the list of contributories in respect of unpaid-up shares (*y*). Further, where shares have been allotted as paid up in full pursuant to a contract to that effect, but which contract has inadvertently not been registered, the Court has ordered it to be registered on being satisfied that no creditor would be prejudiced (*z*). In *Clarke's case* (*a*), the contract was inadvertently not registered until after a resolution to allot the shares had been passed, nor until after some of the allottees had agreed to sell them; but the mistake was discovered, and the contract was registered before any certificates were issued, and before any entries were made in the register, and it was held that the statute had been complied with in time.

Payment in
cash.

In construing the expression payment in cash, the Courts have upheld honest transactions in which no cash has passed; they have treated payment in cash as equivalent to payment within the meaning of a plea of payment at common law, and have held payment in cash to mean payment as distinguished from set-off or accord and satisfaction (*b*). Accordingly, pay-

by mistake. As to the issue of debentures, see *Mowatt v. Castle Steel, &c., Co.*, 34 Ch. D. 58.

(*t*) *Crickmer's case*, 10 Ch. 614; *Pritchard's case*, 8 Ch. 956; *Gibson & Co.*, 5 L. R., Ir. 139. *Apple-tree-wick Lead Mining Co.*, 18 Eq. 95, *contra*, must be treated as overruled.

(*u*) *Coates' case*, 17 Eq. 169.

(*w*) *Ex parte Forde*, 30 Ch. D. 153. *Quare*, in the case of a Banking Company, see 30 & 31 Vict. c. 29, § 1, *ante*, p. 489.

(*x*) See next note. As to compelling the Registrar to register, see *ante*, p. 395, note (*p*).

(*y*) *Arnot's case*, 36 Ch. D. 702.

(*z*) *Dublin v. Wicklow Manure Co.*, 13 L. R., Ir. 200, *ante*, p. 395, note (*p*).

(*a*) 8 Ch. D. 635.

(*b*) See *Spargo's*, 8 Ch. 407; *Fothergill's case*, *ib.* 270; *Pagin and Gill's case*, 6 Ch. D. 681; *Andress's case*, 8 Ch. D. 126; *Gibson & Co.*, 5 L. R., Ir. 139. *Cleland's case*, 14 Eq. 387, was decided before this construction

ment of a balance of an account stated, and in which the nominal amount of the shares is entered, is sufficient (c); and even the settlement of an account treating the amount of the shares as paid by the sums on the other side of the account is sufficient if those sums are *bonâ fide* due from the company to the shareholder (d). On the other hand, if the original contract is that property or services shall be paid for in fully paid-up shares (e), or may be so paid for at the option of either party (f), the person who accepts the fully paid-up shares, will not be considered to have paid for them in cash. And neither giving nominally paid-up shares in satisfaction of the liability to calls on unpaid-up shares (g), nor an agreement to apply a debt payable by the company *in futuro* in paying up shares in advance is a payment in cash (h).

Previously to the above enactment it had been decided, and where the statute in question does not apply, it may be taken as settled, that shares may be fully paid up, not only in money, but in money's worth; and shares which are *bonâ fide* given as paid up, in payment of property transferred to the company, or of services rendered to it, or of other claims against it, must, on the winding up of a company be treated as paid-up shares (i); and in the absence of fraud the Court will not inquire into the value of that which is taken by the company in payment instead of money (k); for example, where payment

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Payment other-
wise than in
cash.

was settled, and cannot be relied upon. It was there held that a creditor of a company who accepted fully paid-up shares in satisfaction of his debt was a contributory, and liable to calls in respect of them.

(c) *Spargo's case*, 8 Ch. 407; *Barrow-in-Furness Investment Co.*, 14 Ch. D. 400.

(d) *Cootes' case*, 17 Eq. 169, was decided on this principle, but *quære* whether there was there a sufficient settlement of the account. See, also, *Magnard's case*, 9 Ch. 60; *Ferraro's case*, ib. 355, which, however, did not turn on this section.

(e) *Pugin and Gill's case*, 6 Ch. D. 681; *Andress's case*, 8 Ch. D. 126;

White's case, 12 Ch. D. 511; *Burkinshaw v. Nicolls*, 3 App. Ca. 1004. *Ex parte Bentley*, 12 Ch. D. 850, does not seem to be in accordance with the other authorities.

(f) *Barrow's case*, 14 Ch. D. 432.

(g) *Fothergill's case*, 8 Ch. 270.

(h) *Kent's case*, 39 Ch. D. 259, affirming 37 Ch. D. 508. The transaction in this case was also invalid on the ground of fraudulent preference. See also *Jones Lloyd & Co. v. Lewis*, 11 Ch. D. 159, where agreement to set off against future calls a present liability of the company to pay cash was held within the section.

(i) See *ante*, p. 395; *Currie's case*, 3 De G. J. & Sm. 367; *Anglesea Colliery Co.*, 2 Eq. 379, and 1 Ch. 555; and the cases in the next notes.

(k) *Pell's case*, 5 Ch. 11, and 8 Eq.

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was made in paper, which turned out to be worthless, it was nevertheless treated as duly made (*l*). But a fictitious payment, by taking money from the company and returning it, is no payment at all: *e.g.*, where a promoter in this way paid up the shares of a director (*m*); or where a director prepays his shares and takes back the money in payment of fees (*n*). Such payments can only be valid where the honesty of the transaction and the solvency of the company are unquestionable. Where a director pays up his shares out of money paid to him, but which can be recovered from him by the company, the shares may be treated as not paid up unless they have been issued pursuant to a duly registered agreement (*o*).

Moreover, if a shareholder pays money to the company upon the terms that the money shall be treated as a loan, or as payment in respect of shares, according as the company continues business or is wound up, the money so paid cannot on the winding up of the company, be treated as having been paid on account of the shares, and in anticipation of calls on them (*p*).

Payments in
respect of
shares.

In order that money may be treated as paid in respect of shares, it must be paid to the company on account of the shares in question (*q*). When one company amalgamates with another, and the shareholders in the old company exchange their shares for shares in the new company, payments to the new company in respect of the new shares cannot be treated as payments to the old company, in respect of the old shares (*r*).

222. See the observations of V.-C. Stuart on this and other cases in *Leek's case*, 11 Eq. 100, affirmed 6 Ch. 469.

(*l*) *Schroder's case*, 11 Eq. 131.

(*m*) *Englefield Colliery Co.*, 8 Ch. D. 388; *Leek's case*, 11 Eq. 100, and 6 Ch. 469; *Disderi & Co.*, 11 Eq. 242, where a cheque of the company was given, and given back.

(*n*) *Syke's case*, 13 Eq. 255.

(*o*) *Hay's case*, 10 Ch. 593. If there has been such an agreement the shares must, it seems, be treated as paid up. See *infra*, pp. 790, 796.

(*p*) *Barge's case*, 5 Eq. 420. The

case turned on the fact, that the agreement was made after a petition to wind up had been presented; but the judgment goes far to support the statement in the text.

(*q*) See case in next note, and *Carriage Co-operative Supply Assoc.*, 27 Ch. D. 322. And see *Duchess of Westminster Silver Lead Ore Co.*, 10 Ch. D. 307, where a payment generally in respect of a number of shares was apportioned equally between them.

(*r*) See *Ex parte Jeaffreson*, 11 Eq. 109.

A payment by a director in advance of the amount of shares held by him will discharge him, although the payment may have been made to enable the company to pay off a debt for which the director was liable as guarantor (s). Bk. IV. Chap. 1.
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If a holder of paid-up shares has had part of the capital of the company returned to him, *e.g.*, by receiving a bonus or dividend paid out of capital, and not out of profits, he could perhaps be treated as the holder of shares not paid up, and be put on the list accordingly (t). Return of
capital.

Even a registered contract will not bind the company to treat a share issued at a discount as a fully paid-up share. To the extent of the discount, nothing has been paid for it. The statute assumes that every share is paid for in money or money's worth, and, to the extent to which there is neither, a registered contract affords no protection. Consequently the holders of such shares will be contributories (u), unless they are purchasers for value without notice. Shares issued at
a discount.

A company may be estopped from proving that shares issued by it as paid-up, are in truth not paid-up. But this doctrine will not avail persons who know the truth (x); it only applies in favour of a *bonâ fide* purchaser for value without notice of the real facts. But it does apply to him, and protects him from being put on the list as a contributory (y), but not a purchaser from him with notice (z). Purchasers for
value without
notice.

Few questions present more difficulty than those which arise when a person, who has agreed to take paid-up shares, is sought Repudiation of
unpaid-up
shares.

(s) *Poole, Jackson, and Whyte's case*, 9 Ch. D. 322.

(t) See *Stringer's case*, 4 Ch. 475, and *Rance's case*, 6 ib. 104; and compare *Re Cardiff Coal and Coke Co.*, 11 W. R. 1007, and *Cardiff, &c., Co. v. Norton*, 2 Eq. 558, and 2 Ch. 405. See, also, *McKay's case*, 2 Ch. D. 1.

(u) *London Celluloid Co.*, 39 Ch. D. 190; *Almada Têrito Co.*, 38 Ch. D. 415; *Addlestone Linoleum Co.*, 37 ib. 191; *Sandy's case*, *infra*, p. 789; *Plaskynaston Tube Co.*, 23 Ch. D.

542; *Ince Hall Rolling Mills Co.*, ib. 545, are overruled.

(x) See below, and *Simm v. Anglo-American Tel. Co.*, 5 Q. B. D. 188.

(y) *Burkinshaw v. Nicolls*, 3 App. Ca. 1004; *A. W. Hall & Co.*, 37 Ch. D. 712; *Waterhouse v. Jamieson*, L. R. 2 H. L. 29, and see *Guest v. Worcester Rail. Co.*, L. R. 4 C. P. 9. *Blyth's case*, 4 Ch. D. 140, *contra*, cannot be relied upon.

(z) *London Celluloid Co.*, 39 Ch. D. 190, correcting in this respect *Barrow's case*, 14 Ch. D. 432.

Bk. IV. Chap. 1. to be put on the list in respect of shares which are not paid
 Sect. 10. up. He naturally desires to repudiate them, but it is seldom
 that he can do so.

Effect of Com- The leading cases on this subject will be found collected
 panies act, 1867. below. In companies to which the Companies act, 1867, applies the question whether a person is to be treated as a member in respect of paid-up or unpaid-up shares, resolves itself into two others, *viz.*, (1) is he, or ought he to be treated (a) as a member in respect of any shares? and (2) can they, consistently with the act, be treated as paid-up? If a person is not a member and cannot properly be treated as a member in respect of any shares, he will escape (b), but otherwise he will be fixed unless the shares have been paid for in cash, or are to be treated as paid-up, pursuant to a duly registered contract (c), or unless he is a purchaser for value without notice (d). In companies not governed by the act in question, similar principles will apply, but the proof that the company is bound to treat the shares as paid-up, may be easier.

It must be borne in mind, that shares in companies governed by the Companies act, 1862, and issued at a discount, are not paid-up, and cannot be treated as paid-up even, if a contract that they shall has been registered (e).

In the following cases, persons who had agreed to take or had taken paid-up shares, were held not contributories:

Arnot's case, 36 Ch. D. 702.

Arnot had agreed to take paid-up shares in payment of services, the agreement was not registered, but no shares were allotted to him or registered in his name. He was held not bound to take unpaid-up shares.

Brown's case, 9 Ch. 102,

was a similar case, but there was no registered contract. On the other hand, there was no agreement to take any shares unless they were paid-up.

Carling's case, 1 Ch. D. 115, reversing 20 Eq. 580.

Hespeler's case, *ib.*

Walsh's case, *ib.*

(a) *I.e.*, having regard to the power to put his name on the register, if not on already.

(b) As in *Arnot's case* below.

(c) As in *Carling's case*, *infra*.

(d) As to which, see *ante*, p. 787.

(e) *Ante*, p. 787.

De Rucigne's case, 5 Ch. D. 306.

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In all these cases directors had paid-up shares transferred to them by a promoter: the shares were registered in their names. They were issued as paid-up pursuant to a duly registered contract. It was held not right, therefore, to put them on the list for unpaid-up shares. Their liability in respect of their corrupt bargain with the promoter was another matter. As to this, see *infra*, p. 790.

Currie's case, 3 De G. J. & Sm. 367 (*f*).

Directors had agreed to take paid-up shares, but no others. The state of the register does not appear.

Miller's case, 5 Ch. D. 70, and 3 ib. 661.

Miller was a director, but had retired. 25 fully paid-up shares were registered in his name as his qualification shares, but they were treated as forfeited when he retired.

In the following cases, persons who had agreed to take paid-up shares, were held contributories:

Currie's case, 3 De G. J. & Sm. 367.

Directors had agreed to qualify themselves; 100 shares qualified; they endeavoured to discharge their obligation by means of fully paid-up shares partly obtained from promoters and partly voted to themselves.

Ex parte Daniel, 1 De G. & J. 372. } *Ante*, p. 782.

Nickolls's case, 24 Beav. 639. }

Leeke's case, 6 Ch. D. 469, and 11 Eq. 100. } See *infra*, under the

Disderi & Co., 11 Eq. 242. } next head.

Barrow's case, 14 Ch. D. 432.

A director was registered as the holder of 300 paid-up shares, but they were neither paid-up nor protected by a registered contract.

Other shares were treated as paid-up, he being regarded as a purchaser for value without notice; but see as to this, *London Celluloid Co.*, 39 Ch. D. 190.

Cleland's case, 14 Eq. 387,

Pugin and Gill's case, 6 Ch. D. 681,

Andress's case, 8 Ch. D. 126,

were all cases in which paid-up shares had been given in payment of goods or services, and registered in the name of the creditor; but there was no registered contract (*g*).

London Celluloid Co., 39 Ch. D. 190. }

Addlestone Linoleum Co., 37 Ch. D. 191. }

Sandy's case, *In re Railway Time Tables*,
etc., *Co.*, W. N. 1889, p. 77. }

Holders of shares at a discount.

(*f*) The shares here referred to are those indicated as (*a*) and (*b*) in the report.

(*g*) See, as to this class of cases, *ante*, p. 785.

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When shares are issued to promoters or their nominees as fully paid up pursuant to a duly registered contract, but under circumstances which render the transaction a breach of trust as against the company, the holders of the shares will not be contributories in respect of them (*h*); although the holders may be compelled to pay the value of the shares by other proceedings, *e.g.*, by proceedings under § 165 of the Companies act, 1862 (*i*).

6. Directors in respect of their qualification shares.

Directors' qualifications.

The cases in which directors and other officers of a company ought to have had a certain number of shares as a qualification for their office, and they have acted more or less without qualifying themselves, have given rise to considerable difference of opinion.

No qualification necessary.

In the first place, mistakes sometimes arise from supposing that a certain number of shares are required to qualify all directors, when in truth the qualification is only necessary with respect to some of them, *e.g.*, for elected directors, as distinguished from those originally named (*j*), for town as distinguished from country directors (*k*). Cases such as these turn on the true construction of the company's deed of settlement or articles of association, and not upon any rule relating particularly to contributories.

Again, a resolution of the board of directors to the effect that all the members of the board shall hold a certain number of shares as a qualification does not necessarily impose any obligation to qualify, and a director who acts without obeying the resolution will not necessarily be a contributory (*l*).

Special acts of Parliament are sometimes so worded as to make first directors shareholders to the extent of the shares

(*h*) *De Ruignè's case*, 5 Ch. D. 306; *Carling, Hespeler, and Walsh's case*, 1 Ch. D. 115.

(*i*) See *Carriage Co-operative Supply Assoc.*, 27 Ch. D. 322, where the agreement was not registered; *Pearson's case*, 5 ib. 336; *McKay's case*, 2 ib. 1, and *ante*, p. 694.

(*j*) As in *Forbes' case*, 8 Ch. 768; *Lord Claud Hamilton's case*, ib. 548; *Stock's case*, 4 De G. J. & Sm. 426; *Tothill's case*, 1 Ch. 85.

(*k*) As in *Cotterell's case*, 11 W. R. 13.

(*l*) *De Ruignè's case*, 5 Ch. D. 306.

necessary to qualify them, and where this is the case such directors will without more be contributories in respect of such shares (*m*). 1k. IV. Chap. 1.
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Where no qualification is necessary, the circumstance that a person has agreed to become a director, and has acted as such, will not make him a contributory in respect of shares allotted to him and placed in his name without his authority or knowledge; and if, in truth, he did not know that shares were in his name, knowledge of the fact will not be imputed to him on the ground that he might have seen the entries in the books if he had looked into them (*n*). But if the regulations of the company do require a director to hold a certain number of shares, and they are allotted to him and are registered in his name, he will be a contributory in respect of them (*o*), although he may not have applied for them or known of their allotment to him (*p*), provided he has no other shares sufficient to qualify him (*q*). Repudiation
of qualifying
shares.

Still less can a director who accepts the shares necessary to qualify him take advantage of any want of formality, and repudiate them on the ground that he never was, properly speaking, a shareholder in respect of them (*r*).

But, generally speaking (*s*), a director is not bound by accepting office to obtain his qualification shares direct from the company; he may obtain them by purchase from other people, and if he obtains them within a reasonable time after he becomes a director he cannot be made a contributory in Qualification
may be obtained
by transfer.

(*m*) *Kincaid's case*, 11 Eq. 192, where shares had been allotted to the directors; *Forbes' case*, 19 Eq. 353; *Knox's and Nugent's case*, Ir. R. 11 Eq. 294; *O'Brien's case*, ib. 422, where no shares had been allotted. See, also, *Porter v. Emmens*, 1 C. P. D. 201 & 664, and *South London Fish Market Co.*, 39 Ch. D. 324.

(*n*) *Hallmark's case*, 9 Ch. D. 329.

(*o*) *Saunders' case*, 2 De G. J. & Sm. 101, is not opposed to this. It arose under older acts.

(*p*) See the cases collected in the

2nd table *infra*, p. 796.

(*q*) See *infra*, as to this.

(*r*) *Walter's case*, 3 De G. & Sm. 149, affirmed on appeal, 19 L. J. Ch. 501; *Roney's case*, 4 De G. J. & S. 426; *Currie's case*, 3 De G. J. & S. 367. And see *Bird's case*, 4 De G. J. & S. 200, where the director applied for shares as agent.

(*s*) The regulations of the company might be exceptional. So if no shares could be obtained except from the company, see *Hamley's case*, 5 Ch. D. p. 707.

Bk. IV. Chap. 1. respect of any additional shares on the ground that he did not
 Sect. 10. qualify himself soon enough, and ought to be treated as
 holding shares as soon as he accepted office or acted as a
 director (*t*).

General
 principles.

Assuming that qualification shares are necessary, then (in the absence of any special statutory enactment applicable to the case) the questions to be determined in each case are—
 1. Has the director expressly or impliedly agreed with the company to take the necessary shares from it? 2. Has he so acted as to be estopped from denying that he has so agreed? If either of these questions is decided against him he will be a contributory, but not otherwise. The state of the register is very important; for if he has been registered as a member in respect of his qualification shares his assent to take them will be readily inferred, and he will be a contributory unless he can prove that his name ought to be removed from the register even after the winding up has commenced (*u*). On the other hand, if he has not been registered as a member, the evidence against him must establish that he ought to be on the register in respect of the qualification shares.

The application of these principles depends on facts and inferences of fact, and, as might be expected, the cases on the subject are by no means all consistent. An attempt has been made below to classify the most important of them for convenience of reference, but the principles underlying them all will be found to be those stated above.

The cases apparently warrant the following inferences:—

Observations on
 the cases.

1. Notwithstanding § 16 of the Companies act, 1862, rendering a company's articles binding on its members, a person who is a member (by subscribing the memorandum of association or by having shares), and who becomes a director, is not necessarily a contributory in respect of the shares necessary to qualify him for the office (*x*).

(*t*) *Brown's case*, 9 Ch. 102; *Wheal Buller Consols*, 38 Ch. D. 42; *Karuth's case*, 20 Eq. 506; *Marquis of Abercorn's case*, 4 De G. F. & J. 78. and see *Hewitt's case* and *Brett's case*, 25 Ch. D. 283; and *Broune v. La Trinidad*, 37 Ch. D. pp. 13, 14.

(*u*) This was done in *Austin's case*, 2 Eq. 435.

Compare *Bilton Hotel Co.*, 9 L. R., Ir. 338.

(*x*) *Karuth's case*, 20 Eq. 506;

2. The Courts have often declined to infer an agreement by a director with the company to accept qualification shares from it, although he has accepted the office of director and acted as such without being qualified. The cases on this point, however, are by no means uniform; nor can they be expected to be so, as they all turn on inferences of fact (*y*).

3. If a company is wound up before the lapse of a reasonable time for the acquisition of qualification shares, directors who have not acquired them will not be contributories in respect of them (*z*).

4. So, if a person has agreed to become a director, but has changed his mind or has retired almost immediately, and has not accepted qualification shares, and has not agreed to take them otherwise than inferentially by being a director, he will not be a contributory (*a*). So if he retires on the ground that conditions on which he accepted office have not been fulfilled (*b*).

5. If the holding of qualification shares is a condition precedent to election as a director, and an unqualified person is elected and acts for a short time, and then retires before he obtains his qualifying shares, he will not be a contributory (*c*). His election will have been void. Nor in such a case will he be made a contributory if qualification shares are allotted to him after his retirement (*d*).

6. A director may treat any shares he holds as qualification shares unless he has agreed to take them in addition to others (*e*).

(*y*) Compare the cases in the two tables below, and see the Irish case, *Re Bilton Hotel Co.*, 9 L. R., Ir. 338, where the director was held liable.

(*z*) *Hewitt's case and Brett's case*, 25 Ch. D. 283; *Wheal Buller Consols*, 38 Ch. D. 42.

(*a*) *Marquis of Abercorn's case*, 4 De G. F. & J. 78, explained and approved in *Brown's case*, 9 Ch. 102; *Karuth's case*, 20 Eq. 506; *Barber's case*, 5 Ch. D. 963. See, also, the next note.

(*b*) *Austin's case*, 2 Eq. 435;

Green's case, 18 Eq. 428. Compare *Sidney's case*, 13 Eq. 228.

(*c*) *Hamley's case*, 5 Ch. D. 705; *Barber's case*, ib. 963; *Jenner's case*, 7 ib. 132.

(*d*) *Barber's case*, 5 Ch. D. 963. See, as to estoppel, *per James, L. J.*, at p. 968.

(*e*) As he had in *Fowler's case*, 14 Eq. 316, but not in *Duke's case*, 1 Ch. D. 620, where *Fowler's case* is doubted; *Brown's case*, 9 Ch. 102, and *Miller's case*, 3 Ch. D. 661, are the leading cases on this point.

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7. Apart from any special circumstances, if a director is the registered holder of the requisite number of shares, he will be qualified, although the articles require him to hold them in his own right, and he may have mortgaged them or even have no beneficial interest in them (*f*).

8. As regards paid-up shares, nothing need be added to what has been stated already when dealing with that subject (*g*). It has been said that shares which are nominally fully paid up cannot satisfy the requirements of the qualification clause (*h*); but if the company is bound to treat the shares as paid up, whether by reason of a duly registered contract or otherwise, that must be sufficient.

§ 165.

Acting as a director without a qualification does not amount to a misfeasance within § 165 of the Companies act, 1862 (*i*).

TABLE I.

In the following cases directors were held not to be contributories in respect of their qualification shares: the Court coming to the conclusion that no agreement to take shares was established, and that the directors were not estopped from denying their due qualification:

Abercorn's case, 4 De G. F. & J. 78.

Director accepted office and was advertised, but he never acted, and did not know qualification was necessary.

See, also, *Mather v. National Ass. Assoc.*, 14 C. B. N. S. 676.

Karuth's case, 20 Eq. 506 (*k*).

Director subscribed memorandum and articles of association, and was advertised; but he withdrew from the company and never acted.

Brown's case, 9 Ch. 102.

Director had fully paid-up shares registered in his name, and no agreement to take others was proved.

(*f*) *Pulbrook v. Richmond Cons. Mining Co.*, 9 Ch. D. 610; *Cumming v. Prescott*, 2 Y. & C. Ex. 488. *See quære*, if he is only a trustee of them, see *Bainbridge v. Smith*, W. N. 1889, 72.

(*g*) *Ante*, p. 783 *et seq.*, and see the tables below.

(*h*) *Currie's case*, 3 De G. J. & S. 367.

(*i*) *Cocentry and Dixon's case*, 14 Ch. D. 660.

(*k*) In all these cases the directors were put on the list for the shares for which they signed the memorandum of association.

Miller's case, 5 Ch. D. 70, and 3 ib. 661.

Director had fully paid-up shares to qualify him, and they were forfeited when he retired.

Hamley's case, 5 Ch. D. 705.

Barber's case, ib. 963.

Jenner's case, 7 Ch. D. 132.

In all of these the qualification was a condition precedent to election, and the directors were not duly elected, and they had retired before obtaining any shares.

Hewitt's case and Brett's case, 25 Ch. D. 283. }

Wheal Buller Consols, 38 Ch. D. 42. }

Directors signed the memorandum and articles of association, but had not had a reasonable time to qualify before winding up commenced. In *Wheal Buller Consols* directors had three months to qualify, and the winding up commenced directly afterwards.

Tothill's case, 1 Ch. 85.

Director signed memorandum and applied for qualification shares, but never got them. His name was in a list for the shares, but he did not know it. N.B.—The articles did not require directors named in them to qualify.

Compare *Roney's case*, 4 De G. J. & Sm. 426.

Stock's case, 4 De G. J. & Sm. 426.

Forbes' case, 8 Ch. 768.

Lord Claud Hamilton's case, 8 Ch. 548.

The last observation applies to these also.

Chapman's case, 2 Eq. 567.

Director signed memorandum and articles of association, and was named in them as a director. He applied for qualification shares, but never got them. He resigned.

Currie's case, 3 De G. J. & Sm. 367 (l), }

Carling's case, 1 Ch. D. 115, }

Arnot's case, 36 Ch. D. 702, }

ante, pp. 788, 789.

are all cases in which directors were entitled to say that they were only liable, if at all, in respect of fully paid-up shares.

Arnot's case was not a case of qualification shares.

Saunders' case, 2 De G. J. & Sm. 101.

Saunders was registered, but he was not liable to creditors as a member, and he was entitled to be indemnified by the company under the older winding-up acts, therefore he was not a contributory.

Hallmark's case, 9 Ch. D. 329.

Shares were registered in a director's name without his knowledge. No qualification shares were necessary.

Austin's case, 2 Eq. 435.

The director was on the register for the qualification shares, but he did not know it. He had retired on the ground that the conditions on which he became a director had not been performed.

N.B.—None of the above were registered in respect of unpaid-up shares, except *Austin*, *Saunders*, and *Hallmark*.

(l) As to the shares *a*, see ante, p. 789, note (f).

TABLE II.

In the following cases directors were held to be contributories in respect of their qualification shares, the Court coming to the conclusion that an agreement to take them was established, or that the directors were estopped from denying their qualification :

Lecke's case, 6 Ch. 469, and 11 Eq. 100.

Director had qualification shares allotted to him ; they were registered in his name as paid up, which, however, they were not. He knew he had the shares, and acted as a director.

Harvard's case, 13 Eq. 30.

Director acted, and had qualification shares allotted to him, but he did not know it.

Levita's case, 3 Ch. 36,

Bird's case, 4 De G. J. & Sm. 200,

were both cases of express application for shares by a director, and registration in his name.

See, also, *Barrow's case*, *ante*, p. 789 ; and *Roney's case* below.

Disleri & Co., 11 Eq. 242.

11 directors had qualification shares allotted to them and registered in their names as fully paid-up, which, however, they were not.

Walter's case, 3 De G. & S. 149, affirmed 19 L. J. Ch. 501.

Qualification shares were placed in director's name with his consent ; but the formalities necessary to make him a shareholder were not duly complied with.

Duke's case, 1 Ch. D. 620.

Fowler's case, 14 Eq. 316.

The question in these cases was how many shares over and above the qualification number the director was liable for. Each was decided according to his real agreement.

Currie's case, 3 De G. J. & Sm. 367 (*m*).

The directors had signed the articles which required them to hold 100 shares. They had voted themselves paid-up shares. They were treated as holders of 100 unpaid-up shares. Shares for which they had signed the memorandum were reckoned as part of their 100 qualification shares. *Currie* acted as a director ; see 20 Eq. 510.

Esparto Trading Co., 12 Ch. D. 191.

Goddard had accepted the office of director, and had acted as such : he was registered in respect of his qualification shares ; they had been marked in the books as cancelled, but they had not been duly forfeited.

(*m*) The shares here referred to are those indicated as *b* and *c* in the report. See *ante*, p. 789.

Roney's case, 4 De G. J. & Sm. 426.

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Roney acted as a director and agreed to take 100 shares; but there was no allotment of them, nor were they registered in his name.

Hay's case, 10 Ch. 593.

Hay had signed the memorandum of association for the shares for which he was held liable. The only question was, whether he had paid for them.

7. *Subscribers of the memorandum of association.*

In companies formed under the act of 1862, the subscribers (*n*) of the memorandum of association are members, and liable to be put on the list of contributories, although the memorandum may have been somewhat altered since they signed it (*o*); and although no shares may have been allotted to them, and they may never have been registered as shareholders (*p*); and although the directors may have cancelled the shares at the request of the subscribers (*q*). If, however, all the shares in the company have been duly allotted to other persons, so that none are left which a subscriber of the memorandum can hold, he will not be a contributory, but must be treated as having transferred his shares (*r*).

In *Felgate's case* (*s*) it was held that a person who signed the memorandum and articles of association was not a contributory, the articles having been altered after he signed them, but before they were registered. But it is very difficult to reconcile this decision with the provisions of the act (*t*).

Shares allotted to the subscribers of a company's memorandum of association are *primâ facie* allotted in respect of, or

(*n*) Signature by an agent is equivalent to signature by oneself, *Whitley Partners, Limited*, 32 Ch. D. 337.

(*o*) *Peel's case*, 2 Ch. 674; *Oakes v. Turquand*, L. R. 2 H. L. 325. Compare *Felgate's case*, 2 De G. J. & Sm. 456.

(*p*) *London and Provincial Consolidated Coal Co.*, 5 Ch. D. 525; *Sidney's case*, 13 Eq. 228; *Evans' case*, 2 Ch. 427; *Hall's case*, 5 Ch. 707. See, also, the cases in the next

five notes.

(*q*) *Esparto Trading Co.*, 12 Ch. D. 191. Compare *Nicol's case*, 29 Ch. D. 421.

(*r*) *Mackley's case*, 1 Ch. D. 247; *Drummond's case*, 4 Ch. 772. See 4 Ch. 776. See, also, *Kipling v. Todd*, 3 C. P. D. 350.

(*s*) 2 De G. J. & Sm. 456, decided on 19 & 20 Vict. c. 47.

(*t*) See §§ 11, 18, and the cases in note (*o*), *ante*.

Subscribers of
the memorandum of associa-
tion.

Bk. IV. Chap. 1. include, the shares subscribed for; consequently, unless there
 Sect. 10. — are circumstances to rebut this inference, a subscriber's liability is not for the number of shares subscribed for, *plus* the number allotted, but only for one of such numbers, or the larger of them if they are unequal (*u*).

Duke's case.

In *Duke's case* (*x*) there were two classes of shares, A. shares and B. shares. Both classes were of the same nominal amount, but the B. shares were preference shares. A person subscribed the memorandum for 50 B. shares; but he applied for and had allotted to him 25 A. shares and 25 B. shares instead of 50 B. shares. It was sought to place him on the list in respect of 25 A. shares and 50 B. shares, but it was held that this being contrary to the intention of all parties, and the act only requiring the memorandum to state the number of shares applied for, he was only liable to be a contributory in respect of 25 A. shares and 25 B. shares.

Shares subscribed for when to be treated as paid up.

The shares which a subscriber to the memorandum agrees to take are *primâ facie* shares not paid up (*y*); and the acquisition by him of fully paid-up shares to which some one else was entitled will not relieve him from his liability to be a contributory in respect of the shares for which he subscribed the memorandum of association (*z*). Before the passing of the Companies act, 1867 (30 & 31 Vict. c. 131, § 25, already noticed), it had been decided that if the memorandum or articles of association showed that the shares subscribed for were shares fully paid up, and the subscriber had given value to the company for them, he would not be a contributory in respect of any other shares (*a*); and that, if the articles of association stated that paid-up shares were to be issued to a subscriber of the memorandum, the shares for which he subscribed were *primâ facie* the same as those which he was

(*u*) *Gilman's case*, 31 Ch. D. 420; *Elliott's case*, W. N. 1866, p. 342.

(*x*) 1 Ch. D. 620. See, also, *Maynard's case*, 9 Ch. 60.

(*y*) *Maynard's case*, 9 Ch. 60; *Hay's case*, 10 Ch. 593, where the shares were paid for out of the company's money. See, also, the cases collected in Table II., *ante*, p. 796, and the

cases in the next four notes.

(*z*) See *Migotti's case*, 4 Eq. 238; *Forbes and Judd's case*, 5 Ch. 270; *Dent's case*, 15 Eq. 407, and 8 Ch. 768.

(*a*) *Baglan Hall Colliery Co.*, 5 Ch. 346; *Baron de Beville's case*, 7 Eq. 11. See note (*c*), *infra*.

entitled to receive under the articles of association; or in other words, shares paid in full (*b*). However, notwithstanding these decisions, it was held in *Dent's case* (*c*), that a person who subscribed the memorandum of association was a contributory and liable to calls, although the articles of association declared that all the shares subscribed for were to be allotted as fully paid up, and although the company was bound by agreement and by its articles to allot fully paid-up shares to a third person, or his nominees, of whom the subscriber was one. It is extremely difficult to reconcile this decision with the case of the *Baglan Hall Colliery Co.* and others of that class; and it may be safely assumed that they will not be extended even if they should be ever followed again.

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Dent's case.

With respect to companies formed since 1867, it has been held by the Court of Appeal, in *Anderson's case* (*d*), that shares for which a person signs the memorandum of association must be treated as paid up if there is a *bonâ fide* consideration for them, and if an agreement that they are to be treated as paid up is duly registered pursuant to 30 & 31 Vict. c. 131, § 25, at the same time as the memorandum itself. Such an agreement was held not to be invalid on the ground that it altered or was inconsistent with the memorandum of association, which was the view adopted in the court below.

Anderson's case.

8. *Holders of scrip.*

With respect to scrip companies, *i.e.*, companies the shares in which pass by the delivery of the scrip certificate, he who when the company is ordered to be wound up, is the *bonâ fide* holder of a certificate, and is *bonâ fide* entitled to a share as such holder, is a contributory in respect of such share (*e*).

Shares in scrip companies.

(*b*) *Jones' case*, 6 Ch. 48; *Pell's case*, 5 ib. 11; *Drummond's case*, 4 Ch. 772. See the next note.

(*c*) *Dent's case*, 15 Eq. 407, and 8 Ch. 768; *Fothergill's case*, 8 Ch. 270.

(*d*) 7 Ch. D. 75. The articles also stated that the shares were paid up; but this alone would not be sufficient, see *ante*, 784, note (*t*).

(*e*) See *Grisewood and Smith's case*, *De Pass's case*, 4 De G. & J. 544; *Finlay Hodgson's case*, 26 Beav. 182; *Barclay's case*, ib. 177; *Shewell's case*, 2 Ch. 387, and the cases in notes (*j*) and (*k*) *infra*.

Bk. IV. Chap. 1. But as will be seen hereafter, *malâ fide* transfers of the certi-
 Sect. 10.

ficates to persons who hold them for the transferors, will not enable the latter to escape from being made contributories (*f*). If, as sometimes happens, the scripholders are a distinct class from the shareholders, not enjoying the same rights, and not subject to the same liabilities, difficult questions arise as to the liability of the scripholders to be put on the list of contributories. A company of this sort has been ordered to be wound up on the petition of a transferee of scrip, but only on his admitting himself to be a contributory. The very fact, however, that this admission was required, shows that the Court was not satisfied that he would have been a contributory without it (*g*); and in other cases arising on the winding up of the same company it was held that even an allottee of scrip was not a shareholder (*h*).

As has been seen above (*i*), an agreement to take shares which, owing to the non-performance of conditions precedent or otherwise, cannot be specifically enforced, does not render the person who has agreed to take them a contributory. Allottees of scrip are frequently in this position; and when they are, they are not contributories. Thus, where scrip transferable to bearer is issued, and it is provided in substance that on registration of the scrip, shares will be exchanged for it, an allottee of scrip who transfers it without registering it (*j*), or whose scrip is forfeited for non-registration (*k*) (power to forfeit in such case being reserved), will not be a contributory, and it is very questionable whether he will if he holds the scrip and it remains unforfeited; unless, indeed, he is registered as a shareholder, and he allows himself so to continue.

Under the Companies act, 1862, shares transferable to

(*f*) *Lund's case*, 27 Beav. 465; *Hyam's case*, 1 De G. F. & J. 75; *Costello's case*, 2 ib. 302. Compare *De Pass's case*, 4 De G. & J. 544. These will be noticed hereafter.

(*g*) *Littlehampton Steam Ship Co.*, 2 De G. J. & Sm. 521.

(*h*) *Ormerod's case*, 5 Eq. 110. Compare *Gregg's case*, 15 W. R. 82, where the allottee was registered as

a member, and was held to be a contributory. See, also, *Weston's case*, 5 Ch. 614, where the son had caused the shares to be registered, and the father was put on the list.

(*i*) *Ante*, p. 778 *et seq.*

(*j*) *Eustace v. Dublin Trunk Rail. Co.*, 6 Eq. 182.

(*k*) *Ex parte Collum*, 9 Eq. 236; *Kelk's case*, ib. 107.

bearer, and not paid up in full, are illegal (*l*); the question who ought to be a contributory in respect of such a share in a company formed and registered under the act, is by no means free from difficulty, and has not been decided. In such a case the only contributories appear to be the subscribers to the memorandum of association (*m*), and other duly constituted shareholders, if any, although they may have parted with their scrip (*n*).

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9. *Trustees and Cestuis que trustent.*

A trustee who is a shareholder is, like any other shareholder, liable to be made a contributory, and he must look for his indemnity to his *cestui que trust*. The trustee, as between himself and the other shareholders, is bound to contribute with them to the payment of the company's debts; and he therefore, is in ordinary cases the person to be on the list. There are numerous cases to this effect in the books. The matter was considered and settled by the House of Lords in several cases of great hardship arising on the failure of the *City of Glasgow Bank*; there some of the persons held liable were described as trustees in the register of shareholders, but this circumstance was of no avail (*o*). Even if the trustee has not complied with all the formalities which ought to have been complied with according to the company's articles of association or deed of settlement, yet if the shares have been assigned

Trustees contributories.

City of Glasgow Bank Cases.

(*l*) This has never been actually decided; but see *General Co. for Promotion of Land Credit*, 5 Ch. 363, and see 30 & 31 Vict. c. 131, § 27, *et seq.*

(*m*) But see the cases in note (*e*), *ante*.

(*n*) *McEuen v. West Lon. Wharves Co.*, 6 Ch. 655.

(*o*) *Muir v. City of Glasgow Bank*, 4 App. Ca. 337, and other cases, *ib.*

547; *Cunninghame v. City of Glasgow Bank*, *ib.* 607; *Cree v. Somervail*, *ib.* 648; *Lumsden v. Buchanan*, 4 Macqu. 950. Their liability is joint and several, *Gillespie v. City of Glasgow Bank*, 4 App. Ca. 632. See, also, *Davidson's case*, 3 De G. & Sm. 21; *Ex parte Jones*, 27 L. J. Ch. 666, and *Barrett's case*, 4 De G. J. & Sm. 416.

Bk. IV. Chap. 1. to him and he has accepted them he will be a contributory in
Sect. 10. respect of them (y).

Cestui que trust
not a contribu-
tory.

Bugg's case.

The *cestui que trust* on the other hand is not liable to be put on the list. The leading case on this head is *Bugg's case* (z); there a person *bonâ fide* bought shares in the name of his brother, in order that it might not be known that he was himself connected with the company: there was evidence to show that the trustee was unable to meet the calls upon him, but the *cestui que trust* was held not a contributory. Moreover, subject to the observations which will be made hereafter on *malâ fide* transfers (a), it is immaterial whether the trustees acquire the shares by allotment, as in *Bugg's case*, or by transfer (b); and the fact that the object of the *cestui que trust* was to avoid liability will not make him a contributory (c).

Transfers into
persons' names
without their
authority.

But although the general rule is that the trustee and not the *cestui que trust* is a contributory, still, a person in whose name shares have been placed without his knowledge or consent, and who has not himself accepted them or ratified what has been done (d), cannot be made a contributory in respect of them (e).

Dishonest
trusts.

Cox's case.

Again, the rule that the trustee, and not the *cestui qui trust*, is a contributory, will not be adhered to where a departure from it is required in order to defeat fraud. In a case where a promoter of a company took a number of shares, and placed them in the names of various persons in order to swell the

(y) *Hoare's case*, 2 J. & H. 229; *Ex parte Drummond*, 2 Giff. 189. Compare *Ex parte Scully*, 6 Ir. Ch. 72; and *Ex parte Hall*, 1 Mac. & G. 307, reversing 3 De G. & Sm. 80. Observe that in this case non-liability to creditors was relied on.

(z) 2 Dr. & Sm. 452. See, also, *Fenwick's case*, 1 De G. & S. 557; *Newry and Enniskillen Co. v. Moss*, 14 Beav. 64; *Wilson v. Keating*, 27 Beav. 121, and 4 De G. & J. 588.

(a) See *infra*, class B.

(b) *King's case*, 6 Ch. 196; *Mit-*

chell's case, 9 Eq. 363.

(c) *Williams' case*, 1 Ch. D. 576; and the cases in the last note.

(d) A ratification of a transfer previously made without authority is sufficient. *Ker's case*, 4 App. Ca. 549, 598. Compare *Bell's case*, 4 App. Ca. 547 (*Janet Hill's case*).

(e) *Pim's case*, 3 De G. & S. 11, and 1 Mac. & G. 291; *Henessey's Ex. case*, 3 De G. & S. 191, and 2 Mac. & G. 201, in both of which the evidence of acceptance was insufficient.

apparent number of shareholders, and so to deceive the public, he was put on the list in respect of all such shares; he was in fact, treated as holding the shares in various names which he had chosen to assume for purposes of his own (*f*). Whether his nominees were also liable to be put on the list was not decided, but was expressly left open for determination (*g*). So where a father bought shares from a company in the name of a son, who was under age, the father was placed on the list, the son's name being treated as his (*h*).

So where a person procured a married woman to apply for shares for him, and she did so, and shares were allotted to her, it was held that he was a contributory: her name being treated as his own disguised (*i*).

Upon the same principle, viz., in order to defeat fraud, if a person transfers his shares to a nominee of his own, in order to put the nominee forward in case of reverse, but at the same time to retain for himself whatever advantages may accrue from the shares, the real owner will be treated as himself holding the shares, and will be placed on the list accordingly (*k*). In all these cases the dishonest purpose of the trust prevents its recognition for the purpose for which it was created.

But, as already seen, a purchase of shares in the name of a person to avoid liability does not entitle the company to put the purchaser on the list, if the transaction is a real transaction (*l*).

Further, in companies, the shares of which are transferable by delivery of certificates, the person who may happen to hold the certificates for another when the company is ordered to be

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Name of trustee
treated as name
of *cestui que*
trust.

Malâ fide
transfers.

Name used to
avoid liability.

Holders of
shares passing
by delivery.

(*f*) *Cox's case*, 4 De G. J. & Sm. 53, on appeal from the Stannaries. Compare *King's case*, 6 Ch. 196.

(*g*) See, as to this, *Barrett's case*, 4 De G. J. & Sm. 416, and *Davidson's case*, 3 De G. & Sm. 21.

(*h*) *Weston's case*, 5 Ch. 614; *Richardson's case*, 19 Eq. 588. Compare *Ex parte Scully*, 6 Ir. Ch.

72.

(*i*) *Pugh and Sharman's case*, 13 Eq. 566. Compare *London, Bombay and Mediterranean Bank*, 18 Ch. D. 581, where there was no fraud.

(*k*) *Chinnock's case*, Johns. 714, and others of that class noticed *infra*, under class B., p. 826. Compare *Williams' case*, 1 Ch. D. 576.

(*l*) *Ante*, p. 802.

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Finlay's case.

Trustees for
company.

wound up, is not necessarily the proper person to be on the list of contributories. Whether he is, or is not, depends upon whether he held them as a principal and legal owner, or simply as the agent of the person to whom they belonged. This is shown by *Finlay's case (m)*, which arose in winding up a Scrip company. In this case Messrs. Finlay & Co., who were merchants and bankers, were the allottees and holders of 1455 shares. Of these sixty were their own, and the rest belonged to their customers. Messrs. Finlay & Co., however, received all dividends and paid all calls on all the shares, and they did so in their own names, without making any distinction between the shares which belonged to themselves and those which did not. One at least of the directors of the company knew that Messrs. Finlay & Co. held shares as agents merely. It was decided that Messrs. Finlay & Co. were contributories only in respect of the sixty shares which were their own. The shares in this case were transferable by delivery, there was no rule of the company to the effect that trusts should be ignored, and there was, therefore, no reason why the *cestui que trustent* should not be treated as the holders of the shares. It may however be doubted, whether it therefore followed that the agents could not have been treated as the holders; for their principals were undisclosed.

A person who holds shares in a company as a trustee for that company, is obviously entitled to be indemnified by the company against all losses (*n*), unless the transaction in respect of which he holds the shares is *ultra vires*, or fraudulent, and not binding on the shareholders (*o*). It follows from this, that where the transaction is valid, the trustee ought not to be on

(*m*) *Finlay, Hodgson's case*, 26 Beav. 182, and 27 L. J. Ch. 664. See, also, *Shewell's case*, 2 Ch. 357. The company had no deed of settlement, and was not incorporated. It had a prospectus, which set out the constitution and regulations of the company, so far as it had any. The scrip certificates declared that the holder was (or on making cer-

tain payments would be) entitled to a certain number of shares in the company. The certificates passed by delivery, and the holder was treated as the owner. See *ante*, p. 799 *et seq.*, as to scrip.

(*n*) *James v. May*, L. R. 6 H. L. 328; *Ex parte Oriental Commercial Bank*, 3 Ch. 791.

(*o*) In a case of fraud the trustee

the list of contributories except in respect of his liability to creditors; and under the older winding-up acts he would not have been a contributory at all (*p*). But as regards companies registered under the Companies act, 1862, members are contributories although they may be trustees for the company; their right to indemnity can only be taken into account when the creditors have been paid, and the rights of the contributories *inter se* come to be adjusted. This point was decided by the V.-C. Wood, in *Chapman and Barker's case* (*q*), where a shareholder in a company borrowed money of it, and transferred his shares to a trustee for the company as a security for the loan. The trustee was put on the list.

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Chapman and
Barker's case.

A trustee of shares is entitled to be indemnified by his *cestui que trust* against all calls paid and to be paid, and all expenses properly incurred by the trustee in the execution of his trust (*r*), and he may obtain a declaration of his right to an indemnity before any call upon him has been made (*s*). It not unfrequently happens that the trustee is insolvent, while the *cestui que trust* is not. Even under these circumstances the *cestui que trust* cannot be put on the list of contributories (*t*). Whether in such a case the company can compel the trustee

Trustee's right
of indemnity.

could be fixed with the shares, whilst his right to indemnity might be repudiated. See *Ex parte Daniell*, 1 De G. & J. 372, and 23 Beav. 568; *Nickoll's case*, 24 Beav. 639; *Davidson's case*, 3 De G. & Sm. 21. Compare *Saunders' case*, 2 De G. J. & Sm. 101.

(*p*) *Saunders' case*, 2 De G. J. & Sm. 101. Observe that there the creditors could not have succeeded at law against Saunders.

(*q*) 3 Eq. 361. See, also, *Cree v. Somervail*, 4 App. Ca. 648, and *Munster Bank, Limited*, 17 L. R., Ir. 341; *Ennis and West Clare Railway Co.*, 3 L. R., Ir. 187. The Court will not rectify the register and treat the trustee as not a member after the company has

gone into liquidation. See *Cree v. Somervail*, *ubi sup.* Quere if it will do so before. See *Beattie v. Lord Ebury*, L. R. 7 H. L. 102. In *Gray's case*, 1 Ch. D. 664, where the trustee was never registered as a holder, and it was agreed that he should not be, he was held not a contributory.

(*r*) See *Cruse v. Paine*, 6 Eq. 641, and 4 Ch. 441; *Butler v. Cumpston* 7 Eq. 16; *James v. May*, L. R. 6 H. L. 328, and see *Hughes-Hallett v. Indian Mammoth Gold Mines Co.*, 22 Ch. D. 561.

(*s*) *Hobbs v. Wayet*, 36 Ch. D. 256, and compare last case.

(*t*) *Bugg's case*, *ante*, p. 803; *Williams' case*, 1 Ch. D. 576.

Bk. IV. Chap. 1. to enforce his right of indemnity, and so reach the *cestui que*
 Sect. 10. *trust*, has not been decided (*u*).

Resignation of
 trustee.

A trustee who is a shareholder does not terminate his liability to the company by a mere resignation of his office, in order to do this he must transfer his shares or in some other way cease to be a shareholder (*v*).

10. *Mortgages.*

Mortgages.

Price and
 Brown's case.

The principle on which a trustee is made a contributory applies to mortgages. *Price and Brown's case* (*x*) shows that a person who holds shares only as a security for a debt, and is known to do so by the directors of the company, is as much a contributory as if he were the absolute owner of such shares. But an equitable mortgagee of shares is in the same position as a *cestui que trust*, and not a contributory (*y*). If a company borrows money on the security of its own shares, which are transferred to the mortgagee, it has been held that the mortgagee will not be a contributory and that the Court will rectify the register so as to give effect to the real intention of the parties (*z*). But this requires reconsideration, and seems inconsistent with the cases that show that persons registered as holders of shares are contributories, although they hold them in trust for the company (*a*).

(*u*) See *Hemming v. Maddick*, 9 Eq. 175, affirmed 7 Ch. 395; *Massey v. Allen*, 9 Ch. D. 164, and *British Nation Life Ass. Assoc.*, 8 Ch. D. at p. 708. If the trustee were made bankrupt, his trustee in bankruptcy could, it is conceived, enforce the right to indemnity; and what was recovered would be distributable like the rest of the bankrupt's estate.

(*v*) *Alexander Mitchell's case*, 4 App. Ca. 548 & 567; *Rutherford's case*, ib. 548 & 581; *Buchan's case*, ib. 549 & 583; *Ker's case*, ib. 549 & 598.

(*x*) 3 De G. & Sm. 146; *Weikersheim's case*, 8 Ch. 831; *Royal Bank of India's case*, 7 Eq. 91, and 4 Ch. 252; *Addison's case*, 5 Ch. 294. As to the mortgagee's right to indemnity from his mortgagor, see *Phené v. Gillan*, 5 Ha. 1.

(*y*) *Sichell's case*, 3 Ch. 119, where, however, the company had refused to register the mortgagee. See, also, *Gray's case*, 1 Ch. D. 664.

(*z*) *South-Eastern Rail. Co.'s claim*, 14 Eq. 10; *Beattie v. Lord Ebury*, L. R. 7 H. L. 102.

(*a*) *Chapman and Barker's case*, 3 Eq. 361, *ante*, p. 805.

11. *Persons under disability.**a) Companies holding shares in other companies.*

A company holding shares in another company is a contributory in respect of such shares, unless to hold shares is beyond the power of the shareholding company (*b*). It is not necessary that the transfer to the holding company should be executed by it under its corporate seal (*c*). Partners who hold shares in the name of their firm are contributories in respect of them (*d*).

Companies
holding shares.*b) Married women and their husbands (e).*

Before the Married women's property act, 1882, it was decided that if a company chose to deal with a married woman as a principal, and not as the agent of her husband, and she being known to the company to be a married woman, was allowed to become a shareholder in her own right; and if further, by the rules of the company, her husband was not a shareholder in respect of her shares, and she had no separate estate, then, on the winding up of the company, neither she nor her husband was a contributory. Not the wife, because she was not capable of binding herself by contract; not the husband, because, *ex hypothesi*, he had nothing to do with the shares or the company, and the latter had not dealt with his wife as his agent (*f*). In *Angas's case* (*g*), a lady known to a company to be married, bought shares, and was accepted as a shareholder in respect of them, without any participation on the part of her husband. He received the dividends, but always as her agent; he attended meetings, and once held a proxy for another shareholder; his name had been placed on the list of shareholders, but this had been done without the knowledge either of himself or his wife. He was held not to

Married women
shareholders.

Angas's case

(*b*) As in *Ex parte British Nation Life Ass. Assoc.*, 8 Ch. D. 679, and see *Ex parte Contract Corporation*, 3 Ch. 105; *Royal Bank of India's case*, 4 ib. 252, and 7 Eq. 91.

(*e*) *Ib.*

(*d*) *Weikersheim's case*, 8 Ch. 831.

(*e*) See *ante*, p. 41.

(*f*) *Ex parte Rhodes*, 7 W. R. 510.

(*g*) 1 De G. & S. 560. Compare *Luard's case*, 1 De G. F. & J. 533.

Bk. IV. Chap. 1. be a contributory; for, by the rules of the company, he was
Sect. 10. not a shareholder in respect of her shares.

London,
Bombay, and
Mediterranean
Bank.

Again, in the *London, Bombay, and Mediterranean Bank* (i), a merchant applied for shares in a limited company in the name of his wife: and shares were allotted to her accordingly. The husband subscribed the memorandum and articles of association for his wife, and paid the deposit money and all calls made on the shares for her, and subsequently transferred some of the shares, executing the transfers in her name or on her behalf. The wife had no knowledge of any of these transactions. The wife's name as "M., the wife of S." was on the register. She had no separate estate, and the liquidator sought to put the executors of the husband, who was then dead, on the list of contributories, on the ground that the husband was the true owner of the shares, and that the wife's name had only been used to enable him to escape liability. V.-C. Hall, however, held that the liquidator was not entitled to do this, as the company had accepted the wife as a shareholder without any misrepresentation or concealment on the part of the husband.

Female share-
holder marrying.

The case of a woman holding shares and marrying is specially provided for by the Companies act, 1862. In such a case her husband is liable during the continuance of the marriage to contribute what she would have been liable to contribute if she had not married (k). She also is liable in respect of her separate estate, if any, under § 13 of the Married women's property act, 1882 (l). Further, in the event of her surviving her husband, she will be liable in respect of such shares (m). Both she and her husband ought therefore to be on the list. His liability does not appear to be limited in this case to the amount of the property he acquired from his wife (n); but as

(i) 18 Ch. D. 581, and compare *Pugh & Sharman's case*, 13 Eq. 566.

(k) Compare §§ 78, and 38 & 74, and see *Ex parte Hatcher*, 12 Ch. D. 284, decided on this act and the Married women's property act, 1874; *Bell's case*, 4 App. Ca. 550.

(l) 45 & 46 Vict. c. 75, § 13.

(m) *Ibid.*, and see under the old law *Burlinton's case*, 3 De G. & S. 18; *Sadler's case*, ib. 36; *White's case*, ib. 157; *Kluhl's case*, 3 De G. & S. 210. See, also, *Luard's case*, 1 De G. F. & J. 533.

(n) See note (k), and 45 & 46 Vict. c. 75, § 14.

between him and her he is entitled to be indemnified out of her separate estate (*o*). Bk. IV. Chap. 1.
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By the Married women's property act, 1882, shares standing in the sole name of a married woman are deemed to belong to her for her separate use unless the contrary can be proved (*p*), and her husband ought not now to be put on the list (*q*) in respect of them unless his wife held the shares before her marriage (*r*). She will be liable to be on the list in respect of her separate estate (*s*), but not further : so that if she has no separate estate except the shares in question and the company is not solvent no one will be liable to contribute in respect of her shares. Effect of Married women's property act, 1882.

If shares belonging to a married woman having separate estate are held by trustees for her, they will be the contributors, and will be entitled to indemnity out of her separate estate (*t*).

If the married woman is herself a trustee she and her husband ought apparently to be both on the list (*u*).

c) Infants.

The writer is not aware of any case in which an infant has been put on the list of contributors. Upon principle, however, there does not appear to be any reason why he should not, if it be for his benefit ; and this, if there are surplus assets, may be the case (*x*). Except, however, where it is for an infant's benefit to accept shares, and with them the burdens attaching to them, it is not easy to see how an infant can be held to be a contributory. In the ordinary case of an insolvent com-

Infant shareholders.

(*o*) See note (*l*).

(*p*) 45 & 46 Vict. c. 75, §§ 6 & 7, *ante*, p. 42.

(*q*) See *ib.* §§ 6 and 13. See, as to the old law, *Luard's case*, 1 De G. F. & J. 533.

(*r*) See *Ex parte Hatcher*, 12 Ch. D. 284, noticed above.

(*s*) So under the old law, see *Matthewman's case*, 3 Eq. 781 ; *Luard's case*, 1 De G. F. & J. 533.

(*t*) *Butler v. Cumpston*, 7 Eq. 16, and see *ante*, p. 801 *et seq.*, as to

trustees.

(*u*) See *Bell's case*, 4 App. Ca. 547, the order made as to Janet Hill, p. 562.

(*x*) See *ante*, p. 39. The 39th section of the act of 1848 (11 & 12 Vict. c. 45, § 39), which enacted that if any contributory were a minor, he might attend the proceedings in the winding up by his father or guardian, evidently contemplated the possibility of an infant's being a contributory.

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pany, the infant's shares would be repudiated (*y*). The principle acted on in *Oakes v. Turquand* (*z*), has never been applied to infants. If an infant fraudulently represented himself as of age, he might perhaps be fixed (*a*); but nothing short of this can, it is conceived, deprive him of his right of repudiation. Even if he signs the memorandum of association, he will, it is submitted, not be bound (*b*).

If an infant shareholder does not repudiate his shares either whilst he is an infant or within a reasonable time after he attains twenty-one, he will be a contributory (*c*); *à fortiori* will he be so if, after attaining twenty-one, he does anything inconsistent with his right of repudiation, *e.g.*, acts as a shareholder, receives a dividend, or pays a call (*d*). But if he is an infant when the winding up commences, or if he is not then precluded from repudiating his shares, he does not lose that right by mere delay. Thus in *Shrapnell's case* (*e*), an infant who had applied and paid for shares, and had paid calls, and received dividends, attained his majority one week before the company stopped payment; three months afterwards he was settled on the list of contributories after due notice, but he paid no attention to the notice, and allowed the time for varying the chief clerk's certificate to expire. A call was afterwards made upon him as a contributory, and he then took out a summons for leave to apply to vary the chief clerk's certificate putting him on the list. This leave was granted on payment by the infant of the costs of the application. He then applied to vary the certificate, and to be removed from the list of contributories, and he was struck off. He had done nothing after attaining twenty-one which could be regarded as an election to take the shares, and his repudiation was held not to be too late (*f*). It

Shrapnell's
case.

(*y*) See *Reid's case*, 24 Beav. 318.

(*z*) *Ante*, pp. 753 and 776.

(*a*) See *Wright v. Snowe*, 2 De G. & S. 321.

(*b*) See §§ 11 & 18 of the Companies act, 1862. § 18 renders the infant a member, but does not exclude his right to repudiate.

(*c*) *Ebbett's case*, 5 Ch. 302. See *ante*, p. 39, and the next note. See the curious case of a female infant

trustee marrying after she attained 21, *Bell's case*, 4 App. Ca. 547; *Janet Hill's case*, p. 562.

(*d*) *Lumsden's case*, 4 Ch. 31; *Mitchell's case*, 9 Eq. 363.

(*e*) *Shrapnell's case*, *Re Barnard's Banking Co.*, before Lord Romilly, at Chambers, 24 April, 1867.

(*f*) See, also, *Mann's case*, 3 Ch. 459, note; *Capper's case*, *ib.* 458; *Hurt's case*, 6 Eq. 512; *Curtis's case*,

has been decided in other cases that a person who was an infant when the winding up commenced cannot on his attaining twenty-one elect to hold shares transferred to him, and thereby defeat the right of the company to reject him, and to have his transferor put on the list in his place (*g*). Bk. IV. Chap. 1.
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The right of a company to reject an infant transferee, and to put his transferor on the list, is clearly established (*h*); but this right may be lost by the company's own laches prior to the winding up (*i*); and if an infant transferee has himself transferred his shares, and his transferee has been accepted as a shareholder, the transfer to the infant cannot be treated as a nullity (*k*). Right of the
company to
reject an infant.

Where shares are taken direct from the company in the names of infants, the persons who really take them, and not the infants, will be contributories (*l*); unless the infant and the company are precluded from repudiating them. Even in the case of a transfer to an infant, if his name is a mere alias for that of some other person, such person may be put on the list, and the company although entitled to fall back on the transferor is not bound to do so (*m*).

d) Lunatics.

The writer is not aware of any decision on lunatic contributories. The principles applicable to them have been already alluded to (see *ante*, p. 40).

ib. 458; *Weston's case*, 5 Ch. 614; *Baker's case*, 7 Ch. 115, where there was some evidence of adoption.

(*g*) *Symons' case*, 5 Ch. 298; *Castello's case*, 8 Eq. 504.

(*h*) See the last two notes.

(*i*) *Parson's case*, 8 Eq. 656; *Maxwell's case*, 24 Beav. 321.

(*k*) *Gooch's case*, 8 Ch. 266, reversing S. C. 14 Eq. 454.

(*l*) See *Weston's case*, 5 Ch. 614; and compare *London, Bombay, and Mediterranean Bank*, 18 Ch. D. 581; *Pugh and Sharman's case*, 13 Eq. 566, and cases *ante*, p. 803.

(*m*) *Richardson's case*, 19 Eq. 588.

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12. *Representatives.*

a) Executors, heirs, and devisees.

If shares are registered in the names of more persons than one, and one dies, the survivors and not his executors are contributories in respect of them (*n*).

Executors of
deceased share-
holders.

Although the executors of a deceased shareholder may not be themselves shareholders, they will nevertheless be liable to be placed as executors on the list of contributories in respect of the shares held by their testator (*o*). Moreover, an executor is liable to be made a contributory as executor, if his testator was virtually, although, owing to the non-compliance with certain forms, not perhaps strictly, a shareholder (*p*). So, although the shares were such as the directors had no right to create (*q*), or, although more than three years have elapsed since the testator's death, and the company is one in which shareholders are not liable to creditors for more than three years after their retirement (*r*); or, although the debts of the company have been incurred since the testator's decease (*s*); or, although the executor swears he has no assets, and has wound up the estate (*t*). Even if a share has been bequeathed and the executor has assented to the bequest, he will still be a contributory in his character of executor, if the legatee has not been accepted by the company as a shareholder in respect of the share in question (*u*). If the executor is himself legatee, he

(*n*) *Hill's case*, 20 Eq. 585. The executors might be put on as representing a past member.

(*o*) 25 & 26 Vict. c. 89, §§ 76, 99, 105. *Baird's case*, 5 Ch. 725; *Thomas's case*, 1 De G. & S. 579.

(*p*) *Straffon's Executors' case*, 1 De G. M. & G. 576; *Ex parte Dixon's Executors*, 1 Dr. & Sm. 225.

(*q*) *Robinson's Executors' case*, 2 De G. M. & G. 517, and 13 Jur. 438, where a deceased director had taken shares which the company might have repudiated. Compare *ante*, 774.

(*r*) *Gouthwaite's case*, 3 Mac. & G.

187. See, also, *Powis v. Butler*, 3 C. B. N. S. 645, and 4 ib., 469.

(*s*) *Baird's case*, 5 Ch. 725; *Ex parte Blakeley's Executors*, 3 Mac. & G. 726, and 13 Beav. 133; *Hamer's Devises' case*, 2 De G. M. & G. 366.

(*t*) *Thomas's case*, 1 De G. & S. 579; *Crosfield's case*, 2 De G. M. & G. 128. See *Henderson v. Gilchrist*, 17 Jur. 570, *ante*, p. 537.

(*u*) *Keene's Executors' case*, 3 De G. M. & G. 272; *Crosfield's case*, 2 ib. 128, and 4 De G. & S. 338; *Hamer's Devises' case*, 2 De G. M. & G. 366, and 3 De G. & S. 279.

will be a contributory as executor only until he has himself been accepted as a shareholder (*v*). Bk. IV. Chap. 1.
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But if a share is bequeathed and the executor has assented to, and the legatee has accepted the bequest, and the company has accepted the legatee as a shareholder in respect of such share, then, on the subsequent winding up of the company, the legatee and not the executor is the person to be made contributory (*x*); and if an executor applies to the directors to know what shares his testator had in the company, and is told none or a certain number only, and the executor acts upon the faith of this statement and winds up the estate of the deceased, transferring those shares, if any, which, according to the statement of the directors, belonged to him, and the company is afterwards wound up, the executor cannot be made a contributory; although his testator may in fact have had shares in the company other than those mentioned by the directors (*y*). When executor
not liable.

Effect of wind-
ing up estate
of deceased on
the faith of
statements made
by the company.

The official liquidator is entitled to bring an action for the administration of the estate of a deceased shareholder, and to prove against the estate for all calls made and to be made, and he is entitled to have a fund set apart to meet such claim (*z*). Rights against
estate.

If a deceased shareholder's personal estate is insufficient to pay his debts, his heir or the devisees of his real estate may be made contributories (*a*). They may be added to the list when it becomes necessary to have recourse to them (*b*). Heirs and
devisees of
realty.

After the shares of a deceased shareholder have been duly Effect of transfer
by executor.

(*v*) *Bulmer's case*, 33 Beav. 435.

(*x*) See the cases cited in the last two notes, and *post*, under the head Retired shareholders. *Crosfield's case*, 2 De G. M. & G. 128, and 4 De G. & S. 338, may be referred to with reference to the acceptance of one of several executors as a shareholder. See, too, *Pim's case*, 3 De G. & S. 11.

(*y*) *Meux's Executors' case*, 4 De G. & S. 331, and 2 De G. M. & G. 522.

(*z*) 25 & 26 Vict. c. 89, §§ 76 and 99, cl. 7, *Re Muggerridge*, 10 Eq. 443; *Buck v. Robson*, 10 Eq. 629;

Turquand v. Kirby, 4 Eq. 123.

Executors of deceased shareholders in going companies cannot safely pay legacies without providing for future calls, see *Taylor v. Taylor*, 10 Eq. 477.

(*a*) 25 & 26 Vict. c. 89, §§ 76, 99, 105. *Hammer's Devisees' case*, 2 De G. M. & G. 366, reversing S. C., 3 De G. & S. 279. See *Broughton v. Hutt*, 3 De G. & J. 501, as to setting aside deeds executed by heirs or devisees on the assumption that the shares were real estate.

(*b*) 25 & 26 Vict. c. 89, § 99.

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transferred by his executors, they cease to be liable to be made contributories in respect thereof. This will be seen hereafter, when the position of persons who have ceased to have any connection with the company is being considered. It may however here be observed that, unless the constitution of a company warrants the surrender of shares, executors who surrender the shares of their testator do not thereby get rid of their liability to be made contributories (*c*).

Executors becoming shareholders.

If executors themselves become shareholders, they will be contributories, without reference to the character in which they became entitled to the shares taken by them. Thus, where the directors of a company offered reserved shares to the shareholders and the executors of deceased shareholders in proportion to the amount of their original shares, and the executors of a late shareholder accepted some of such reserved shares, but accepted them only in their representative character, they were nevertheless put on the list of contributories in respect of these shares without any qualification (*d*).

Executors, however, do not render themselves personally liable as shareholders by keeping a testator's shares and receiving the dividends until the shares are sold (*e*); and even if the shares of the deceased are registered by the company in the names of the executors they will not be personally liable unless they authorised or ratified the registration (*f*).

(*c*) *Ex parte Richmond's Executors*, 13 Jur. 727.

(*d*) *Fearnside and Dean's case*, and *Dobson's case*, 1 Ch. 231. See, also, *Duff's Executors' case*, 32 Ch. D. 301; *Jackson v. Turquand*, L. R. 4 H. L. 305; *Spence's case*, 17 Beav. 203, where the executors had purchased shares. Compare *Pim's case*, 3 De G. & S. 11, where the acceptance by the executor was held not to bind him. In *Mallorie's case*, 2 Ch. 181, the applicant was not executor, but acted for him.

(*e*) See *Bulmer's case*, 33 Beav.

435, where the executor was legatee of the shares. See, also, *Armstrong's case*, 1 De G. & S. 565; *Gouthwaite's case*, 3 Mac. & G. 187, and 3 De G. & S. 258; *Doyle's case*, 2 Hall & T. 221; *Hamer's Devises' case*, 2 De G. M. & G. 366; *Crosfield's case*, ib. 128, and 4 De G. & S. 338. In *Pim's case*, 3 De G. & S. 11, the shares exchanged by the executor were in no sense his testator's. See the analogous case of trustee's in bankruptcy, noticed *infra*, note (*n*).

(*f*) *Buchan's case*, 4 App. Ca. 549, at p. 589.

*b) Trustees in bankruptcy.*Position of the
bankrupt.

A bankrupt member of a company being wound up under the Companies act, 1862, who has obtained his order of discharge under the Bankruptcy act, 1869, or under the Bankruptcy act, 1883, is not a contributory either as a present (*g*) or as a past member (*h*); nor was he under the older acts, unless he retained his shares and remained a member after his order of discharge, and the company was ordered to be wound up at some subsequent period, in which case his order of discharge did not protect him (*i*).

Position of the
trustee in bank-
ruptcy.

By the Companies act, 1862, the trustee of a bankrupt contributory represents him, and is "deemed to be" a contributory accordingly, and can be required to admit to proof against the bankrupt's estate what is due from him in respect of his liability to contribute (*k*); and not only calls already made, but the estimated value of those to be made, may be so proved (*l*). The expression "deemed to be" leaves it uncertain whether the trustee ought to be settled on the list of contributories or not; but it is clear that he cannot be made a contributory in any other than his representative character, unless he does something to render himself a shareholder (*m*). The payment of calls to preserve the shares from forfeiture, and the receipt of dividends paid in respect of the shares, does not render a trustee in bankruptcy liable to be made a contributory personally (*n*).

Disclaimer by
trustee.

If the company being wound up is insolvent and the bank-

(*g*) 25 & 26 Vict. c. 89, §§ 75 and 77. See *Ex parte Marshall*, 7 Ch. 324; *Ex parte Budden & Roberts*, 12 Ch. D. 288; *Mercantile Mutual Marine Ins. Assoc.*, 25 Ch. D. 415. A bankrupt contributory is a stranger to the company, *Cape Breton Co.*, 19 Ch. D. 77.

(*h*) *McEwen's case*, 6 Ch. 582.

(*i*) See *Hastie's case*, 4 Ch. 274, and 7 Eq. 3; *Martin's Patent Anchor Co. v. Morton*, L. R. 3 Q. B. 306; *Financial Corporation v. Lawrence*, L. R. 4 C. P. 731; *Ex parte Malone*,

Ir. Rep. 6 Eq. 272, and *ante*, p. 556.

(*k*) 25 & 26 Vict. c. 89, § 77.

(*l*) *Ib.*, § 75, and 46 & 47 Vict. c. 52, § 37; *Mercantile Mutual Marine Ins. Assoc.*, 25 Ch. D. 415.

(*m*) *Stone's case*, 3 De G. & S. 220.

(*n*) See, as to paying calls, *Stone's case*, 3 De G. & S. 220, and as to receiving dividends, *Armstrong's case*, 1 De G. & S. 565. See, too, *South Staffordshire Rail. Co. v. Burnside*, 5 Ex. 129. See the analogous case of executors, *ante*, note (*r*).

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rupt's shares are not fully paid up his trustee can disclaim them; and in that case the company can prove for damages against his estate (o).

Where a call is provable, an order under the Companies act, 1862, for its payment ought not to be made, even although the shares may be standing in the name of the bankrupt (p).

B.—CONTRIBUTORIES AS PAST MEMBERS.

General observations on past members.

Late share-
holders.

The liability of shareholders, and of persons who are bound to take shares, at the time of the commencement of the winding up having been now examined, it is necessary to advert to the position of persons who would have been contributories if they had not ceased to hold their shares before the time in question.

The liability of a retired member of a company to be placed on its list of contributories depends primarily on the effect of the retirement as between himself and the other members, and secondarily on its effect as between himself and the creditors of the company.

The extent to which a member of a company who leaves it gets rid, as between himself and the other members, of his obligations to contribute with them to the discharge of the debts and liabilities of the company depends theoretically on the constitution of each particular company. Practically, however, it will be found that, as a general rule (q), a member of a company, whose shares have been duly transferred, surrendered, or forfeited, is discharged, as between himself and the other members, from all liability as well in respect of past as of future transactions: the acceptance by the company of the transfer or surrender, or the declaration by the company of the

(o) 46 & 47 Vict. c. 52, § 55. See *ante*, p. 553. See under the act of 1869, *Ex parte Budden & Roberts*, 12 Ch. D. 288; *Hardy v. Fothergill*, 13 App. Ca. 351.

(p) *Mitchell's case*, 5 Ch. 400.

(q) There are exceptions, as in

Helby's case, 2 Eq. 167, and others of that class, noticed *infra*. By the Stannaries act, 1887, 50 & 51 Vict. c. 43, § 22, the relinquishment of a share in a mine subject to that act has no effect if the company goes into liquidation within six weeks.

forfeiture, being, generally speaking, equivalent to a release by the company of the member whose shares are thus dealt with, from all liability in respect of them. Where this is the case, he is not liable, on the subsequent winding up of the company, to be put on the list of contributories with the present members; and his liability to be put on the list at all can only arise from some necessity of having recourse to past members in order to pay the debts of the company or to adjust the rights of such members *inter se*.

Under the Winding-up acts of 1848 and 1849, the liability of a late shareholder to be made a contributory depended upon the simple question whether he had, as between himself and the company, got rid of the obligations which, by supposition, he was once under. If he had, he was not a contributory with the existing members, whatever his liability to creditors might have been; whilst if he had not, he was a contributory, although he might have been under no liability to the creditors at law (*r*). But there might be, and, in fact, there usually were, a considerable number of retired members who, although not liable to contribute with the existing shareholders, were, as between themselves, liable to contribute to the payment of those debts which were enforceable against them at law, and which the existing shareholders were unable to discharge. The question then arose whether these transferors ought not to be contributories, seeing that they might be ultimately called upon to defray debts of the company, although they were entitled to be indemnified against such debts by the existing shareholders. This question was formerly answered in the affirmative (*s*); but the later practice was not to make such persons contributories until it actually became necessary to do so, in order to prevent one or more of them from bearing more than his or their share of loss. In other words, retired shareholders were not placed on the list of contributories

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Under the Acts
of 1848 and
1849.

(*r*) See *Ex parte Gouthwaite*, 3 Mac. & G. 187; *Stirling's case*, 6 Ir. Ch. 180, and the cases in the next two notes.

(*s*) *Ex parte Morgan*, 1 Mac. & G. 225; *Hawthorn's case*, 1 De G. & S.

571, and on appeal, 1 Mac. & G. 49. The transfer took place within, and not (as stated in the marginal note in 1 De G. & S. 571) more than three years before the winding up of the company.

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Sect. 10. — simply because they might possibly be called upon to make good losses which, as between themselves and the existing shareholders, ought to be borne by the latter (*t*). Before the retired shareholders could be made contributories, it had to be shown that there was some necessity for putting them on the list for the purpose of equitably adjusting these claims against each other (*u*).

Under the Companies act, 1862. This practice is also followed in winding up companies under the Companies act, 1862 (*x*): and a person improperly put on the list as a present member will be struck off the list altogether, although he may possibly be put on again as a past member. Nor is it necessary when striking him off the list (*i.e.*, the list of present members), expressly to reserve, or to add without prejudice to, his liability to be put on the list as a past member. The removal from the list of a person sought to be put on as a present member is understood in practice to leave open for future decision the question whether he ought to be on the list as a past member (*y*).

In winding up companies under the Companies act, 1862, and in considering the liability of a person who was a shareholder before, but not at the time of the commencement of the winding up, to be put on the list of contributories, it is necessary to distinguish,—

1. Unregistered companies ;
2. Companies registered but not formed under the act ;
3. Companies formed as well as registered under the act.

1. Unregistered companies.

1. The liability of a past member of an unregistered company depends on § 200, which contains no statutory limit as to the time after which a past member ceases to be liable. His

(*t*) *Curcw's case*, 7 De G. M. & G. 43 ; *Sutton's case*, 3 De G. & S. 262 ; *Holme's case*, 4 ib. 312, and 2 De G. M. & G. 113 ; *Ex parte Stirling*, 6 Ir. Ch. Rep. 180.

(*u*) Compare the cases in the last two notes, and observe that in *Hawthorn's case*, the transferor was made a contributory at the instance of a person in the same position as himself.

(*x*) See § 170, now repealed by 44 & 45 Vict. c. 59. See, as to *Part's case*, 10 Eq. 622, *infra*, note (*z*).

(*y*) See *Wright's case*, 12 Eq. 331. See pp. 345–6, *per* L. J. Selwyn. Where, however, the register of members, as distinguished from the list of contributories, is rectified, it may be necessary to add, without prejudice, &c., see *Marshall v. Glamorgan Iron, &c., Co.*, 7 Eq. 129.

position, therefore, depends on his liability to existing creditors, and on the constitution of the company of which he was a member. It very rarely, however, happens that a past member can be put on the list by reason of any rights which the present members have as against him : and speaking generally no past member of an unregistered company is liable to be on the list at all, unless there are debts to which he was liable before he retired, and unless the present members are unable to pay such debts (*z*).

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With respect to cost-book mining companies the Stannaries act, 1869, renders past members not liable to be put on the list if they have ceased to be shareholders for two years or upwards before the mine has ceased to be worked, or before the date of the winding-up order (*a*).

Cost-book
mines.

2. The liability of a past member of a company registered, but not formed under the Companies act, 1862, depends on § 196, which renders § 38 applicable to the company from the time of its registration (*b*). But this is subject to the important qualification that the liabilities of members at the time of registration to their existing creditors are preserved (see §§ 195, 196, cl. 5, and § 197). Consequently, in dealing with companies of this description it is necessary to subdivide the past members into three classes, viz. :—

2. Companies
registered under
the Act of 1862,
but not formed
under it.

(*a*.) Those who ceased to be members before registration.

(*b*.) Those who ceased to be members afterwards, but more than a year before the commencement of the winding up.

(*c*.) Those who ceased to be members after registration, and less than a year before such commencement.

(*a*.) As regards the first of these classes it seems that they are not liable to be put on the list of contributories of the registered company, never having been members of it (*c*). But

Class (*a*).

(*z*) See *Part's case*, 10 Eq. 622. If, in this case, there were present members capable of paying the debts in respect of which Part was held liable, the decision was not conformable with the usual practice.

(*a*) 32 & 33 Vict. c. 19, § 25. See *Chynoweth's case*, 15 Ch. D. 13, and see *ante*, p. 816, note (*q*).

(*b*) *Ramsay's case*, 3 Ch. D. 388.

(*c*) See *Lanyon v. Smith*, 3 B. & Sm. 938; and *Kelk's case*, 9 Eq. 107.

Bk. IV. Chap. 1. if this technical difficulty is got rid of, by an order winding up
 Sect. 10. — the unregistered company, as well as the registered company, the liability of the past members now under consideration will be the same as that of past members in unregistered companies.

Class (b). (b.) As regards the second of the above classes, § 38 frees them from all liability in respect of debts contracted by the company after its registration ; but §§ 195 to 197 leave those persons who were members before registration exposed to liability in respect of such debts as existed at the time of registration, and at the commencement of the winding up, and as the present members are unable to pay. In respect, therefore, of such debts, if any, such past members of this class may be liable to be put on the list.

Class (c). (c.) The third of the above classes may include persons who became members before the registration of the company, as well as those who became members since. The position of those who became members since the registration of the company depends entirely on § 38, and is the same as that of past members in companies formed and registered under the act (see § 196) (d). The position of those who became members before the registration of the company is more complicated : for first they are by § 38, under the same liability as those last spoken of ; and, secondly, they are by §§ 195, 196, and 197, liable to be made contributories in respect of debts existing before registration, and still unpaid ; and whilst their liability under § 38 may be limited, their liability under § 196 may be unlimited.

3. Companies formed and registered under the Act.

3. The position of retired members of companies formed and registered under the Companies act, 1862, is defined by § 38. Persons who have ceased to be members twelve months before the commencement of the winding up are not liable to be put on the list at all (e) ; whilst persons who have ceased to be members less than twelve months before that time are liable to be put on the list, but only as past members ; and no person is under any liability as a past member unless two things can be proved, viz. :—

1. It must be shown that there is some undischarged debt

(d) *Ramsay's case*, 3 Ch. D. 388. (e) See *Gooch's case*, W. N. 1872, p. 227.

or liability of the company contracted before the person in question retired (*f*). Bk. IV, Chap. 1.
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2. The Court must be satisfied that the existing members are unable to satisfy their contributions (*g*).

Hence, as under the older winding-up acts, it is not the practice to put any person on the list of contributories as a past member until the inability of the present members to discharge their liabilities is apparent (*h*). But it is not necessary to obtain from them all that they can pay before settling a past member on the list (*i*). Contributories as
past members.

It is now settled that the liability of past members is only to pay those debts contracted before they ceased to be members, which the present shareholders are unable to pay. The past members get the benefit of all dividends paid by calls on present members; and their liability is confined to calls in respect of what remains of the debts in question. It follows from this that if these debts are paid or released, no calls can be made on past members, and they ought not to be put on the list of contributories (*k*).

Settling a person on the list of contributories as a past member does not of itself decide or prejudice any question as to his liability to any particular call (*l*).

Past members are not sureties; and a compromise by the liquidator with present members, even when made without notice to a past member, does not discharge him from his liability to be a contributory, at least if such liability is reserved, as in practice it always is (*m*). The right, however, of a past member to be indemnified by his own transferee is not affected by a compromise between him and the liquidator (*n*). Past members
not sureties.

(*f*) *Weston's case*, 6 Eq. 17; *Brett's case*, 6 Ch. 800, and 8 Ch. 800; *Webb v. Whiffin*, L. R. 5 H. L. 711.

(*g*) See § 38, cl. 2 and 3.

(*h*) See *Needham's case*, 4 Eq. 135, and *ante*, pp. 749, 750.

(*i*) *Andrew's case*, 3 Ch. 161. See *Helbert v. Banner*, L. R. 5 H. L. 28, which shows that the Court will act on the liquidator's estimates, unless

they can be shown to be wrong.

(*k*) See *Brett's case*, 8 Ch. 800, a rehearing of S. C., 6 Ch. 800.

(*l*) See *Andrew's case*, 3 Ch. 161.

(*m*) *Hudson's case*, 12 Eq. 1; *Nevill's case*, 6 Ch. 43; *Helbert v. Banner*, L. R. 5 H. L. 28.

(*n*) *Roberts v. Crowe*, L. R. 7 C. P. 629. See, also, *Kellock v. Enthoven*, L. R. 8 Q. B. 458, and 9 ib. 241; *Heritage v. Paine*, 2 Ch. D. 594.

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Having made these preliminary remarks on the liability of persons who have retired from a company before the commencement of its winding up, to be put on the list of contributories as past members, it is proposed to examine the position of such persons more in detail, and to point out when they are liable to be put on the list as present members, and when as past members only.

Irregular
retirement.

It has already been seen that, where a person has, in fact, become a shareholder, he is a contributory, although all prescribed formalities may not have been observed (*o*). On similar principles, where a person has, in fact, retired from a company, he will not be a contributory (at least as a present member), although his retirement may have been somewhat irregular in point of form (*p*). But this proposition assumes that the shareholder had the right to retire; and that his retirement would have been unimpeachable if all proper formalities had been duly observed. Where this is not the case, the retired member will, in point of law, be a shareholder still; and will be liable to be made a contributory accordingly, as a present member, subject only to the question whether there is any statutory or other limit of time, after the lapse of which the retirement cannot be called in question. Statutory limit there appears to be none, unless it be twenty years (*q*); but there is the highest authority for the proposition that where a person has retired *bonâ fide* and openly, so that all the shareholders ought to be treated as aware of the fact, the equitable doctrines of laches and acquiescence ought to be applied against a company, and preclude it from disputing the validity of the retirement (*r*).

Effect of lapse
of time.

(*o*) *Ante*, A (2), p. 757.

(*p*) See *Taurine Co.*, 25 Ch. D. 118; *Bush's case*, 6 Ch. 246, affirmed *Murray v. Bush*, L. R. 6 H. L. 37. Upon the application to such cases of the maxim, *omnia præsumuntur rite esse acta*, the following cases are particularly instructive: *Lane's case*, 1 De G. J. & Sm. 504; *Knight's case*, 2 Ch. 321; *Woolaston's case*, 4 De G. & J. 437.

(*q*) See § 16 of the Companies act, 1862; *Helby's case*, *Stoke's case*, and *Horsey's case*, all in 2 Eq. 167.

(*r*) See *ante*, p. 522; *Murray v. Bush*, L. R. 6 H. L. 37; *Evans v. Smallcombe*, L. R. 3 H. L. 249, affirming *Smallcombe's case*, 3 Eq. 769; *Brotherhood's case*, 31 Beav. 365, and 4 De G. F. & J. 566. See *ante*, pp. 517—523. See, also, *Hunt's case*, 32 Beav. 387.

Bearing these observations in mind, it is proposed to consider the liability, to be put on the list of contributories, of— Bk. IV. Chap. 1.
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1. Persons who have transferred their shares to others.
2. Persons who have surrendered their shares to the company.
3. Persons whose shares have been forfeited.

1. *As regards persons who have transferred their shares to others.*

In considering the position of a person who has parted with his shares to another, two classes of cases must be distinguished from each other: viz., 1, cases in which the transferee has actually been substituted by the company for the transferor before the commencement of the winding up; and 2, cases in which there has been no such substitution.

a) Where the transferee has been accepted by the company in the place of the transferor.

If a person has transferred his shares to another, if the transferee has accepted the transfer, and if he has been accepted by the company as a shareholder in respect of those shares, then, on the subsequent winding up of the company, the transferee, and not the transferor, is the person to be made a contributory as a present member in respect of the shares transferred. Transferors of
shares when not
contributories.

A leading case on this head is *Cape's Executors' case* (s), in which it was held that the purchaser of shares in a banking company governed by 7 Geo. 4, c. 46, was liable as a contributory, as well in respect of debts contracted *before* as in respect of those contracted *after* he became a shareholder. It was considered that, in the absence of any special provisions in the company's deed to the contrary, the purchaser took the shares as they stood, subject to the state of the concern at the date of his purchase. This may safely be taken to be Cape's Executors' case.

(s) 2 De G. M. & G. 562, affirming the decision of the Master of the Rolls, 16 Jur. 787. See, too, *Holme's case*, 2 De G. M. & G. 113; *Mayhew's case*, 5 ib. 837, a case of a cost-book mine,

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the general rule; and it follows from it that, as between the company, the buyer, and the seller, the seller, when he transfers his shares, transfers his liability to be made a contributory.

The proposition that in such cases the transferor is not a contributory, is established indirectly by the cases just cited, and more directly by others; *e.g.*, *Harrison's case* (t), where the directors assented to a transfer on the terms that the transferor should guarantee payment of future calls by the transferee; and it was held that the transferor was not a contributory, although the transferee was insolvent.

Even where the transfer is in some respects irregular, still if it is *intra vires*, and the transferee has accepted the transfer, and has been accepted by the company, the transferee (u), and not the transferor (x), will be the contributory as a present member. The same rule holds good in the case of a *bonâ fide* transfer without value (y). But a transfer which is wholly invalid cannot be treated as good, simply by being acted upon (z). Even in this case, however, the transferee and not the transferor will be a contributory, if there was in effect an agreement between them both and the company, that the transferee should take the shares instead of the transferor (a).

(t) 6 Ch. 286. For other illustrations of the same principle, see *Croxtan's case*, 1 De G. M. & G. 600; *Nicol's case*, 3 De G. & J. 387; *Orpen's case*, 9 Jur. N. S. 615.

(u) *Meux's Executors' case*, 2 De G. M. & G. 522; *Straffon's Executors' case*, 1 De G. M. & G. 576; *Sanderson's case*, 3 De G. & S. 66, and 3 H. L. C. 698; *Gordon's case*, 3 De G. & S. 249; *Walters' case*, 3 De G. & S. 149. Compare the cases cited *infra*, p. 830 *et seq.*, where the transferee had not been accepted by the company in the place of the transferor.

(x) *Murray v. Bush*, L. R. 6 H. L. 37, affirming *Bush's case*, 6 Ch. 246, where the transferor was an outgoing

director; *Ex parte Littledale*, 9 Ch. 257, where the transferor had not paid his calls; *Rivington's case*, 3 Ch. D. 10; *Doman's case*, *ib.* 21, where the transfer had not been enrolled as required by act of parliament. See, also, the cases in the last note.

(y) *Maquir's case*, 3 De G. & S. 31; *Fenwick's case*, 1 De G. & S. 557.

(z) See *Chappell's case*, 6 Ch. 902; and the cases of scrip, *McEuen v. West London Wharves Co.*, 6 Ch. 655; *East Gloucester Rail. Co. v. Bartholomew*, L. R. 3 Ex. 15, which, although not contributory cases, are applicable to them. Compare *Taurine Co.*, 25 Ch. D. 118.

(a) See *Morton's case*, 16 Eq. 104.

Moreover, the fact that the transfer has been made to a man of straw simply to avoid liability makes no difference (*b*). Bk. IV. Chap. 1.
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In *Hyam's case* (*c*), Lord Campbell threw some doubt upon this doctrine; but, notwithstanding his Lordship's remarks, it seems to be settled that, where the transfer is a real transaction, it will stand, although the transferor's sole object in making it may be to get rid of liability (*d*); except, perhaps, in the case of a director transferring his qualification shares (*e*). Transfer made to
avoid liability.

By the Stannaries act, 1869, 32 & 33 Vict. c. 19, § 35, a transfer of shares made for the purpose of getting rid of liability for a nominal consideration, or to a person who is insolvent, or in the domestic service of the transferor, is presumed to be fraudulent and need not be recognised either by the Court or the company. Still, if the company, knowing the facts, has recognised the transfer, it cannot afterwards set it aside (*f*).

But, independently of any statutory enactment, such transfers are naturally viewed with great suspicion, and if there is any doubt as to whether the transferor has *bonâ fide* parted with all his interest in the shares, or if the directors having power to reject the transferee have been imposed upon in accepting him, the transfers will be treated as invalid. The following are the leading cases on this head:— Malâ fide
transfer-.

First, where there is no real transfer.

In *Lund's case* (*g*) a holder of 100 shares, of 10*l.* each, in an insolvent company, sold them all to one of his servants for half-a-crown. The shares passed by delivery, and it was not necessary that the purchaser should be accepted as a shareholder by the company. The sale was held to have been made *malâ fide*, and the seller was held to be a contributory. 1. No real
transfer.
Lund's case.

(*b*) *De Pass's case*, 4 De G. & J. 544, and cases below.

(*c*) 1 De G. F. & J. 75.

(*d*) *Taurine Co.*, 25 Ch. D. 118; *Master's case*, 7 Ch. 292; *Hakim's case*, *ib.* 296, note; *Bishop's case*, *ib.*; *Harrison's case*, 6 Ch. 286; *Weston's case*, 4 Ch. 20; *Slater's case*, 35 Beav.

391; *Costello's case*, 2 De G. F. & J. 302; *Garstin's case*, 10 W. R. 457; *Hatton's case*, 8 Jur. N. S. 380.

(*e*) *South London Fish Market Co.*, 39 Ch. D. 324, at p. 331, and *Gilbert's case*, 5 Ch. 559.

(*f*) *Chynoweth's case*, 15 Ch. D. 13.

(*g*) 27 Beav. 465.

- Bk. IV. Chap. 1. *Hyam's case (h)* was a similar case, the transferor in effect giving the transferee the money expressed to be paid for the shares. The Court
Sect. 10. treated the whole transaction as a mere fable which the parties were acting
Hyam's case. and held upon the evidence that they never intended the transfer to have any effect as between themselves. In this case also the shares passed by delivery.
- Chinnock's case. In *Chinnock's case (i)*, there was a formal transfer, and the company's deed contained a clause that trusts should not be recognised; but the transferor was nevertheless put on the list, as it was clear that the transferee had no real interest in the shares, and the trust was merely created to screen the transferor from liability.
- Costello's case. In *Costello's case (j)*, a son transferred his shares to his father, who was old and was supported by his family. The sale was expressed to be made for a trifling consideration, after the company had been ordered to be wound up, and was clearly not a *bona fide* transaction, but a mere device to substitute the father for the son. The son was put on the list.
- Alexander's case. *Alexander's case (k)*. There a shareholder, who was a broker, transferred his shares to a clerk for an alleged consideration of 97*l.* 10*s.*, which was never paid. The transfer was registered, but the transferor kept the certificates, and his clerk sent all notices to him. The clerk was settled on the list, and was ultimately attached and imprisoned for not paying the calls made upon him. He then took the benefit of the Insolvent act. The transferor was afterwards examined, and the result was that the transfer was held invalid, and he was put on the list in the place of the clerk. This case is the more instructive as it is plain that the clerk was himself estopped from denying that he was a shareholder.
- Budd's case. *Budd's case (l)*. There a solicitor transferred shares to his servant without consideration, and solely for the purpose of escaping from liability. The solicitor was held to be a contributory. It was considered that the servant might have repudiated the transaction, and that the company was entitled to show that the transfer was invalid, although the transferee did not himself impeach it.
- Hatton's case. *Hatton's case (m)*. There the transfer was made after notice of a call, and in order to avoid payment of it. The directors had refused to register the transfer. The transaction was plainly a mere device to avoid liability.
- De Pass's case. *De Pass's case (n)* was the first case of this class in which the transferor was held not a contributory. There a shareholder knowing that the company was in difficulties transferred his shares to a clerk for a nominal consideration. The shares were transferable by delivery, and the Court of Appeal came to the conclusion that the transfer was a real transfer out and out. This case is extremely difficult to reconcile with the others noticed above, and is generally admitted to be unsatisfactory (*o*).

(h) 1 De G. F. & J. 75.

(i) Johns. 714. See, also, *Scully's case*, 6 Ir. Ch. 72.

(j) 2 De G. F. & J. 302.

(k) 9 W. R. 410. See *ante*, p. 747.

(l) 30 Beav. 143, affirmed on

appeal, 3 De G. F. & J. 297.

(m) 8 Jur. N. S. 380. Compare *Orpen's case*, 9 ib. 615.

(n) 4 De G. & J. 544. For other cases to the same effect, see *ante*, note (y).

(o) The Master of the Rolls put

Whether *De Pass's case* was rightly decided or not, both that and the other decisions above referred to establish, that notwithstanding a transfer in form, the transferor will be held a contributory if the evidence shows not only that the transfer was made to get rid of liability, but that the transfer was not a real transaction, and was not intended to divest the interest of the transferor, and to render the transferee the *bonâ fide* owner of the shares, but that the transferee held them subject to the orders of the transferor: and although it cannot, perhaps, be denied that, in the cases in question, the relation of trustee and *cestui que trust* was created, it is obvious that the sole object of the trust was to screen the transferor from liability. The cases show that such devices will not have the effect desired by the persons who practise them (*p*).

Secondly, where the company has been imposed upon.

The power of directors to reject a transferee depends on the company's regulations (*q*); if there is no power to reject him a misdescription is immaterial, and if he is *sui juris* and becomes a shareholder, the transferor escapes (*r*). But if the directors have power to object to a transferee, and shares are transferred to a pauper or a man of straw, who is misdescribed, so that the directors are imposed upon and induced to make no inquiry about him, the company can, on ascertaining the facts, repudiate the transfer and place the transferor on the list of contributories. This has been done where the transferee was a clerk, and was paid to accept a transfer, and he was described as a gentleman paying for the transfer (*s*). So where the transferee was a ship's steward, paying nothing for the transfer, but was described as of a certain place, where he did not live, and as paying the market price for the shares (*t*).

De Pass on the list. The Lords Justices reversed the decision. An appeal to the House of Lords was prevented by a compromise.

(*p*) See acc. *King's case*, 6 Ch. 196, where the difference between transfers and allotments is alluded to. *Williams' case*, 1 Ch. D. 576, was a case of allotment. See *ante*, p. 801

et seq., A (9), trustees and *cestuis que trustent*.

(*q*) *Weston's case*, 4 Ch. 20. See *ante*, p. 464.

(*r*) 1b.

(*s*) *Payne's case*, 9 Eq. 223.

(*t*) *Ex parte Kintrea*, 5 Ch. 95. He was not described as a gentleman or anything.

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2. Company
imposed upon.

Bk. IV. Chap. 1. Sect. 10. — Moreover in cases of this description, proof that the directors were not in the habit of inquiring about transferees is not material; it is their duty to inquire where their suspicions are aroused, and the mis-statements are of course made to lull suspicion (*u*).

However, the mere fact that the transferee is described as a "gentleman," when he is not entitled to be so called, is not sufficient to invalidate an otherwise valid transfer (*x*).

If the directors have accepted the transferee with knowledge of the facts, the transferor cannot be made a contributory (*y*).

Transfers to infants.

Transfers to infants are voidable not only by the infant whilst under age, or within a reasonable time after coming of age (*z*), but also by the company (*a*); unless it has accepted him, knowing him to be an infant (*b*), or has allowed him to transfer and has accepted his transferee (*c*). Hence, except under special circumstances, transferors to persons who are infants at the commencement of the winding up (*d*), or who, if then of age, can repudiate their shares (*e*), or can be repudiated by the company (*f*), are contributories, and not the infant transferees. Moreover, the fact that the infant transferee has got rid of some of the shares transferred to him, does not prevent the transferor from being settled on the list in respect of the rest (*g*). The only cases yet reported in which trans-

(*u*) See *Williams's case*, 9 Eq. 225, note.

(*x*) *Masters's case*, 7 Ch. 292; *Bishop's case*, ib. 296, note; and, see, as to an allottee, *Williams's case*, 1 Ch. D. 576.

(*y*) *Chynoweth's case*, 15 Ch. D. 13, a case in a company governed by the Stannaries act, 1869, as to which, see *ante*, p. 825.

(*z*) *Ante*, pp. 39 *et seq.*, and p. 809, A 11 (*c*).

(*a*) *Symons' case*, 5 Ch. 298; *Castello's case*, 8 Eq. 504.

(*b*) *Parson's case*, 8 Eq. 656.

(*c*) As in *Gooch's case*, 8 Ch. 266, reversing S. C. 14 Eq. 454.

(*d*) As in *Hart's case*, 6 Eq. 512; *Capper's case*, 3 Ch. 458; *Curtis's*

case, 6 Eq. 455; *Weston's case*, 5 Ch. 614; *Castello's case*, 8 Eq. 504; *Symons' case*, 5 Ch. 298. See, also, *Reid's case*, 24 Beav. 318; *Reureley's case*, 1 De G. & S. 550, where the transferee was untruly stated to be of age; *Litchfield's case*, 3 ib. 141, where he was described as *Master*.

(*e*) As in *Shrapnell's case*, *ante*, p. 810.

(*f*) This follows from *Symons' case*, 5 Ch. 298, and *Castello's case*, 8 Eq. 504, where the transferee tried to screen his transferor by keeping the shares. See, also, *Mann's case*, 3 Ch. 459, note.

(*g*) *Mann's case*, 3 Ch. 459, note; *Curtis's case*, 6 Eq. 455.

ferors to infants have escaped being put on the list are : 1, Bk. IV. Chap. 1. Sect. 10. cases (*h*) where the company was precluded by its own conduct before the winding up commenced, from repudiating the transfer ; and 2, cases where the infant attained 21 before the commencement of the winding up, and was precluded from repudiating the shares (*i*). A transferor to an infant more than one year before the commencement of the winding up of a company formed and registered under the Companies act, 1862, is not liable to be put on the list either as a past or as a present member, if the shares have been since transferred by the infant to a person on the register (*k*).

Again, if a shareholder transfers shares into the name of a person without his authority, and the transferee never accepts the shares, the transferor will be the contributory (*l*). Transfers to persons not consulted.

If the directors of a company make a mistake, and unintentionally pass a transfer, and it is registered, but the mistake is discovered and corrected before anything more is done, the transferor will be a contributory if the transferee does not object (*m*). Mistake of company.

Again, where a transfer is part of an illegal scheme for amalgamating the company with another (*n*), the transferor will be a contributory. So where a director transfers his shares under circumstances entitling the company to impeach the transfer, as where he postpones a call to enable him to get rid of his shares, he will be a contributory (*o*). Other cases of invalid transfers.

Where a company has transferred its assets to another, and has ceased to carry on business, a member of it who afterwards transfers his shares is nevertheless a contributory (*p*) ; Transfer after company has discontinued business.

(*h*) *Parson's case*, 8 Eq. 656 ; *Maxwell's case*, 24 Beav. 321.

(*i*) *Ebbett's case*, 5 Ch. 302 ; *Mitchell's case*, 9 Eq. 363 ; *Lumsden's case*, 4 Ch. 31 ; and the next note.

(*k*) *Gooch's case*, 8 Ch. 266, reversing S. C., 14 Eq. 454.

(*l*) *Cartmell's case*, 9 Ch. 691 ; where the transfer was to two directors at the request of the manager, and was registered. *Heritage's case*, 9 Eq. 5 ; *Henessey's Executors' case*,

3 De G. & Sm. 191, and 2 Mac. & G. 201 ; *Pim's case*, 3 De G. & Sm. 11, and 1 Mac. & G. 291, noticed *ante*, p. 802.

(*m*) *Anderson's case*, 8 Eq. 509.

(*n*) As in *Cluck's case*, 11 W. R. 986.

(*o*) *Gilbert's case*, 5 Ch. 559 ; and see *South London Fish Market Co.*, 39 Ch. D. at p. 331.

(*p*) *Chappell's case*, 6 Ch. 902 ; *Lankester's case*, *ib.* 905, note ; *Allin's case*, 16 Eq. 449. Lord Justice Mel-

Bk. IV. Chap. 1. for, the company having virtually ceased to exist, practically
Sect. 10. there are no shares to transfer, and a transfer of them is inconsistent with the general scheme for putting an end to the company.

Transfers to
directors.

A *bonâ fide* transfer to a director as an individual, and not as a trustee for the company, has the same effect as any other transfer (*q*). So has a *bonâ fide* transfer to a director or other person who is a nominee for the company; provided the transferor acted throughout in the belief that he was dealing with an ordinary individual, and had no notice of any trust for the company (*r*). But, as will be seen in the next section, a surrender of shares to the company does not release a shareholder from liability to be made a contributory, unless the surrender is warranted by the constitution of the company.

Cases where
the transferor
remains liable
to losses not-
withstanding
the transfer.
Holme's case.

Before leaving this branch of the subject, it is necessary to allude to those difficult and exceptional cases which occasionally arise on winding up old companies, the deeds of settlement of which contain clauses to the effect that a transfer of shares shall not release the transferor from liability in respect of antecedent losses. In *Holme's case* (*s*), where there was such a clause, and where it was proved that there were debts incurred before the shares in question had been transferred, and which debts were still unpaid, it was nevertheless held that the transferor was not a contributory; for both before and after he sold his shares, accounts not showing any losses had been laid before the shareholders, and by those accounts the company was held bound.

*Helby's, Stokes',
and Horsey's*
cases.

In *Helby's case*, *Stokes' case* and *Horsey's case* (*t*), however, which arose under the Companies act, 1862, on winding up an old banking company, the deed of settlement of which contained a similar clause, the V.-C. Kindersley held (1), that a

lishdissentd, but see Lord Selborne's observations in 16 Eq. 455.

(*q*) *Jessopp's case*, 2 De G. & J. 638, and the cases cited in the next note.

(*r*) See *Grady's case*, 1 De G. J. & S. 488, and others of that class, noticed *infra*, p. 841.

(*s*) 2 De G. M. & G. 113, and 4

De G. & S. 312.

(*t*) 2 Eq. 167. See, also, *Sunder-son's case*, 3 De G. & Sm. 66, which was afterwards observed upon in *Dodgson's case*, *ib.* 85, and was appealed to the Lords, 3 H. L. C. 693, when the order of the Court below was varied by consent.

person who had transferred his shares more than twenty years before the commencement of the winding up ought not to be put on the list at all; but (2) that persons who had transferred their shares within that time were liable to be put on the list, but that their liability was to be confined to their proportions of the losses, if any, which had accrued whilst they held their shares. There was evidence to show the existence of such losses.

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b) Where the transferee has not been accepted by the company in the place of the transferor.

In all cases of this class, something remains to be done before the transferor ceases to be a shareholder, and he therefore *primâ facie* remains a contributory. There is generally a clause to this effect in a company's articles or deed of settlement, but even where there is no such clause, the moment it is established that where shares are held in trust, the trustee and not the *cestui que trust* is the contributory (*u*), it follows that a seller of shares, who, as between himself and the company, remains the holder of them when the winding up commences, must be the contributory in respect of them (*x*).

For similar reasons the executors of a deceased shareholder remain liable to be made contributories after they have sold the shares of their testator, until the purchaser has been accepted by the company as a shareholder in respect of them (*y*).

Transfers by
executors.

The principle of these cases is particularly applicable to transfers by or to directors; for it is more especially the duty of directors to observe all requisite formalities. If therefore they transfer their own shares informally, it is their own fault (*z*); and if shares are transferred to them informally, although it may not be the fault of the transferor, it will

Transfers to or
by directors.

(*u*) *Ante*, p. 801.

(*x*) *Humby's case*, 5 Jur. N. S. 215; *Chartres' case*, 1 De G. & S. 581; *De Castro's case*, 2 Jur. N. S. 1203; *Ex parte Walton & Hue*, 3 ib. 853. Compare *Mayhew's case*, 5 De G. M. 837. See, also, the Irish

cases of *Ex parte Scully*, 6 Ir. Ch. Rep. 72, and *Ex parte Kennedy*, ib. 121.

(*y*) *Keene's Executors' case*, 3 De G. M. & G. 272.

(*z*) *Ex parte Brown*, 19 Beav. 97. See, too, *Eyre's case*, 31 Beav. 177.

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strongly corroborate other evidence tending to show that the transfer was not made *bonâ fide* (a). Such evidence may, of course, be rebutted, and then the informality will be of less consequence (b).

The general rule, illustrated by the foregoing decisions, is as applicable at the present day as formerly (c), subject to the qualification introduced by the Companies act, 1862, and which it is proposed now to examine.

Companies act.
1862, § 153.

By § 153 of the Companies act, 1862, it is enacted, that where a company is being wound up by the Court, or subject to its supervision, every transfer of shares or alteration of the status of the members of the company made between the commencement of the winding up (d) and the order for winding up shall be void, unless the Court otherwise orders; and by § 131, it is enacted, that where a company is being wound up voluntarily, all transfers of shares, except transfers made to or with the sanction of the liquidators, or alteration in the status of the members of the company, taking place after the commencement of the winding up, shall be void. Transfers made after a winding-up order are *à fortiori* void if not sanctioned by the

Altering register
of members.

Court or the liquidators (e). The effect of these enactments appears to be that after the commencement of the winding up of a company its register of members cannot be lawfully altered, except by the order of the Court (f), or, perhaps, in a case of voluntary winding up, by the sanction of the liquidators (g). But the act does not invalidate contracts for the sale of shares made but not completed before the commencement of the winding up (h). The act, it will be observed, applies not only to cases where shares have been transferred

(a) *Ex parte Henderson*, 19 Beav. 107.

(b) *Murray v. Bush*, L. R. 6 H. L. 37, affirming *Bush's case*, 6 Ch. 246; *Ex parte Bagge*, 13 Beav. 162.

(c) See *infra*, p. 833 *et seq.*

(d) As to date at which a winding up commences, see *ante*, p. 664, and *Taurine Co.*, 25 Ch. D. 118.

(e) See §§ 38 and 74, and compare 11 & 12 Vict. c. 45, § 76; *Glanville's case*, 10 Eq. 479.

(f) A consent order removing a person's name from the register is not invalidated by the fact, that on the same day a petition to wind up is presented on which a winding up order is afterwards made. *London Suburban Bank*, 15 Eq. 274. Compare *Barge's case*, 5 Eq. 420.

(g) See, as to this, *ante*, p. 748.

(h) *Chapman v. Shepherd*, and *Whitehead v. Izod*, L. R. 2 C. P. 228.

after the commencement of the winding up, but also to cases where they have been transferred previously, but the transfers have not been registered. The words "alteration of the status of the members" plainly include the last-mentioned cases. But it is by no means clear from the language of the act, whether the Court can, under § 153, alter the register in cases to which § 35 does not apply; or whether § 35 restricts the general power to sanction transfers which is conferred on the Court by § 153. The tendency of the more modern decisions is in favour of the latter view (*i*).

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Again, whether the Court can exercise the discretion, which is generally reposed in the directors, of permitting or refusing transfers is another very important matter on which there is also a conflict of judicial opinion. This question, it will be observed, does not depend on the power of the Court to rectify the register, but on its power to substitute its own judgment for that of the persons in whom the discretion of accepting or rejecting transferees has been reposed by the members of the company. The better opinion is that this cannot be done (*k*); although the absence of approval is not material where there were no grounds for disapproval, and where the approval was not a condition precedent to the transferee's becoming a shareholder (*l*).

The following observations it is hoped will be found to be in accordance with the most recent decisions (*m*):—

a) Where the sale has taken place before the commencement of the winding up.

1. If a person has sold his shares, and has unnecessarily delayed compelling the purchaser to complete the transfer, and the seller remains the registered holder at the commencement of the winding up, he, and not the purchaser, will be placed on the list (*n*); although, as between the seller and the

Delay on the part of the parties to the transfer.

(*i*) See, as to the construction of § 35, *ante*, p. 120, *et seq.* Giffard in *Marshall v. Glamorgan Iron and Coal Co.*, 7 Eq. at p. 137.

(*k*) *Infra*, pp. 834—837. See, also, *Shepherd's case*, 2 Ch. 16. (*n*) *Ward and Henry's case*, 2 Ch. 431, reversing *Ward's case*, 2 Eq. 226; *Walker's case*, 6 Eq. 30; *Head's case*, 3 Eq. 84; *White's case*, *ib.* The observations of the Master of the

(*l*) *Ward and Garfit's case*, 4 Eq. 189, and *infra*, p. 834.

(*m*) See the summary of V.-C.

L.C.

3 H

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No delay, and
transfer com-
plete although
not registered.

Discretion of
directors exer-
cised by the
Court.

purchaser, the former may be entitled to an indemnity from the latter (*o*), and although each of them may be as solvent as the other (*p*).

2. Where before the commencement of the winding up shares are *bonâ fide* sold, and the transfer has been executed by both transferor and transferee, and has been left for registration at the company's office, and there has been no unnecessary delay on either side in completing the transfer, and nothing remains to be done except to register it, and the company, having had an opportunity of registering, have neglected, but not declined to do so (*q*): under these circumstances, the Court will allow, and indeed order, the transferee's name to be substituted for that of the transferor, unless there is some good reason why the transfer should not be completed (*r*). Even if the transferee has not executed the transfer, still if he has accepted the shares, and has been accepted by the directors as a shareholder, the transferee will be treated as the owner (*s*).

3. Where, as is generally the case, the directors have power to decline to register a transfer if the transferee is not approved by them, and a transfer has been left for registration in sufficient time to be approved before the commencement of the winding up, but has not been approved; still, if no delay is imputable to the parties to the transfer, and there are no grounds on which the directors could have properly declined to accept the transferee, the Court will accept him, and order his name to be registered (*t*). But if the directors did object

Rolls in *Ward's case*, 2 Eq. 226, were commented upon and explained by him in these two last cases.

(*o*) *Head's case* and *White's case*, 3 Eq. 84.

(*p*) *Ibid.* In *Head's case*, the liquidator was indifferent as to which of the two was put on the list.

(*q*) See *infra*, 3, 4, and 6, as to this. And compare *Lord R. Montagu's case*, W. N. 1888, 136, where the transferor had neglected to see that the transfer was registered,

and there was no default on the part of the company.

(*r*) *Fyfe's case*, 4 Ch. 768; *Hill's case*, *ib.* 769, note; *Lowe's case*, 9 Eq. 589; *Ward and Garfit's case*, 4 Eq. 189; *Nation's case*, 3 Eq. 77; and see *Ward's case*, 2 Eq. 226.

(*s*) *General Floating Dock Co.*, W. N. 1867, 27, where the transferee was registered.

(*t*) *Weston's case*, 4 Ch. 20, where the transferee was a man of straw, but the directors had no right to object to him. See, also, *Ward and*

on proper grounds, the Court clearly cannot interfere; and it has been held competent for directors, seeing that the company is *in extremis*, to resolve that no more transfers shall be registered without their express sanction; and where this is done, the Court will decline to complete a transfer left for registration just before the passing of the resolution (*u*), although the Court will complete a transfer which was left for registration, and ought to have been registered before the resolution was passed (*x*).

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4. It is always material, in these cases, to ascertain whether the directors have received a proper transfer in sufficient time before the commencement of the winding up to enable them to pass or reject the transfer in the ordinary course of business. Where there has been no board meeting in the interval between the leaving of the transfer and the commencement of the winding up, the Court has never yet completed the transfer, and it is very doubtful whether the Court has any power to do so (*y*). But where there has been such a meeting, although only one, delay is imputable to the company in not passing and registering the transfer, and the Court can and will order it to be completed if the parties to the transfer have not themselves been guilty of delay (*z*).

Delay in registering transfer.

5. But this assumes that the transfer left for registration is one which the directors were bound to accept: if it be not, no delay is imputable to the company, and the transferor will be the contributory.

Improper transfers.

This has been decided where no transfer has been left for registration (*a*); where the transfer left was not executed by the transferee, as was required by the practice of the com-

Garfit's case, 4 Eq. 189; *Nation's case*, 3 Eq. 77; and compare *Weston's case*, with *Ex parte Parker*, 2 Ch. 685.

(*u*) *Alexander Mitchell's case*, 4 App. Ca. 548 & 567; *Rutherford's case*, ib. 548 & 581; *Mitchell v. City of Glasgow Bank*, ib. 624; *Shepherd's case*, 2 Ch. 16, and 2 Eq. 564.

(*x*) *Nation's case*, 3 Eq. 77; and see *Lowe's case*, 9 Eq. 589.

(*y*) See *Ward and Henry's case*, 2 Ch. 431; *Shepherd's case*, ib. 16.

(*z*) See *Nation's case*, 3 Eq. 77; *Hill's case*, 4 Ch. 769, note; *Lowe's case*, 9 Eq. 589, where petitions for winding up, which were afterwards withdrawn, were pending. Qu. this case.

(*a*) *Musgrave and Hart's case*, 5 Eq. 193.

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pany (b) ; where the transferee was a person to whom the company might have objected (c) ; where the transferor not having paid his calls was not entitled to transfer (d). But a transfer executed in blank and filled up afterwards, but before being sent in for registration, has been held sufficient (e).

The directors of a mutual insurance society are entitled to evidence of the assignment of a policy, and if reasonable time for inquiry has not elapsed before the winding up, the Court will not register the transferee (f).

6. It must be borne in mind in these cases that if the company has refused to register the transferee before the company was in difficulties, the company cannot insist on having his name put on the list of contributories instead of that of the transferor (g) ; and the creditors of the company are in this respect in no better position than the company (h).

(β) Where the sale has taken place since the commencement of the winding up.

If, in order to rectify a company's register and to substitute the name of a transferee for that of the transferor, it is essential that the transfer shall be left for registration before the functions of the directors cease, it will follow that a person who sells his shares after that time must, under all circumstances, be a contributory. But if this is not essential, there will be the same power of making the substitution where sales are made after, as where they are made before, a petition to wind up (i). It is obvious, however, that to allow shareholders to get rid of their liabilities by selling their shares after the commencement of the winding up of the company would lead to the greatest fraud ; and it is difficult to conceive any circumstances which can entitle such a seller to have the purchaser substituted for him, if the liquidators or the creditors

(b) *Marino's case*, 2 Ch. 596 ; (f) See *Sanders' case*, 20 Ch. D.
Walker's case, 2 Eq. 554, and see 403.

last note.

(g) *Sichell's case*, 3 Ch. 119.

(c) *Shipman's case*, 5 Eq. 219.

(h) *Ib.*

(d) *Holden's case*, 8 Eq. 444.

(i) See acc. *Emmerson's case*, 1

(e) *Contract Corporation*, 3 Ch. 433.

oppose the substitution (*k*). Nor is there yet any reported case in which the substitution has been made, even where there has been no opposition on their part. In *Emmerson's case* (*l*), indeed, the Master of the Rolls made the substitution; but the decision was reversed on appeal (*m*). This case, moreover, was decided before it was held, as it now is, that the question who ought to be on the list of contributories, is materially different from the question whether the seller is entitled to indemnity from the purchaser. In *Walker's case* (*n*), the Court declined to make the substitution, on the ground that the Court could not itself exercise the discretion of approving or rejecting transferees, and which discretion was vested by the articles of the company in the directors. In each of the above cases the liquidator was indifferent as to which person was on the list.

In connection with this subject it is to be remembered that sales of shares after the commencement of a winding up are not void under § 153 of the Companies act, 1862; and transfers after that date may be approved by liquidators (*o*).

2. *As regards persons who have surrendered their shares to the company.*

The right of shareholders to retire from a company has been discussed in an earlier chapter (*p*), and it was there seen that in the absence of an express agreement, except in the case of cost-book mining companies, the only mode in which a shareholder can retire from a company is by transferring his shares to some other person. If, therefore, a shareholder has surrendered his shares, and even if they have been cancelled by the directors, he will, nevertheless, be a contributory, as a

(*k*) Under the acts of 1848 and 1849 the transferor has been decided to be the contributory. *Glanville's case*, 10 Eq. 479.

(*l*) 2 Eq. 231.

(*m*) 1 Ch. 433. It was reversed upon the ground that neither buyer nor seller knew of the petition to

wind up, and that under those circumstances a decree for specific performance could not have been made against the purchaser.

(*n*) 2 Eq. 554.

(*o*) See *Rudge v. Bowman*, L. R. 3 Q. B. 689.

(*p*) *Ante*, p. 517.

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Emmerson's
case.

Walker's case.

Surrenderors
of shares.

Bk. IV. Chap. 1. present member, unless he can show that the company is bound
Sect. 10. by what has taken place. *Primâ facie*, directors have no right
to accept a surrender of shares.

Morgan's case. *Morgan's case* (q), *Stanhope's case* (r), and *Munt's case* (s),
Stanhope's case. and the cases which arose on winding up the *Agriculturist*
Munt's case. *Cattle Insurance Company* (t), the facts of which have been
before stated (u), are leading authorities upon the subject now
in question, and it appears from them, and other cases which
will be found in the notes below, that, unless the constitution
of a company is such as to warrant directors in accepting a
surrender of shares, or unless an unauthorised surrender has
been so acquiesced in by the company as to become binding
upon it (x), a person whose shares have been surrendered will,
nevertheless, remain liable to be a contributory, as a present
member. This has been held where the directors would have
had power to buy shares of the company out of certain accu-
mulated funds if they had existed, but which, in fact did not
exist, and the shares were nevertheless purchased by the
directors for the company in pursuance of a resolution passed
at one general meeting of the shareholders (y), and ratified at
another similar meeting (z). So, where the shares had been
surrendered and cancelled considerably more than six years
before the company was ordered to be wound up (a); where the
cancelled shares had been allotted without authority (b); where
it was part of the bargain when they were issued that they
should be cancelled (c); where they had been transferred to

(q) 1 De G. & S. 750, and 1 Mac.
& G. 225, *ante*, p. 518.

(r) 3 De G. & S. 198, *ante*, p. 518.

(s) 22 Beav. 55, *ante*, p. 519.

(t) *Stanhope's case*, 1 Ch. 161;
Stewart's case, ib. 511; *Spackman*
Evans, L. R. 3 H. L. 171; *Houlds-*
worth v. Evans, ib. 263.

(u) *Ante*, p. 522.

(x) As to which, see *Evans v.*
Smallcombe, L. R. 3 H. L. 249, and
other cases noticed, *ante*, pp. 517
to 523; and *Hunt's case*, 32 Beav.
387.

(y) *Ex parte Morgan*, 1 Mac. & G.

225, and 1 De G. & S. 750, *ante*, p.
518.

(z) *Lawes's case*, 1 De G. M. & G.
421. See, also, the cases in note (t).
Such a power in the case of a limited
company would now be invalid,
Trevor v. Whitworth, 12 App. Ca.
409.

(a) See the cases in note (t), and
Addison's case, 5 Ch. 294. See, also,
Stanhope's case, 3 De G. & S. 198,
and *Richmond's Executors' case*, ib.
96.

(b) *Holt's case*, 1 Sim. N. S. 389.

(c) *Addison's case*, 5 Ch. 294.

the surrenderor in an informal manner (*d*); where they were those of dissatisfied shareholders, whose retirement was one of the terms of a compromise effected with them (*e*); where the shares were those of dissatisfied directors wishing to have nothing more to do with the company (*f*); where the shares were those of a person who had released all his claims upon the other shareholders, for such a release is not a release by them of their claims on him (*g*); where the shares were cancelled on non-payment of a call made for the purpose of enabling the shareholder to get rid of his shares (*h*); where the shares were cancelled at the request of the holders (*i*); where the shares were held by a trustee, and were cancelled pursuant to a compromise between the *cestui que trust* and the company (*k*); where the shares were cancelled and exchanged for other shares, pursuant to a scheme for amalgamating the company with another (*l*).

Upon precisely the same principles it has been held that persons who have agreed to become shareholders are contributories as present members, although the directors may have since agreed to cancel their shares (*m*).¹

Moreover, where there is a power to accept a surrender, and a surrender is made colourably, but not *bonâ fide* in exercise of it, the surrenderor will be a contributory (*n*).

Compare *Miller's case*, 3 Ch. D. 661. and 5 ib. 70.

(*d*) *Walter's 2nd case*, 3 De G. & S. 244.

(*e*) *Bennett's case*, 5 De G. M. & G. 284, and 18 Beav. 339. *London and Provincial Consolidated Coal Co.*, 5 Ch. D. 515, where the persons retiring had subscribed the memorandum of association and no shares had been allotted. See, also, the cases *ante* in note (*t*), noticed *ante*, p. 522.

(*f*) *Munt's case*, 22 Beav. 55; *Daniell's case*, ib. 43, and on appeal, 3 Jur. N. S. 803; *Stanhope's case*, 3 De G. & S. 198. See *Walker's case*, 8 De G. M. & G. 607; *Ex parte Brown*, 19 Beav. 97, and the cases noticed,

ante, pp. 517 to 523.

(*g*) *Ex parte Apps*, 18 L. J. Ch. 409.

(*h*) *Richmond's case*, 4 K. & J. 305.

(*i*) *Esparto Trading Co.*, 12 Ch. D. 191.

(*k*) *Barrett's case*, 4 De G. J. & Sm. 416. See, *infra*, p. 842 as to compromises.

(*l*) *Austin's case*, W. N. 1867, 138.

(*m*) See *Adams's case*, 13 Eq. 474; *Sidney's case*, 13 Eq. 228; *Hall's case*, 5 Ch. 707; *London and Provincial, &c., Coal Co.*, 5 Ch. D. 525.

(*n*) *Hall's case*, 5 Ch. 707, and see, *infra*, p. 842, under the head Forfeiture.

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Persons who have duly surrendered their shares not contributories.

Where, however, the shareholders have power to relinquish their shares, and do relinquish them in the exercise of that power, then, as between themselves and the company, their liability is at an end, and on the winding up of the company they are not liable to be made contributories, unless it be as past members (*o*). There are many decisions under the older acts to the effect that, under the circumstances now supposed, persons who had surrendered their shares were not contributories (*p*), even although the surrender was somewhat irregular (*q*). The same principles are applicable to surrenderors of shares in companies formed and registered under the Companies act, 1862 (*r*). The writer conceives the same to be true of unregistered companies wound up under that act, although, if there are no present as distinguished from past members, surrenderors will be liable to be contributories if there are debts for which but for the act they could be sued at law (*s*).

Distinction between surrendering shares and transferring them.

Before quitting this subject it is necessary to advert to the distinction between a transfer of shares and a surrender of them. A surrender which is carried out by a transfer to a nominee of the company is treated as a surrender and not as a transfer (*t*); but if what is called a surrender of shares is in fact a *bonâ fide* transfer of them, the transferor will, as between

(*o*) As to companies governed by the Stannaries act, 1887, see 50 & 51 Vict. c. 43, § 22.

(*p*) See *Fenn's case*, 4 De G. M. & G. 285, and 1 Sm. & G. 26; *Birch's case*, 2 De G. & J. 10; *Loft-house's case*, ib. 69; *Bodmin United Mines*, 23 Beav. 370, all cases of cost-book mines.

(*q*) *Lane's case*, 1 De G. J. & S. 504; *Grady's case*, ib. 488; *Busk's case*, 3 De G. & S. 267, affirmed on appeal, see 16 Jur. 343; *Cockburn's case*, 4 De G. & S. 177; *Ex parte Bayge*, 13 Beav. 162; *Hawthorn's case*, 10 W. R. 572.

(*r*) *Teesdale's case*, 9 Ch. 54, where the power was given by special resolution altering the articles. But see

the observations on this case in *Hope v. International Financial Soc.*, 4 Ch. D. 327; *Thomas's case*, 13 Eq. 437; *Snell's case*, 5 Ch. 22, where the surrenderor had subscribed the memorandum of association. Compare *Hall's case*, ib. 707, where the transaction was held not to amount to a surrender.

(*s*) *Part's case*, 10 Eq. 622. See *ante*, p. 819, note (*z*).

(*t*) See *Addison's case*, 5 Ch. 294; *Lankester's case*, 6 Ch. 905, note, as explained by L.-J. Mellish, at p. 910; *Eyre's case*, 31 Beav. 177; *Benham's case*, 13 W. R. 483; *Clack's case*, W. N. 1866, p. 275, where dissentient shareholders retired. Compare next two notes.

himself and the company, be released from liability, and will not be a contributory, although the main object of the transfer may have been to enable him to get quit of the company (*u*). Moreover, even if the transfer is made to a person in trust for the company, but the transferor is ignorant of this fact, and throughout acts in the *bonâ fide* belief that he is transferring his shares to the transferee as an individual, the transfer will be valid, and the transferor will not be a contributory (*x*).

A transfer to an individual director, moreover, will not relieve the transferor from his liability if the transfer is not made with perfect *bona fides*, and so as to constitute the transferee a shareholder in respect of the shares transferred. In *Ex parte Brown* (*y*), a transfer by a director to a director was held invalid as between the transferor and the company, on the ground that the transfer was made irregularly, and the transferee had already as many shares as he was entitled to hold in his own right; and in *Ex parte Henderson* (*z*), a transfer by an auditor to a director was held invalid as against the company, because, in addition to the grounds relied upon in the last case, the transferor had made no attempt to transfer his shares in the proper manner, and had acted throughout with want of good faith.

A person who has not bound himself to take shares, can waive any right to take them which he may have acquired; and an arrangement by which he abandons some and retains the rest, does not entitle the company to hold him a contributory in respect of more shares than he ultimately agrees to take (*a*). So if shares are allotted pursuant to an invalid resolution which is afterwards rescinded, and the shares are cancelled, the allottee will not be a contributory (*b*). So shares

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Ex parte Brown.

Ex parte
Henderson.

Difference
between sur-
rendering shares
and declining
to take them.

(*u*) *Jessopp's case*, 2 De G. & J. 638. See, also, the next note.

(*x*) *Grady's case*, 1 De G. J. & Sm. 488; *Reeve's case*, 10 W. R. 817; *Hollwey's case*, 1 De G. & S. 777; *Nicol's case*, 3 De G. & J. 387; *Hughes' case*, 15 W. R. 476. Compare these with the last two notes.

(*y*) 19 Beav. 97.

(*z*) *Ib.* 107. Compare *Murray v.*

Bush, L. R. 6 H. L. 37, affirming *Bush's case*, 6 Ch. 246, where there was irregularity, but no *mala fides*.

(*a*) See *Sahlgreen and Carrall's case*, 3 Ch. 323; *Meyer's case*, 16 Beav. 383; *Coleman's case*, 1 De G. J. & Sm. 495; *Hebb's case*, 4 Eq. 9. See, also, *Nicol's case*, 29 Ch. D. 421.

(*b*) *Barnett's case*, 18 Eq. 507.

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allotted by mistake as paid up may be withdrawn, and re-issued when the mistake has been rectified (c). Such cases as these do not turn on a shareholder's right to retire from a company, but on a person's right to withdraw from an unconcluded agreement, and to have mistakes corrected.

Compromise
of doubtful
liability.

Moreover, if there is a *bonâ fide* question whether a person is or is not a shareholder or bound to take shares, and such question is settled by a compromise, and he gives up all his rights (if any) against the company, and the company relinquish all claims upon him, he will not be a contributory as a present member; although he might have been had there been no compromise, and although shareholders in the company may have had no right to surrender their shares (d).

Moreover, this principle applies although the parties may not have got so far as to dispute the question capable of being disputed between them (e). But in the absence of a *bonâ fide* dispute, or of a question capable of being *bonâ fide* made a matter of dispute, there can be no compromise, and no room therefore for the application of the principle in question (f).

Surrender under
§ 161.

A shareholder who in the course of winding up surrenders his shares under § 161 of the Companies act, 1862, does not cease to be a contributory (g).

3. *As regards persons whose shares have been forfeited.*

Position of
persons whose
shares have
been forfeited.

It was seen in a previous chapter, that the right to forfeit shares does not exist except where it is expressly conferred (h). Consequently, persons whose shares have been declared forfeited, do not cease to be shareholders, and are not relieved from their liability to be made contributories as present

(c) *Hartley's case*, ib. 542, and 10 Ch. 157.

(d) *Lord Belhaven's case*, 3 De G. J. & Sm. 41; *Fox's case*, 5 Eq. 118; *Blake's case*, 34 Beav. 639. See, also, *Bath's case*, 8 Ch. D. 334; *Hesketh's case*, 13 Ch. D. 693.

(e) *Dixon v. Evans*, L. R. 5 H. L.

606, reversing *Dixon's case*, 5 Ch. 79.

(f) *Adams's case*, 13 Eq. 474; *Dixon's case*, 5 Ch. 79, was decided on this principle, but was reversed on appeal. See the last note.

(g) *Vining's case*, 6 Ch. 96.

(h) *Ante*, p. 528.

members, unless the forfeiture is warranted by the constitution of the company. Bk. IV. Chap. 1.
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On the other hand, where there is power to forfeit shares, and shares are *bonâ fide* forfeited in pursuance of the power, the shareholder who is thereby deprived of all interest in the company, is not liable to be made a contributory, as a present member, on its winding up (*i*), unless, notwithstanding the forfeiture, he continues, as between himself and the company, liable for its debts, which, although not an impossible, is a very improbable case. Persons whose
shares have
been duly
forfeited not
contributories.

A power to forfeit is, however, one which must be exercised with great attention to the formalities prescribed by the instrument conferring it (*k*), and a person whose shares have been improperly forfeited will be a contributory as a present member under ordinary circumstances (*l*). Irregular
forfeitures.

Nevertheless, if everything required to be done is substantially done by the company, and if the shares have been treated both by the company and by the shareholder as forfeited, the shareholder will not be a contributory. This is well exemplified in *Knight's case* (*m*), where there was power to forfeit for *Knight's case*.

(*i*) See, in addition to the cases cited in the next three notes, *Dawes's case*, 6 Eq. 232, where the forfeiture was in the interval between a resolution to wind up voluntarily, and a resolution confirming it; *Kelk's case* and *Pahlen's case*, 9 Eq. 107, and *Ex parte Collum*, ib. 236, where the forfeiture was for not bringing in certificates for registration. See, also, *Beresford's case*, 3 De G. & S. 175, and 2 Mac. & G. 197; *Ex parte Bailey*, 15 Jur. 29. These cases show that if a company's deed confers a power of forfeiture, that power may be exercised against a person who ought to execute, but has not, in fact, executed that deed. And see *Strick v. Swansea Tin Plate Co.*, 36 Ch. D. 558, where members expelled from a trade association were held to have no claim to share in the division of surplus assets.

(*k*) *Ante*, p. 532.

(*l*) *Esparto Trading Co.*, 12 Ch. D. 191, where there was no intention to forfeit the shares, but merely to cancel them; *Bottomley's case*, 16 Ch. D. 681, where the forfeiture was invalid owing to the number of directors being insufficient; *Garden Gully Mining Co. v. McLister*, 1 App. Ca. 39, where the forfeiture was invalid on the ground that it was made by persons not properly elected directors.

(*m*) 2 Ch. 321. See, also, *Woollaston's case*, 4 De G. & J. 437, reversing, on this point, *Woollaston's case*, 5 Jur. N. S. 617; *Lyster's case*, 4 Eq. 233, where the forfeiture was by two out of six directors; *King's case*, 2 Ch. 731 and 735, where the shares forfeited were illegally subdivided shares; and see *Webster's case*, 32 L. J. Ch. 135; *Grady's case*,

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non-payment of calls, on giving certain notices, and by a resolution to that effect: a shareholder from whom calls were due, received notice in proper form that if his calls were not paid on a certain day his shares would be forfeited. He made default, and the secretary thereupon made an entry in the company's books to the effect that the shares were forfeited, and had been transferred to the company. By the regulations of the company the shareholder ought to have had notice of this; but no notice was sent to him; and no resolution to forfeit appeared in the company's books: indeed, it was tolerably plain that there had been no such resolution. The shareholder in question, however, had never acted or been treated as a shareholder after the forfeiture; and it was held, that a resolution to forfeit ought to be presumed, and the shareholder was accordingly held not to be a contributory.

Intention to
forfeit not
carried out.

In the above case, it will be observed that there was power to forfeit, an intention to forfeit, and notice of that intention: and the intention was actually carried into effect, although not with due regularity. But, as has been seen on a former occasion, an intention to forfeit not carried into effect is no forfeiture at all (*n*); therefore, where a shareholder received notice that if he did not pay his calls in arrear by a certain day his shares would be forfeited without further notice; and he paid his calls on some of his shares but not on others, stating that he should submit to their forfeiture, but the directors after all did not forfeit them, but kept his name on the books as it had been before the notice; he was held, on the subsequent winding up of the company, to be a contributory in respect of all his shares (*o*).

Bigg's case.

Improper exercise of power
to forfeit.

Even when there is a power to forfeit, that power can only be exercised *bonâ fide* for the benefit of the company. If, therefore, a shareholder procures his shares to be forfeited in order that they may be cancelled and got rid of, or as part of

1 De G. J. & S. 488, and *Coleman's case*, ib. 495, as to presuming forfeiture. See, also, *Miller's case*, 3 Ch. D. 661, and 5 ib. 70, *infra* note (*o*).

(*n*) *Ante*, p. 533.

(*o*) *Bigg's case*, 1 Eq. 309. In *Miller's case*, 3 Ch. D. 661, and 5 ib. 70, there was no notice or declaration of forfeiture, but it was a consequence of ceasing to be a director

a scheme by which he may be enabled to surrender his shares and retire from the company, he will remain a contributory notwithstanding the forfeiture (*p*). On the same principle a surrender of shares which is *ultra vires* cannot be treated as valid by being referred to a power of forfeiture, which was never really exercised (*q*).

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A forfeiture of shares taken or agreed to be taken, must be distinguished from the withdrawal of shares allotted to a person, but which he has not bound himself to take, and has expressly or impliedly declined to accept. Whether any power to forfeit shares exists or not, such a person is not a contributory (*r*).

Distinction between forfeiting shares and withdrawing shares not agreed to be taken.

The forfeiture of a share within a year before the commencement of the winding up of a company formed and registered under the Companies act of 1862, does not relieve the former holder from his liability to be put on the list of contributories as a past member (*s*), even although he may have transferred them before the forfeiture (*t*); and even although the company's regulations are to the effect that forfeited shares are to be treated as extinguished (*u*).

Liability as past members.

(*p*) *Richmond's and Painter's case*, 4 K. & J. 305, *ante*, p. 532. See also, *Spackman v. Evans*, L. R. 3 H. L. 171; *Houldsworth v. Evans*, ib. 263; *Stanhope's case*, 1 Ch. 161; *Stewart's case*, ib. 511; noticed *ante*, pp. 518 to 523; *Gower's case*, 6 Eq. 77, where the member's name was still on the register.

(*q*) *Hall's case*, 5 Ch. 707; *Esparto Trading Co.*, 12 Ch. D. 191.

(*r*) *Goldsmid's case*, 16 Beav. 262;

Coleman's case, 1 De G. J. & S. 495; *Belhaven's case*, 3 ib. 41. See, also, *Dixon v. Evans*, L. R. 5 H. L. 606, reversing *Dixon's case*, 5 Ch. 79. *ante*, p. 842.

(*s*) *Bridger's case*, and *Neill's case*, 4 Ch. 266; *Bath's case*, 8 Ch. D. 334. Compare *Hesketh's case*, 13 Ch. D. 693.

(*t*) *Bridger's case*, and *Neill's case*, 4 Ch. 266.

(*u*) *Creyke's case*, 5 Ch. 63.

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SECTION XI.—CALLS FOR DEBTS, ETC.

1. *Generally.*

Calls on contributories.

Having settled the list of contributories so far as he is able, the next thing which the judge acting in the winding up usually finds it necessary to do, is to make calls on the contributories for the payment of the debts, losses, and liabilities of the company (*x*).

Purposes for which calls may be made.

Calls may be made :

1. For the payment of the company's debts and liabilities ;
2. For the payment of the costs of winding up ; and
3. For the adjustment of the rights of the contributories amongst themselves (*y*).

Moreover, in making calls, the probability that some of the contributories will fail to pay the full amount due from them may be taken into consideration (*z*).

Time and amount of calls.

With respect to the time for making calls, and the amount to be raised, the Companies act, 1862, gives the judge a wide discretion (*a*) ; and he is, to a great extent, guided by the liquidator's view of what is required (*b*). Moreover, the court of appeal is very reluctant to interfere with the discretion of the judge upon such a question, as to whether the time has arrived for making a call, or as to the amount for which it should be made (*c*). A call can only be made upon persons who are settled on the list of contributories (*d*) ; but it is not necessary to wait until the list is completed (*e*) ; nor until the assets of the company have been realised or have been

(*c*) The power of making calls on the contributories is given by § 102 of the Companies act, 1862. These calls must not be confounded with calls made under a company's articles of association or deed of settlement. See *ante*, p. 407.

(*y*) § 102. See, also, §§ 38, 196, cl. 5, and § 200.

(*z*) § 102.

(*a*) *Ib.*

(*b*) See *Helbert v. Banner*, L. R. 5

H. L. 28 ; *The Contract Corporation*, 2 Ch. 95.

(*c*) *Ibid.*

(*d*) See the act § 102.

(*e*) *Ibid.*, and see, as to past members, *Creykes' case*, 5 Ch. 66 ; and see *Helbert v. Banner*, L. R. 5 H. L. 28. See *Underwood's case*, 5 De G. M. & G. 677, where the list was in such a state that it was held no call could be made.

ascertained to be insufficient to discharge its liabilities (*f*); Bk. IV. Chap. 1. nor until the claims against the company have been estab- Sect. 11.
lished (*g*).

Applications to the judge to make a call are made by sum- Practice as to mons, stating the proposed amount of the call (*h*). The calls.
summons must be served four clear days at least before the day appointed for making the call on every contributory proposed to be included in it (*i*). Notice of the intended call may, however, be given by advertisement if the judge so directs (*k*). The application for a call must be supported by affidavit, which in ordinary cases is made by the official liquidator (*l*).

When an order for a call is made, a copy of it must be Order for a call.
served upon each of the contributories included in it, together with a notice specifying the balance due from him in respect of such call (*m*). If this notice states that interest will be charged in case of non-payment on the day named, such interest will be payable (*n*). But provisions in a company's articles of association for the payment of interest on calls do not apply to calls made in winding up (*o*). The order need not be advertised unless the judge so directs (*p*). If default is Balance order.
made by any contributory in payment of the sum which he has thus been required to pay, another and special order, called a balance order, is made, requiring him to pay what is due from him within four days after service (*q*). Upon non-

(*f*) § 102. *Helbert v. Banner*, L. R. 5 H. L. 28; *Gay's case*, 1 De G. M. & G. 347; *Greenwood's case*, 3 ib. 459.

(*g*) *Contract Corporation*, 2 Ch. 95, noticed *infra*, p. 850.

(*h*) See rule 33.

(*i*) Ib.

(*k*) Ib. See the forms in the Rules, schedule 3, Nos. 34-37.

(*l*) See ib. No. 33.

(*m*) See rule 34, and the forms in the schedule, Nos. 36 and 37. As to the mode of service, see § 63; as to substituted service, see *Ellis's case*, 3 De G. & S. 172. As to service abroad, see *ante*, pp. 687, 688. In

Ex parte D'Urban, 18 Jur. 781, notice sent by post to a person abroad was held good, though it reached him after the day appointed for payment. As to the affidavits of service, see *Natle Slate Co.*, 7 W. R. 319; *Re Job*, 27 Beav. 32.

(*n*) *Barrow's case*, 3 Ch. 784; *Ex parte Lintott*, 4 Eq. 184.

(*o*) *Welsh Flannel and Tweed Co.*, 20 Eq. 360, a case of voluntary winding up.

(*p*) Rule 34.

(*q*) Rule 35, and see the forms in the schedule, Nos. 38 and 39. This order ought not to be issued against a bankrupt contributory, against

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Mode of enforcing balance order.

compliance with this order it may be enforced in the way in which orders in the Chancery Division of the High Court are usually enforced (*r*), *i.e.*, by *fi. fa.*, &c., or by sequestration (*s*). A writ of *ne exeat regno* to prevent a contributory from absconding without paying a call made upon him will be granted on motion *ex parte* (*t*).

Calls made in the winding up of a company are specialty debts, binding heirs (*u*); and provision is made for obtaining payment out of the real as well as out of the personal estates of deceased contributories (*x*); and the liability to a call is considered as commencing at the time when the shares in respect of which they are made were taken (*y*); and executors as such are liable to calls in respect of debts contracted by the company since their testator's death (*z*). Calls may be proved against the estate of bankrupt contributories (*a*).

An order for payment of a call might formerly have been registered (*b*); and it may be made the foundation of a charging order, under 1 & 2 Vict. c. 110 (*c*). But a balance order cannot be sued upon (*d*); nor made the foundation of a bankruptcy notice (*e*); nor if made against an executor does it prevent him from retaining his own debt out of the testator's assets (*f*).

whose estate the call can be proved. *Mitchell's case*, 5 Ch. 400.

(*r*) See the act, § 120. As to enforcing orders in Scotland, see § 121.

(*s*) *Ante*, p. 697.

(*t*) *Mawer's case*, 4 De G. & S. 349. See *Jackson v. Petrie*, 10 Ves. 164.

(*u*) See the act, § 75. *Re Muggidge*, 10 Eq. 443; *Buck v. Robson*, *ib.* 629. It was otherwise under the older acts. See *Robinson's Exors. case*, 6 De G. M. & G. 572.

(*x*) *Ib.*, §§ 105 and 106, and see § 76, and *ante*, p. 813. As to enforcing payment of a call out of the assets of a deceased Scotch shareholder, see *Wryghte v. Lindsay*, 3 McQueen, 772.

(*y*) *Ib.* § 75. See on this section, *Ex parte Hatcher*. 12 Ch. D. 284;

Ex parte Mackenzie, 7 Eq. 240; *Hastie's case*, *ib.* 3, and 4 Ch. 274; *Martin's Patent Anchor Co. v. Morton*, L. R. 3 Q. B. 306; *Ex parte Canvell*, 4 De G. J. & Sm. 539, and the cases cited in note (*u*). Compare *Williams v. Harding*, L. R. 1 H. L. 9.

(*z*) *Baird's case*, 5 Ch. 725; *Blakeley's case*, 13 Beav. 133. and 3 Mac. & G. 726.

(*a*) See, as to this, *ante*, pp. 555 *et seq.*

(*b*) *Ex parte Thomas*, 9 C. B. 740.

(*c*) *Re Connell*, 25 L. J. Ch. 649. See R. S. C. Ord. xlvii., r. 1.

(*d*) *Chalk, Webb & Co. v. Tennent*, W. N. 1867, p. 159.

(*e*) *Ex parte Grimwade*, 17 Q. B. D. 357; *Ex parte Whinney*, 13 *ib.* 476.

(*f*) *International Marine, &c., Co. v. Hawes*, 29 Ch. D. 934.

The proceeds of a call made to pay a creditor of the company may be attached under the Common law procedure act, by his judgment creditors (*g*). Bk. IV. Chap. 1.
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An order for a call may be appealed from by any contributory on whom it is made (*h*), and he may on the appeal show, if he can, that although his name is on the list of contributories, it ought not, in truth, to be there (*i*). But he will not be allowed to go into this matter if any considerable time has elapsed since his name was settled on the list, or if he has acquiesced in being made a contributory (*k*); nor will he be allowed to dispute the validity of the winding-up order (*l*). Appeal from
order.

Where a person is settled on the list, and a call is made upon him, and he resists payment on the ground that he is not a contributory, he should apply to have his name removed from the list, and to have the proceedings to enforce payment of the call stayed; he must, however, be prepared to pay the call into Court (*m*).

The power of liquidators to effect compromises with contributories has already been alluded to (*n*).

2. Calls for debts.

The proper mode of providing funds for the payment of a debt due from a company which is being wound up is by making a call on its contributories, and not by ordering them to pay the debt (*o*).

Under the acts of 1848 and 1849, a creditor of a company was not entitled, as creditor, to require a call to be made for Right of creditor
to require a call
to be made.

(*g*) See *Prichard's claim, Ex parte Turner and Smith*, 2 De G. F. & J. 354. See R. S. C. Ord. xlv.; *Rapier v. Wright*, 14 Ch. D. 638.

(*h*) See *ante*, p. 697. *Longworth's Executors' case*, Johns. 461.

(*i*) *Londesborough's case*, 4 De G. M. & G. 411. As to obtaining back money already paid for calls, see *Ex parte Holroyd*, 15 Jur. 696; *Ex parte Day*, 3 Jur. N. S. 1016; *Alison's case*, 9 Ch. 2.

(*k*) *Underwood's case*, 5 De G. M. & G. 677.

(*l*) *Arthur Average Association*, 3 Ch. D. 522; *London Marine Insurance Association*, 8 Eq. 176.

(*m*) See *Oakes' case*, and *Peck's case*, W. N. 1866, 361; *London Bank of Scotland*, 2 ib. 114; *Jopp's case*, ib. 192.

(*n*) *Ante*, p. 709.

(*o*) See *Re Cameron Coalbrook, &c., Co.*, 30 Beav. 216.

Bk. IV. Chap. 1. his payment. His remedy, if he had a judgment already, was
 Sect. 11. to enforce it against those individuals who were liable to it, and, if he had no judgment, then to obtain one against the official manager, and enforce it as before (*p*). The persons proceeded against could require a call to be made for their own indemnity, but it was only in this manner that a creditor, as such, could obtain payment under the acts of 1848 and 1849, if driven to his strict rights (*q*). If, however, the creditor was himself a contributory, he was, even under the acts of 1848 and 1849, entitled to require a call to be made for his own payment (*r*) ; and when creditors become parties to the winding up under the act of 20 & 21 Vict. c. 78, and were thereby disabled from proceeding at law, they were entitled as creditors to require a call to be made for payment of their allowed demands. Under the Companies act, 1862, a creditor who has established his debt against the company is entitled to have a call made for his payment on those contributories who are liable to calls.

For what debts
calls may be
made.

Contract Cor-
poration.

The only debts for the payment of which calls can be made, are the debts proved against the company being wound up (*s*) ; whether the debt is equitable or legal is unimportant (*t*) ; but no call can be made for providing a fund which may or may not be wanted (*u*). Nevertheless it was decided in the case of the *Contract Corporation* (*x*), that it is not necessary that disputed debts shall be finally established against the company before calls in respect of them are made.

Under the Winding-up acts of 1848-49 it was held, that before a call could be made on any particular contributory settled on the list, his liability to contribute (*y*) to the debt to

(*p*) See *ante*, p. 612.

(*q*) See *Thompson v. Norris*, 5 De G. & S. 686 ; and *Prichard's case*, 5 De G. M. & G. 484.

(*r*) *Gleadlow v. Hull Glass Co.*, 15 Beav. 200.

(*s*) See *Wryghte's case*, 2 De G. M. & G. 636 ; and see *Marylebone Bank*, 18 Jur. 281.

(*t*) *Terrell v. Hutton*, 4 H. L. C. 1091.

(*u*) *Marylebone Bank*, 18 Jur. 281,

and see *ante*, p. 731, as to providing funds to answer possible claims by landlords.

(*x*) 2 Ch. 95. See, also, *Helbert v. Banner*, L. R. 5 H. L. 28, which shows that the Court will act on the estimates of the liquidator.

(*y*) Direct liability to creditors was not the test of liability to calls under the Winding-up acts of 1848-49. *Hopkinson's and Underwood's case*, 7 De G. M. & G. 193.

pay which the call was made, must have been established (*z*); for it by no means follows that every person settled on the list is liable to all the calls which it may be necessary to make in the course of winding up the company (*a*). Thus, if debts had been incurred by the directors, and such debts were provable against the company, but ought, as between the directors and the shareholders, to be borne by the former, the call for the payment of those debts must have been first made on the directors exclusively. This was held where the directors had expressly guaranteed the shareholders against all loss (*b*); where the debts in question had been incurred by the directors in excess of the authority reposed in them (*c*); and where they had been contracted by the directors, who had fraudulently obtained a covenant for their own indemnity (*d*).

In applying these decisions, however, to companies which are wound up under the Companies act, 1862, it is necessary to bear in mind not only the difference between the position of creditors under that act and the older acts, but also the rule that calls on past members form part of the general assets of the company, and are not specifically applicable to any particular debt (*e*). The proper mode of dealing with such cases as the above under the act of 1862, is, if necessary (*f*), to make a call on all the contributories, liable as present members, and to pay the creditors, and afterwards adjust the rights of the contributories *inter se* (*g*).

Calls for costs.—See *infra*, § 12.

(*z*) *Upfill's case*, 1 Sim. N. S. 395; *parte Chippendale*, 4 ib. 19, and *Hunter's case*, ib. 435; *Marylebone Bank*, 18 Jur. 281.

(*a*) See *Ex parte Mansfield*, 2 Mac. & G. 67, *per* Lord Cottenham.

(*b*) *Mowatt and Elliott's case*, 3 De G. M. & G. 254, reversing *Ex parte Mowatt*, 1 Drew. 247; *Londesborough's case*, 4 De G. M. & G. 411.

(*c*) *Ex parte Cropper*, 1 De G. M. & G. 147; *Worcester Corn Exchange Co.*, 3 ib. 180. Compare *Ex parte Bignold*, 22 Beav. 143.

(*d*) *Carew's case*, 7 De G. M. & G. 43; and see *Walker's case*, 8 ib. 607.

(*e*) *Webb v. Whiffin*, L. R. 5 H. L. 711.

(*f*) See under the next head.

(*g*) See the judgments in the *Contract Corporation*, 2 Ch. 95, and *Helbert v. Banner*, L. R. 5 H. L. 28.

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Calls for adjustment of rights of the contributories inter se.

Paid-up and unpaid-up shares.

3. *Calls for the adjustment of the rights of the contributories.*

It is the duty of the judge acting in the winding up, to adjust and finally settle all cross claims between the contributories (*h*) ; but this does not preclude him from making a call on them all alike, and from afterwards adjusting such inequalities of payments as on taking the whole of the accounts between them may be found to exist. If, for example, several of the contributories have already paid to the company more than others, who ought to have paid as much as they, a call may nevertheless be made on all alike if it is necessary to raise a fund at once for defraying some loss or expense to which they are all liable ; the temporary injustice produced by such a call may be set right afterwards (*i*). At the same time, such temporary injustice ought, if possible, to be avoided ; and a call ought not to be made on the general body of contributories if it appears that any of them are indebted to the company in sums which can readily be recovered, and which, if recovered, would render the call unnecessary (*k*).

If in an unlimited company there are two classes of shareholders, viz., holders of shares paid up, and holders of shares not paid up, the latter ought to be called upon to pay up their shares before any call is made on the former (*l*). Again, in limited companies where some of the shares are paid up in full but others are not, calls ought to be made on the holders of the unpaid-up shares in favour of the holders of the paid-up shares, in order to put all the shareholders on an equality (*m*) ;

(*h*) *I.e.*, *quâ* contributories, *Alexandra Palace Co.*, 23 Ch. D. 297. See § 109 of the Companies act, 1862, and *Marylebone Joint Stock Bank Co.*, 25 L. J. Ch. 650 ; *Ex parte Perrier*, 7 Ir. Ch. Rep. 256 ; *Ex parte Dayrell*, and *Ex parte Lowndes*, 1 Jur. N. S. 1129.

(*i*) See *Gay's case*, 5 De G. & S. 122, and 1 De G. M. & G. 347 ; *Prece and Evans' case*, 2 De G. M. & G. 374.

(*k*) *Gay's case*. 1 De G. M. & G.

347 ; *Underwood's case*, 5 ib. 677. See, too, *The Marylebone Bank*, 18 Jur. 271 ; and see above, notes (*c*), (*d*), (*g*).

(*l*) See last note, and as to paid-up shares, *ante*, p. 783.

(*m*) *Anglesva Colliery Co.*, 2 Eq. 379, and 1 Ch. 555 ; *Crookhaven Mining Co.*, 3 Eq. 69 ; *Scinde, Poonjau, and Delhi Corp.*, 6 Ch. 53, note ; *Ex parte Maude*, ib. 51 ; *Gibson & Co.*, 5 L. R. Ir. 139 ; *Newtownards Gas Co.* 15 L. R. Ir. 51.

unless the regulations of the company exclude the right to such a call (*n*). Bk. IV. Chap. 1.
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Again, in some insurance societies calls ought not to be made on policy-holders who are members until calls have been made on the shareholders (*o*).

In settling the cross claims of contributories, a call cannot seem to be made on a contributory otherwise than in respect of the shares standing against his name in the list of contributories (*p*). But, as already seen, orders can be made for payment of money owing to the company by its officers (*q*); and in one case it was held that where directors were liable to make good losses incurred by their own fraudulent conduct, the shareholders have a right to have a call for the whole amount made on those, or that one of the directors who was able to pay (*r*).

4. *Limit of liability to calls.*

a) Present members.

The extent to which contributories are liable to calls depends, in the first place, on the nature of the company. Extent of liability to calls.

If the company is one, the liability of whose members is not limited by the Legislature or the Crown, or by registration as a limited company, the amount of the calls which may be made upon the contributories is limited only by the debts and engagements of the company, and the costs of winding up, and the sums, if any, which may be required for the adjustment of the rights of the contributories amongst themselves (*s*).

(*n*) As in *Eclipse Gold Mining Co.*, 17 Eq. 490; *Doncaster Permanent Building Society*, 4 Eq. 579, and *Holyford Mining Co.*, Ir. L. R., 3 Eq. 208.

(*o*) *Albion Life Ass. Soc.* 16 Ch. D. 83.

(*p*) See *Addison's case*, 20 Eq. 620, where a call to enforce a contract of indemnity was refused. But see the next note but one.

(*q*) *Ante*, p. 851.

(*r*) See *Ex parte Perrier*, 7 Ir. Ch. Rep. 256, where one contributory

had to pay the whole value of nominally paid-up shares which had been fraudulently obtained by him from the company, and had been afterwards given by him to the directors who enabled him to commit the fraud.

(*s*) See, as to mutual marine insurance societies, *Andrews and Alexander's case*, 8 Eq. 176; *Lion Insurance Association v. Tucker*, 12 Q. B. D. 176; *Arthur Average Association*, 3 Ch. D. 522.

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In those cases in which, by the constitution of the company, the liability of its shareholders as between themselves is limited to the amount of their respective shares, a call may be made upon them to the full amount of those shares not already paid up (*t*); and even beyond that amount, if, notwithstanding the constitution of the company, the liability of the shareholders to the creditors is unlimited (*u*). But if the liability of the shareholders is, as between them and the creditors of the company, limited to the amount unpaid up of their respective shares, then no calls for the payment of the debts of the company can be made beyond the same amount (*x*); although even then the liability for calls in respect of costs will be unlimited (*y*).

2. Where company is limited.

If, on the other hand, the company is one, the liability of whose members is limited by the Legislature, or the Crown, or by registration as a limited company, the amount of calls which may be made upon the contributories cannot exceed the limit imposed by the Legislature or the Crown, or by the Companies act, 1862, as the case may be.

With respect to companies formed and registered under the last-mentioned act with limited liability, the act declares,

By shares.

1. That in the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares, in respect of which he is liable as a present or a past member (*z*); and

By guarantee.

2. That in the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount of the undertaking entered into on his behalf by the memorandum of association (*a*). With respect, however, to

(*t*) *Talbot's case*, 5 De G. & S. 547.
386.

(*u*) *Greenwood's case*, 3 De G. M. & G. 459, reversing S. C., 2 Sm. & G. 95. See *Marylebone Joint Stock Banking Co.*, 25 L. J. Ch. 650.

(*x*) *Prince of Wales Life Assur. Society*, Johns. 80, affirmed 3 De G. & J. 660. See, also, the Companies act, 1862, § 38, cl. 6; and *ante*, pp. 246 *et seq.*

(*y*) *Lethbridge v. Adams*, 13 Eq.

(*z*) § 38, cl. 4. As to calls on the holders of fully paid-up shares who have received back part of the capital or assets of the company, compare *Cardiff Coal Co.*, 2 N. R. 562, and 11 W. R. 1007, with *Cardiff, &c., Coal Co. v. Norton*, 2 Eq. 558, and 2 Ch. 405; and see *Stringer's case*, 4 Ch. 475; *Rance's case*, 6 ib. 104.

(*a*) § 38, cl. 5.

companies limited by guarantee, and having capitals divided into shares, it is also declared that any share of capital that may not have been called up shall be deemed assets of the company, and be a debt due to the company from each member, to the extent of any sums unpaid on any shares held by him, and shall be payable at such time as the Court may appoint (*b*). Bk. IV. Chap. 1
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It must also be borne in mind that, even if a company is limited, still, its articles may contain clauses obliging holders of paid-up shares to contribute to some particular debt (*c*); and if the company is a banking company issuing notes, the liability of its contributories in respect of those notes is not limited (*d*). Limited banking
companies.

It has already been seen that a company formed before November, 1862, as an unlimited company, may be registered under the Companies act, 1862, as a limited company (*e*), and that a company originally registered as an unlimited company may be re-registered as limited (*f*). But such registration does not affect the obligation of the company or its shareholders to discharge in full the debts and liabilities of the company contracted whilst the company was unlimited (*g*); and in a case of this description, it has been decided that calls may be made on the shareholders in the unlimited company, beyond the amount unpaid up on their shares in the limited company (*h*). 3. Company
originally un-
limited but
afterwards
limited.

b) Past members.

1. As regards companies formed and registered under the Companies act, 1862, the extent of a contributory's liability to calls depends further on whether at the time of the presenta- 1. Companies
formed and
registered
under the Act
of 1862.

(*b*) § 90.

(*c*) As in *Maxwell's case*, 20 Eq. 585, and *McKewan's case*, 6 Ch. D. 447. And in a mutual marine insurance society limited by guarantee, see *Lion Insurance Association v. Tucker*, 12 Q. B. D. 176.

(*d*) See the Companies act, 1879, § 6. This act repealed § 182 of the Companies act, 1862.

(*e*) *Ante*, pp. 116, 253.

(*f*) Companies act, 1879, § 4, and *ante*, p. 335.

(*g*) *Ib.* The remedy of the creditors is affected, but not their right to payment. See *ante*, pp. 127, 276 *et seq.*

(*h*) *Garnet and Moseley Gold Mining Co. v. Sutton*, 3 Best & Sm. 321; *Ex parte Stevenson*, 32 L. J. Ch. 97. Compare *Fountain's case*,

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tion of the winding-up petition he was or was not a member of the company. With respect to retired members the act in substance declares,

1. That no past member shall be liable to contribute if he has ceased to be a member for a year or more before the commencement of the winding up (*i*).

2. That no past member shall be liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member (*k*).

3. That no past member shall be liable to contribute unless the existing members are unable to pay their contributions (*l*).

In giving effect to these provisions, considerable difficulties arise. Such of them as affect the liability of past members to be settled on the list of contributories have been already alluded to (*m*); but assuming a past member to be properly on the list, the question still remains what calls can be made upon him? He is not liable to any call in respect of any debt or liability contracted after he ceased to be a member (*n*); but he is liable in respect of all debts contracted before that time and subsisting at the date of the winding-up order, even although they were contracted before he became a member (*o*); and if the assets of the company, including the contributions of the present members, are not sufficient to discharge the whole of the liabilities of the company, the past members become liable to have a call made upon them in respect of those debts. But the amount of the call cannot exceed the unpaid residue of the debts in respect of which the past members are liable to be put on the list: all payments made by the liquidator out of the assets of the company in respect of those debts enure for the benefit of the past members and diminish their liability (*p*).

11 Jur. N. S. 553, L. C., which turned on the Industrial and Provident Societies act.

(*i*) § 38, cl. 1, and § 84.

(*k*) § 38, cl. 2.

(*l*) § 38, cl. 3. See as to past and present members of insurance companies, *Hesketh's case*, 13 Ch. D. 693; *Bath's case*, 8 Ch. D. 334. *Bath's case*, 11 Ch. D. 386, is overruled.

(*m*) *Ante*, pp. 816 *et seq.*

(*n*) § 38, cl. 2, and see § 133; *Andrew's case*, 4 Eq. 458, and 3 Ch. 161.

(*o*) *Helbert's case*, 6 Eq. 509, and L. R. 5 H. L. 28, *sub nom. Helbert v. Banner*; *Webb v. Whiffin*, L. R. 5 H. L. 711.

(*p*) *Brett's case* and *Morris's case*, on the rehearing, 8 Ch. 800; and

In limited companies the liability of each past member is further limited by the amount unpaid up of his shares. Bk. IV. Chap. 1.
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Again, the money raised by calls made on past members becomes part of the general assets of the company, applicable to the payment of all its debts and liabilities, without reference to the time when they were contracted (*q*), and also to the costs of winding up (*r*). There is no marshalling either of debts or of assets for the benefit either of creditors or of members (*s*). The consequences of this as regards costs will be seen hereafter (*t*). No marshalling
of calls.

2. As regards companies not formed under the Companies act, 1862, the liability of past members to calls depends on sections 196 and 200 (*u*), which do not exonerate members who have retired more than a year before the commencement of the winding up from liability. Consequently, if there are debts to which past members are still liable, and which present members cannot pay (*x*), calls must be made on the past members. The amount of call must, it is apprehended, be decided on the principles explained when considering the liability of these persons to be on the list of contributories (*y*). 2. Other
companies.

As has been already pointed out, past members are not in the position of sureties, and are not discharged by compromises made with present members before the past members are settled on the list (*z*); nor by the forfeiture of their shares (*a*).

5. *Set-off against calls.*

If the company is indebted to a contributory on whom a call is made, his right to set off the amount due to him from the call upon him has to be considered. With reference to this Set-off against
calls.

see the same cases on the first hearing, 7 Ch. 200, and 6 Ch. 800.

(*q*) *Webb v. Whiffin*, L. R. 5 H. L. 711, affirming *Briton, &c., Life Ass.*, 5 Ch. 428.

(*r*) *Ib.*

(*s*) See *Webb v. Whiffin*, L. R. 5 H. L. 711, correcting *Brett's case*, 6 Ch. 800, and *Morris's case*, 7 ib. 200, and *Brett's case* and *Morris's*

case, 8 Ch. 800, on the rehearing.

(*t*) See *infra*, § 12.

(*u*) See, as to registered companies, § 196, cl. 5, and as to unregistered companies, § 200.

(*x*) See, as to this, *ante*, 749 and 817.

(*y*) *Ante*, p. 818.

(*z*) *Ante*, p. 821.

(*a*) *Ante*, p. 845.

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In limited
companies.

In unlimited
companies.

subject, it is important to determine whether his claim against the company arises simply from his being a member of the company ; or whether it arises from some transaction with the company which would give him a claim against it even if he were not a member. If his claim is of the first description, *e.g.*, if it is a claim to dividends or profits, no set-off is allowed, to the prejudice of the creditors of the company ; but the claim must be taken into account in finally adjusting the rights of the contributories amongst themselves ; and this rule applies as well to unlimited as to limited companies (*b*). If, on the other hand, his claim is of the second description, then the ordinary doctrines of set-off apply in his favour if the company is unlimited, but not if it is limited (*c*). In other words, where the company is limited, no set-off is allowed, as against the company, except to the extent of setting off a call made and payable by a contributory against a dividend payable to him in respect of his debt : whilst if the company is unlimited, any debt owing by it to a contributory, otherwise than in respect of his shares, may be set off against calls made upon him (*d*).

In this respect the law as to unlimited companies is the same as it was under the Winding-up acts of 1848-49. Under them it was held that where the company was indebted to a contributory otherwise than in respect to his shares (*e*), he might set off the amount of that debt from calls made upon him (*f*) ; and, if necessary, calls for his reimbursement were made on the other contributories (*g*) ; and unless their liability, as between him and them, was clearly limited to the amount of their respective shares, it was no answer to a call on them for his indemnity, that they had already paid up their shares in full (*h*).

(*b*) See § 38, cl. 7, and § 101.

(*c*) *Ib.* *Black & Co.'s case*, 8 Ch. 254. § 10 of the Judicature act, 1875, has not changed the law, *Gill's case*, 12 Ch. D. 755.

(*d*) See, on this subject, *ante*, pp. 741 *et seq.*

(*e*) See 11 & 12 Vict. c. 45, § 61.

(*f*) *Ex parte Chippendale*, 4 De G.

M. & G. 19.

(*g*) *Marylebone Joint Stock Banking Co.*, 25 L. J. Ch. 650, V.-C. K. See, too, *Ex parte Dayrell*, and *Ex parte Lowndes*, 1 Jur. N. S. 1129 ; *Ex parte Sedgwick*, 2 Jur. N. S. 949.

(*h*) *Marylebone Joint Stock Banking Co.*, 25 L. J. Ch. 650.

Where an order is made to wind up a limited company, and the costs are ordered to be paid by the company to the petitioner, he is entitled to receive these costs, although he may be a debtor to the company before they are paid (i). Bk. IV. Chap. 1.
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Set-off against costs.

SECTION XII.—COSTS.

The costs of winding up a company are usually so large, that the rules relating to their payment are of great practical importance. In fact, it is by no means an uncommon circumstance for contributories to have heavier calls made upon them for the payment of costs than for all other purposes put together (j). In considering the question of costs, the first point to determine is, what costs are payable by the company, and the next is, how and by whom such costs are to be paid. Costs of winding up.

First, as to the costs payable by the company.

The costs of the petition for winding up a company have been already alluded to (*ante*, p. 658).

The costs of the proceedings subsequent to the winding-up (k) order may be divided into two classes, according as they are or are not incurred in litigation. The non-litigious expenses are borne by the company, unless otherwise directed by the judge acting in the winding up (l). But provision is made against burdening the company with the costs of persons who, for their own better protection, desire to attend the winding-up proceedings; they can only do so at their own expense, Costs of petition.

Costs of proceeding subsequent to the winding-up order.

(i) See *The General Exchange Bank*, 4 Eq. 138; and see *ante*, p. 715, as to costs and debts becoming due from the company whilst in liquidation.

(j) The power of the taxing-master to disallow costs has been much increased by the order of May, 1889, LXV., r. 27 (38a).

(k) The Court cannot order the costs of an action brought for the benefit of the company before the

winding up and subsequently dismissed by consent to be paid out of the company's assets: *Hull Central Drapery Co.*, 15 Ch. D. 326.

(l) In *Ex parte Hardinge*, 1 N. R. 40, it was held that the official manager of a Company was not entitled to costs incurred under an order made by a court having no jurisdiction. Compare *Arthur Average Association*, 3 Ch. D. 522.

Ek. IV. Chap. 1. and if their attendance causes extra expense to the company,
Sect. 12. such expense may be thrown upon them (*m*).

If the Court orders delinquent directors to be prosecuted, it may order the costs to be borne by the company (*n*).

General rules. The litigious expenses (or costs in the usual sense of the word) are in the discretion of the Judge (*o*). This discretion, however, is not to be exercised arbitrarily; and where there are no reasons to the contrary, the costs incurred by any particular litigation must be borne by the unsuccessful party.

Ex parte Sichell. This rule was expressly laid down in *Ex parte Sichell* (*p*), and it has been held to apply to appeals (*q*). The rule, moreover, applies as well in favour of as against the company, and not only in cases of litigation between the company and its contributories, but also in those between it and non-contributories, or between different classes of contributories disagreeing amongst themselves. For example, if a contributory applies unsuccessfully to be removed from the list (*r*), or unsuccessfully resists being put on it (*s*), or applies unsuccessfully to have another person put on (*t*), or appeals unsuccessfully against an order making, or refusing to make, a call (*u*), or if he moves unsuccessfully to discharge the winding-up order (*v*), or to disturb a compromise made with other contributories (*x*), or if a person claiming to be a creditor appeals against a disallowance of his debt, and he fails on the appeal (*y*); in all these

(*m*) See Rule 60.

(*n*) See § 167.

(*o*) See, as to costs in the Stannary Courts, *Ex parte Palmer*, 7 Ch. 286.

(*p*) 1 Sim. N. S. 187. See, also, *Ex parte Barry's representatives*, 2 Dr. & Sm. 321; *Ex parte Oakes and Peck*, 3 Eq. 633, 634.

(*q*) *Ex parte Hall*, 1 De G. M. & G. 1. But see *Sichell's case*, 3 Ch. 119.

(*r*) Examples of this are very numerous. See, amongst others, *Ex parte Oakes and Peck*, 3 Eq. 633, 634; *Sichell's case*, 1 Sim. N. S. 187; *Reaveley's case*, 1 De G. & S. 550; *Bernard's case*, 5 ib. 283; and as to appeals, *Ex parte Mansfield*, 2 Mac. & G. 57; *Laves's case*, 1 De

G. M. & G. 421; *Straffon's Executors' case*, ib. 576; *Gibson's case*, 2 De G. & J. 275.

(*s*) *Ex parte Barry's representatives*, 2 Dr. & Sm. 321; *Gower's case*, 6 Eq. 77.

(*t*) *Bugg's case*, 2 Dr. & Sm. 452.

(*u*) *Ex parte Cropper*, 1 De G. M. & G. 147; *Ex parte Chippendale*, 4 ib. 19; *Londesborough's case*, ib. 411; *Ex parte Woolmer*, 2 ib. 665.

(*v*) *Ex parte Woolmer*, 5 De G. & S. 117, and 2 De G. M. & G. 665; *Clark's case*, 1 K. & J. 22.

(*x*) *Lucy's case*, 4 De G. M. & G. 356.

(*y*) *Ex parte Lloyd*, 1 Sim. N. S. 248; *Wryght's case*, 2 De G. M. & G. 636.

and similar cases the motion or the appeal will, as a rule, be dismissed with costs. Bk. IV. Chap. 1.
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So where the official liquidator, on the part of the company, unsuccessfully appeals against an order excluding a person from the list of contributories (*z*), or unsuccessfully resists an appeal by a person put on the list, and seeking to have his name removed from it (*a*), or an appeal against an order for a call (*b*), or an appeal against the disallowance of a creditor's demand (*c*), or an appeal against an order excluding a contributory from attendance before the Judge acting in the winding up (*d*), or an appeal against an order for the delivery up of documents (*e*); in these and similar cases the official liquidator, as a rule, is either ordered to pay the costs, reimbursing himself from the assets of the company (*f*); or to pay the costs out of the assets (*g*).

However, where the case of one individual is selected to represent that of a class, the general rule is not to make him pay the costs even if he fails; and sometimes the company is ordered to pay them (*h*), but not as between solicitor and client (*i*). Representative
cases.

(*z*) As in *Maudslay & Field's case*, 17 Sim. 157; *Copper's case*, 1 Sim. N. S. 178; *Conway's case*, 5 De G. & S. 150; *Holme's case*, 4 ib. 312; and 2 De G. M. & G. 113; *Ex parte Beurdshaw*, 1 Drew. 226; *Ex parte Roberts*, ib. 204; *Brockwell's case*, 4 ib. 205; *Nicol's case*, 3 De G. & J. 387.

(*a*) As in *Roberts' case*, 3 De G. & S. 205, and 2 Mac. & G. 192; *Mather's case*, 3 De G. & S. 234; *Mainwaring's case*, 2 De G. M. & G. 66.

(*b*) As in *Upfill's case*, 1 Sim. N. S. 395; *Hunter's case*, ib. 435; *Mowatt and Elliott's case*, 3 De G. M. & G. 254.

(*c*) *Croxtan's case*, 5 De G. & S. 432.

(*d*) *Ex parte Slatter's executors*, 5 De G. & S. 34.

(*e*) *Pell's case*, 3 De G. & S. 170.

(*f*) *Dominion of Canada Plumbago*

Co., 27 Ch. D. 33; *Campbell's case*, 4 Ch. D. p. 475; *Ferrao's case*, 9 Ch. 355; *Sichell's case*, 3 Ch. p. 124; and compare in bankruptcy, *Ex parte Angerstein*, 9 Ch. 479; *Pitts v. La Fontaine*, 6 App. Ca. 482.

(*g*) *Smallpage's case*, 30 Ch. D. p. 604; *Dronfield Silkstone Coal Co.*, 23 Ch. D. 511; *Home Investment Soc.*, 14 Ch. D. 167; *Ex parte Bartley*, 12 Ch. D. p. 857; and compare in bankruptcy, *Ex parte Leicestershire Banking Co.*, 14 Q. B. D. 48; *Ex parte Stapleton*, 10 Ch. D. 586.

(*h*) See *Walton v. Edge*, 10 App. Ca. p. 44; *Tosh v. North British Building Soc.*, 11 App. Ca. p. 508; *Ex parte Jeaffreson*, 11 Eq. 116; *Walker's case*, 2 Eq. 554. But see *contra*, *Ex parte Walton*, and *Ex parte Hue*, 3 Jur. N. S. 853.

(*i*) *Grinwade v. Mutual Society*,

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No order as to
costs.

But although the general rule is as above stated, its application is far from being universal. It frequently happens, that no order whatever is made as to costs, except that those of the official liquidator are to be borne by the company. It is very difficult to lay down any general rules which can be relied upon as guides, in cases where so much is left to the discretion of the Judge; all that can be said is that there are cases in which a person has not been made to pay costs, where he has unsuccessfully resisted being made a contributory under circumstances of considerable hardship (*k*); where he has been induced to take shares by misrepresentation or fraud (*l*); where the law applicable to his case has been doubtful (*m*); where he has been made a contributory on the authority of a recent decision, followed with reluctance (*n*); where the Judge acting in the winding up has at different times taken different views of a contributory's liability (*o*), or has decided in favour of the contributory (*p*); where a director has succeeded in getting himself struck off the list on which he would not have been put, had it not been for his own ambiguous conduct (*q*); in other hard or doubtful cases, and where one side has been as much in fault as the other (*r*).

Payment of
costs by official
liquidator.

All costs properly incurred by the official liquidator, are defrayed out of the assets of the company, and if necessary by

18 Ch. D. 530; but see *contra*, *Part's case*, 10 Eq. p. 629. See generally as to this, *Andrews v. Barnes*, 39 Ch. D. 133.

(*k*) As in *Crosfield's case*, 4 De G. & S. 338, and 2 De G. M. & G. 128; *Chartre's case*, 1 De G. & S. 581; *Richmond's Executors' case*, 3 ib. 96; but see *Ex parte Oakes and Peck*, 3 Eq. 633, 634.

(*l*) *Dodgson's case*, 3 De G. & S. 85; *Parbury's case*, ib. 43. But see *Hitchcock's case*, ib. 92, and *Gibson's case*, 2 De G. & J. 275; and *Ex parte Oakes and Peck*, 3 Eq. 633, 634.

(*m*) As in *Angas's case*, 1 De G. & S. 560; *Kluht's case*, 3 ib. 210.

(*n*) As in *Hole's case*, 3 De G. &

S. 241; *Ex parte Brittain*, 1 Sim. N. S. 281. But see *Ex parte Sichel*, ib. 187, and *Markwell's case*, 5 De G. & S. 528.

(*o*) As in *Stanhope's case*, 3 De G. & S. 198.

(*p*) As in *Bird's case*, 1 Sim. N. S. 47; *Holt's case*, ib. 389; *Keene's Executors' case*, 3 De G. M. & G. 272; *Woollaston's case*, 5 Jur. N. S. 617, and 4 De G. & J. 437.

(*q*) As in *Cockburn's case*, 4 De G. & S. 177; *Sharp and James's case*, 1 De G. M. & G. 565.

(*r*) See *Worcester Corn Exchange Co.*, 3 De G. M. & G. 180; *Talbot's case*, 5 De G. & S. 386; *Preece and Evans's case*, 2 De G. M. & G. 374.

calls on its contributories (s). Even where the official liquidator is a party to some proceeding, the costs of which he is ordered to pay personally, his right to be indemnified by the company is not necessarily taken away by such order (t). But there can be no doubt of the power of the Court to order an official liquidator to pay out of his own pocket, and without recourse to the company, any costs, charges, or expenses, improperly incurred by him in winding up the company (u); and on more than one occasion, the official liquidator has been made to bear his own costs (x). It has, however, been said that the official liquidator cannot be ordered personally to pay the costs incurred by his having improperly summoned a person as a contributory (y). In those cases in which no costs are given, or in which the costs of the official liquidator are not otherwise provided for, his costs are borne by the company, unless the contrary is ordered.

As regards appeals, an appeal will lie against an order refusing to give the liquidator his costs out of the assets of the company (z). If a liquidator unsuccessfully supports an order appealed from, he gets his costs out of the assets of the company, but if he unsuccessfully appeals and is ordered to pay costs, the Court of Appeal usually leaves it to the Judge having the conduct of the winding up to determine how those costs are to be borne (a). It is not necessary for the liquidator to obtain leave to appeal, but unless he does so, he incurs considerable risk of losing his costs if he is unsuccessful (b).

(s) As to calls for remuneration for work to be done, see the *Marylebone Bank*, 18 Jur. 281. As to taxation of liquidator's costs, see *Re East Holyford Mining Co.*, Ir. Rep. 10 Eq. 361.

(t) *Grand Trunk Rail. Co. v. Brodie*, 3 De G. M. & G. 146. See *ante*, note (f).

(u) See *Ex parte Roberts*, 1 Drew. 204.

(x) *Silver Valley Mines*, 21 Ch. D. 381; *Clifton's case*, 5 De G. M. & G. 743; *Ex parte A'Beckett*, 2 Jur. N.S. 684, where the O. M. had not kept proper books.

(y) *Ex parte Marsh*, 1 Mac. & G. 302.

(z) *Silver Valley Mines*, 21 Ch. D. 381.

(a) See *Silver Valley Mines*, 21 Ch. D. 381; *Robinson's case*, 4 Ch. 335; *Stringer's case*, ib. 493. See *National Savings Bank Association*, 1 Ch. 554. See, also, *Westcomb's case*, 9 Ch. 553, where the liquidator was a respondent and was left to apply to the judge for his costs.

(b) *Silver Valley Mines*, 21 Ch. D. 381. He will be allowed the costs of an application for leave to appeal unless the application is frivolous,

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Costs of creditors' representatives.

A creditors' representative appointed under the Winding-up amendment act of 1857, was entitled to his costs out of the assets of the company (*c*).

The office of creditors' representative is abolished, but the Court has power to appoint persons to represent either creditors or contributories (*d*), and the costs of such persons are usually paid by the company even when there is no adverse interest between them and the official liquidator (*e*). But other individuals who choose to appear upon questions not directly concerning them, must do so at their own expense (*f*).

Secondly, as to the payment of the costs payable by the company.

Calls for costs.

The costs which have to be borne by the company, or are payable out of its estate, are discharged by the official liquidator out of the assets of the company in his hands, if he has sufficient for the purpose, and if not, then by calls on the contributories (*g*).

In the event of the assets being insufficient to satisfy the liabilities, the Court may make an order as to the payment out of the estate of the company of the costs, charges, and expenses incurred in winding it up, in such order of priority as the Court thinks just (*h*).

Costs paid in full not proved.

Costs ordered to be paid by the company in the course of the winding up are not like debts on which a dividend only

ib. See, also, *City and County Investment Co.*, 13 Ch. D. 475.

(*c*) See *Budd's case*, 3 De G. F. & J. 297; *Hutton's case*, 10 W. R. 313; *Ex parte Finlay & Co.*, 27 L. J. Ch. 658; and see *McIver's claim*, 5 Ch. 427. As to his costs when he supported the official manager, see *per V.-C. Wood*, in *Hutton's case*, 10 W. R. 313; *Hoare's case*, ib. 381; and *Re Saxon Life Assurance Society*, 2 J. & H. 408; *Burges and Stock's case*, 2 J. & H. 441. As to his costs of attending the settlement

of the list of contributories, *Mexican and South American Mining Co.*, 26 Beav. 172; *Alabaster's case*, 7 Eq. 285.

(*d*) Rule 61.

(*e*) See *Ex parte Oakes and Peck*, 3 Eq. 634.

(*f*) *Ib.*

(*g*) See, as to calls for costs, *The Companies act*, 1862, §§ 38, 102.

(*h*) *Ib.* § 110. And see *Dominion of Canada Plumbago Co.*, 23 Ch. D. 511.

can be paid if there is a deficiency in assets, but are payable in full out of the assets if there are any (*i*); but the ordinary costs of proving a debt in chambers are usually added to it (*k*). Bk. IV. Chap. 1.
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Where the assets are deficient, even for the payment of costs, the costs of the petition to wind up are entitled to priority over the other costs, and even over those of the liquidator (*l*): next come the costs of any successful litigant which the liquidator has been ordered to pay (*m*); next comes the liquidator's own costs (*n*); and then the other costs without priority *inter se* (*o*). But this order of payment is only applicable to assets not specifically charged; assets which are mortgaged are not liable as against the mortgagee to any costs not incurred for his benefit (*p*): his principal and interest must be paid out of the mortgaged property in priority even to costs incurred by the liquidator in carrying on the company's business with a view to increase its assets, and thereby to benefit its creditors generally (*q*); but the costs of realising the security are a first charge on the fund produced by it (*r*). Assets deficient.

A call for costs may, if necessary, be made before all the assets are got in (*s*), and before the exact amount of the costs payable has been ascertained by taxation (*t*); and a call for

(*i*) *Madrid Bank v. Pelly*, 7 Eq. 442; *Bailey and Leatham's case*, 8 Eq. 94. See, also, *Ex parte Clark*, 7 Eq. 550; *Ex parte Smith*, 3 Ch. 125; *National Building Land Co.*, 15 L. R., Ir. 47.

(*k*) *Ex parte Wright and Gamble*, 8 Eq. 123.

(*l*) *Audley Hall Cotton Spinning Co.*, 6 Eq. 245.

(*m*) This is so whether the liquidator was ordered to pay the costs out of the company's assets, *Home Investment Society*, 14 Ch. D. 167, or to pay them himself with liberty to recoup himself out of the assets, *Dominion of Canada Plumbago Co.*, 27 Ch. D. 33, overruling *Dronfield Silkstone Coal Co.*, 23 Ch. D. 511.

(*n*) Not his remuneration, *Re*

Massey, 9 Eq. 367.

(*o*) *Ex parte Percival*, 6 Eq. 519.

(*p*) See *Oriental Hotels Co.*, 12 Eq. 126.

(*q*) *Ex parte Grissell*, 3 Ch. D. 411, and compare *Marine Mansions Co.*, 4 Eq. p. 611. Where part of the assets have been severed from the rest to meet a particular claim, see *Cook's claim* (2), 18 Eq. 655.

(*r*) See the cases in the last two notes, and compare *Batten v. Wedge-wood Coal Co.*, 25 Ch. D. 317.

(*s*) *Gay's case*, 1 De G. M. & G. 347, and 5 De G. & S. 122. See *ante*, p. 850.

(*t*) *Dale's case*, 1 De G. M. & G. 513; *Ex parte Woolmer*, 2 ib. 665. Compare *Marylebone Bank*, 18 Jur. 281.

Bk. IV. Chap. 1. costs is *primâ facie* payable, by those liable to it, in proportion
Sect. 12. — to the number of shares held by them respectively (*u*).

The right to have a call made for payment of costs may be lost by laches (*x*).

On whom call
to be made.

But a call for costs, like a call for debts, is only to be made on those liable to pay it (*y*). Therefore, where in winding up an abortive company, costs had been incurred, for which a call was made on all the contributories, before their liabilities to the debts of the company had been ascertained, it was held that this call was wrongly made (*z*). It is, therefore, the duty of the judge in the winding up, to ascertain to what costs each contributory or set of contributories is liable, and to make the call for their liquidation accordingly. It is, however, to be observed, that where costs have been incurred in proceedings, taken for the benefit of all the contributories as a body, they are all ratably chargeable with the costs of those proceedings, although they may have been taken unsuccessfully, and although some of the contributories may have already paid more than others towards the discharge of the company's debts (*a*). Any temporary injustice resulting from this last circumstance must be set right afterwards (*b*).

Costs not payable out of funds of company to prejudice of creditors.

In winding up Insurance companies, the policies of which are payable out of the funds of the company, the costs of realising those funds are not deducted from them, but are treated like all the other costs of winding up; *i.e.*, they must be defrayed by calls on the contributories (*c*).

Past members.

The liability of past members for calls in respect of costs, turns, as regards companies formed and registered under the Companies act, 1862, on the true construction of the early part of § 38, taken in connection with the second and third

(*u*) *Ex parte Woolmer*, 2 De G. M. & G. 665.

(*x*) See *Ex parte A'Beckett*, 2 Jur. N. S. 684.

(*y*) *Hunter's case*, 1 Sim. N. S. 435.

(*z*) *Ib.* See, too, *Gay's case*, 5 De G. & S. 122; *Marylebone Bank*, 18 Jur. 281.

(*a*) *Preece and Evans' case*, 2 De

G. M. & G. 374; *Ex parte Woolmer*, *ib.* 665; *Gay's case*, 5 De G. & S. 122, and 1 De G. M. & G. 347.

(*b*) *Ib.*

(*c*) *Professional Life Ass. Co.*, 3 Ch. 167; *Agriculturist Cattle Ins. Co.*, 10 Ch. 1. See, further, *Accidental Death Ins. Co.*, 7 Ch. D. 568.

clauses of the same section (*d*). The early part of § 38 renders past members liable for costs; and the second and third clauses apparently do not exempt them therefrom. As regards companies registered, but not formed under the act (*e*), and as regards unregistered companies (*f*), the provisions of the act are very imperfect, and at present there are no decisions on them.

As regards companies formed and registered under the Companies act, 1862, it was settled in *Brett's case* (*g*), that if there are no debts in respect of which a past member can be made a contributory no calls can be made upon him for any costs. But if there are any such debts a call for some costs may be made on him; but only apparently for costs incurred in settling the list of past members and of adjusting such equities *inter se* as may require adjustment (*h*). At the same time whatever sum is raised by a call on a past member is applicable to pay all debts and costs for which the company is liable.

SECTION XIII.—DISTRIBUTION OF SURPLUS ASSETS, AND FINAL DISSOLUTION OF THE COMPANY.

After the debts, liabilities, and losses of the company have been paid, discharged, and made good, and provision has been made to meet future contingent claims (*i*), and the cross claims between the contributories have been settled, and the costs of winding up have been paid or provided for, there remains but to distribute the surplus assets of the company, if any there be (*k*). The cases in which any surplus is left are rare, but

(*d*) See, also, §§ 75, 110, 196, cl. 5, 200, and as to voluntary winding up, § 144.

(*e*) See § 196, cl. 5.

(*f*) See § 200.

(*g*) 8 Ch. 800, and 6 ib. 800. See *ante*, p. 856.

(*h*) See 8 Ch. 808 *et seq.*, and *Marsh's case*, 13 Eq. 388.

(*i*) *Gooch v. London Banking Association*, 32 Ch. D. 41; *Lord Elphinstone v. Monkland Iron Co.*, 11 App. Ca. 332.

(*k*) Companies act, 1862, § 109. See as to a voluntary society not governed by the Companies acts, *Brown v. Dale*, 9 Ch. D. 78.

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the possibility of there being a surplus, shows that a person may be prejudiced by being excluded from the list of contributors, although, in point of fact, those who are so excluded seldom have reason to complain. A person, however, upon whom calls can be made, will not be allowed to remain on the list so long as he thinks it will be for his benefit to continue there, and then insist on his name being removed when he begins to apprehend that it will be to his prejudice (*l*).

Surplus may not
be profit.

Although there may be surplus assets to be divided, it by no means follows that the company has made any profit. If the surplus is not sufficient to return to the shareholders the amount of capital paid up by them, there has been a loss; and the question to be decided in distributing the surplus is then how that loss is to be borne. If on the other hand the surplus is more than sufficient to return to each shareholder the capital paid up by him, there is a profit and the question then is how the profits are to be shared.

Preference
shareholders.

If there has been a loss the holders of shares entitled to a preference in respect of dividends payable out of profits are not entitled to any preference in respect of the surplus assets (*m*). If there has been a profit the question is more difficult, and depends upon whether (according to the company's act, charter, deed, or articles) the excess of the assets over the capital paid up, though profit in one sense, constitutes a fund divisible as profits amongst the holders of the preference shares.

Bridgewater
Navigation
Company.

Thus in the *Bridgewater Navigation Co.*, the articles of association provided for the issue of preference shares, and contained a clause that no dividends should be paid except out of the profits of the company arising from the business of the company as shown upon the balance sheet, which should from time to time have been examined and passed by the auditors. Shares were afterwards issued entitling the holders to a dividend of 5 per cent. taking precedence of all dividends and claims of the holders of ordinary shares. The company subsequently sold its business for a sum greatly in excess of what

(*l*) See *Underwood's case*, 5 De G. 519; *Griffiths v. Paget*, 6 Ch. D. 511.

(*m*) *London India Rubber Com-*

was needed to return the paid-up capital ; the preference share-^{Bk. IV. Chap. 1.} holders claimed to receive out of this excess a preferential^{Sect. 13.} dividend of 5 per cent. and to share the balance with the ordinary shareholders, while the ordinary shareholders contended that the preference shareholders were not entitled to receive anything out of this excess beyond a dividend of 5 per cent. It was held that under the articles of association the holders of preference shares were only entitled to a dividend of 5 per cent. and all other profits belonged to the ordinary shareholders, but that the profit arising from the compulsory sale was not profit in respect of which dividends might have been declared, and that the clauses relating to dividends were in no way applicable to the fund to be divided (*n*). The constitution of the company may however be such as to confer on some shareholders a preference as to capital, and not only as to dividends, and where this is the case the surplus assets must be applied accordingly (*o*).

Questions also arise as to the mode in which assets are to<sup>Paid-up share-
holders.</sup> be divided when some shareholders have paid up more on their shares than others. If there is a loss, the loss in the absence of express agreement (*p*) is to be borne by all shareholders equally, and the shareholders who have paid up less than others will not be allowed to share in the surplus until those, who have paid up more than they, have been put on an equality with them. This may be done either by returning to shareholders, who have paid up more than the others, the excess so paid by them (*q*) or by making a call on the shareholders, who have paid less than the others (*r*).

If there is a profit, and the dividends of the company whilst it has been carrying on business have been paid upon the

(*n*) *Bridgewater Navigation Co.*, 39 Ch. D. 1. See, too, the remarks of North, J., pp. 12 & 13, as to the possibility of some funds coming to the liquidator's hands being divisible as profits.

(*o*) *Bangor v. Port Madoc Slate and Slab Co.*, 20 Eq. 59.

(*p*) As in *Eclipse Gold Mining Co.*, 17 Eq. 490. See, also, *Holyford*

Mining Co., Ir. L. R. 3 Eq. 208.

(*q*) As in *Ex parte Maude*, 6 Ch. 51 ; *Scinde, Punjab, and Delhi Corporation*, 6 Ch. 53, note. See, also, *Newtownards Gas Co.*, 15 L. R., Ir. 51.

(*r*) As in *Anglesea Colliery Co.*, 1 Ch. 555, and 2 Eq. 379 ; *Crookhaven Mining Co.*, 3 Eq. 69.

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amount of capital paid up, the surplus will in the absence of any provision to the contrary be divided in the same manner (s). If the company has treated the amount paid up by some shareholders in excess of others, as an advance to it, upon which it has been paying interest, these shareholders will be entitled to a return of this advance with interest up to the date of repayment before the other shareholders receive anything and then the surplus will be divided between the two classes equally (t).

Termination of
winding up.

Upon the termination of the proceedings in chambers for the winding up of a company, the official liquidator is required to bring in a balance sheet and pass his final account (u). Upon payment, as he may be directed, of the balance, if any, in his hands, the recognisance of himself and his sureties may be vacated (x), and a certificate that the affairs of the company have been completely wound up is to be made by the chief clerk (y).

Order dissolving
company.

When the affairs of the company have been completely wound up, the Court is required to make an order (z) dissolving the company as from the date of the order (a); and notice of this order is forthwith to be given by the official liquidator to the registrar of joint-stock companies, who is required to make a minute in his books of the company's dissolution (b).

The order dissolves the company (c).

Books of com-
pany.

The books of the company are to be disposed of as the Court may direct (d). The documents relating to the winding

(s) *Bridgewater Navigation Co.*, 39 Ch. D. 1; *Sheppard v. Scinde, Punjab, and Delhi Rail. Co.*, 36 W. R. 1, since affirmed by the House of Lords; *Somes v. Currie*, 1 K. & J. 605.

(t) *Exchange Drapery Co.*, 38 Ch. D. 171. They could not claim interest after the winding up against creditors.

(u) Rule 65.

(x) Rule 65.

(y) Rule 66, and see the form in schedule 3, No. 55.

(z) See the form in the 3rd sche-

dule to the rules, No. 56.

(a) § 111, and see rule 66.

(b) §§ 112 and 113.

(c) § 111. As to the jurisdiction of the Court over dissolved companies, see *Crookhaven Mining Co.*, 3 Eq. 69; *Pinto Silver Mining Co.*, 8 Ch. D. 273; *London and Caledonian Marine Insurance Co.*, 11 Ch. D. 140.

(d) § 155. As to the liability of a liquidator to produce the books in an action to which he is a party, see *London and Yorkshire Bank v. Cooper*, 15 Q. B. D. 473.

up, and the book containing the official liquidator's account, are to be deposited in the Record and Writ Clerk's Office (*e*). Bk. IV. Chap. 1.
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In addition to the usual method of dissolving a company on the winding up by an order of court, power has been given to the registrar of joint-stock companies, after giving certain prescribed notices, to strike the names of defunct companies off the register (*f*), and by so doing to dissolve them. But any company or member thereof who feels aggrieved by the name being struck off may apply to the Court; and the Court if satisfied that the company was at the time of the striking off carrying on business, or that it is just so to do, may order the name of the company to be restored to the register (*g*), and thereupon the company shall be deemed to have continued in existence as if the name thereof had not been struck off. Defunct com-
panies.

Note on building societies. (See infra, p. 918.)

In the distribution of the surplus assets of benefit building and mutual loan societies, the peculiar nature and constitution of the societies give rise to questions of a different character from those already examined. The members of these societies are divided into two classes: *unadvanced members* who, by continuing in the society for a certain period of time and paying regularly what becomes due from them according to the rules of the society, are at the end of that period of time entitled to receive all they have paid with a share of any profits the society may have made; and *advanced members*, who receive at the beginning the sum which the unadvanced members receive at the end, and execute a mortgage to the society to secure the repayment of this sum with interest by fixed instalments, with a right of redemption, when the amount of the instalments they have paid together with any profits with which they may have been credited, is equal to the principal sum advanced with the interest agreed upon. Further, the rules of these societies usually allow members to withdraw either the whole or part of the sums standing to their credit in the books of the society on giving a notice of their desire so to do. When the surplus assets of such a society are not sufficient to pay to the unadvanced members the whole sum to which they are entitled, difficulties have arisen as to the terms on which advanced members are entitled to redeem their mortgages, and as to the manner in which the assets are to be divided between those members who have given a notice of withdrawal, which has expired before the commencement of the winding up, and members who have given no such notice. Benefit Building
Societies.

The rights of the members are to be determined in each case by the contract into which they have entered, and not by presumptions or inferences

(*e*) Rule 67.

(*f*) 43 Vict. c. 19, § 7.

(*g*) See *Outlay Assurance Society*,
34 Ch. D. 479.

Bk. IV. Chap. 1. from the law relating to companies of a different kind or to common law partnerships (*h*).
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Position of
advanced and
unadvanced
members.

In these societies there is no presumption that all the members are liable to contribute equally to the losses of the society so that in the absence of anything in the rules as to the way in which such losses are to be borne, advanced members are entitled, on the company going into liquidation, to redeem their mortgages on payment of what remains due from them after credit has been given for all instalments already paid and for any profits which may have been allocated to them, and the society has no right to make any deductions either from these instalments or from these profits in order to throw the losses of the society equally upon the advanced and unadvanced members (*i*).

Withdrawing
members.

Members who have given notice which has expired before the commencement of the winding up, of their desire to withdraw the monies standing to their credit, either out of the general funds of the society or out of a special fund, as the case may be, are entitled to receive payment of these monies before the other members who have claims against the same funds, but who have given no such notice, receive anything, provided that on the true construction of the rules the effect of the notice is to confer on the members who have given it, an unconditional right to receive these monies, though the society may not be bound to pay them immediately (*k*); but if the notice merely confers upon the members who give it a right to be paid if there be a particular fund in existence and there is no such fund, the members who have given notice have no priority over the other members (*l*).

Preference shares
in building
societies.

There is nothing in the acts relating to building societies or in the nature of the societies themselves to prevent the issue of preference shares, and if such shares are issued the preferences created by them must be observed. Thus, in a case where the society had power to issue fully paid up or deposit shares, which entitled the holders, called depositors, to withdraw their deposits on giving the prescribed notice, in preference to other shares, it was held that the depositors, whether they had or had not given notice of withdrawal before the commencement of the winding up, were entitled to be paid the amount of their deposits before the members who held other shares received any portion of the surplus assets (*m*).

(*h*) See the cases in the next note, and *infra*, p. 918.

(*i*) *Brownlie v. Russell*, 8 App. Ca. 235; *Tosh v. North British Building Society*, 11 App. Ca. 489; *Auld v. Glasgow Working Men's Building Soc.*, 12 App. Ca. 197; and see *Doncaster Permanent Building Soc.*, 3 Eq. 158. The society cannot by any subsequent resolution alter the terms on which a member has a right to redeem. *Smith's case*, 1 Ch. D. 481.

(*k*) *Walton v. Edge*, 10 App. Ca.

33, and 24 Ch. D. 421, *sub nom. Blackburn Benefit Building Society; Mutual Aid Building Society*, 29 Ch. D. 182, affirmed 30 Ch. D. 434; *Alliance Society*, 28 Ch. D. 559.

(*l*) *Mutual Society*, 24 Ch. D. 425, note, explained in the cases cited in the last note. It is not competent for the majority of the society to alter the terms on which a member is allowed to withdraw. *Auld v. Glasgow Working Men's Building Society*, 12 App. Ca. 197.

(*m*) *Guardian Building Soc.*, 23

If, after the payment of all the shareholders who are entitled to priority, there remains a surplus to be divided amongst the ordinary unadvanced shareholders, and if these shareholders have joined the society at different times, the surplus is divided amongst them in proportion to the time they have been members of the society (*n*).

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Ch. D. 440 & 453, affirmed 9 App. Ca. 519, *sub nom. Murray v. Scott*. The question here decided was not whether the depositors who had given notice of withdrawal before the commencement of the winding up were entitled to priority over depositors who had given no notice, but whether the depositors as a class were entitled to priority over the holders of other shares. For the decision of this question it was im-

material whether notice had or had not been given, for the winding up is equivalent to the compulsory withdrawal of all members. See 8 App. Ca. p. 254.

(*n*) *Doncaster Permanent Building Society*, 4 Eq. 579. In this case there was a rule to this effect, but it is evident from the nature of the society that the method of distribution is the fair one.

CHAPTER II.

OF WINDING UP VOLUNTARILY, AND SUBJECT TO THE SUPERVISION
OF THE COURT.SECTION I.—DIFFERENCES BETWEEN THE VARIOUS METHODS OF
WINDING UP.Bk. IV. Chap. 2.
Sect. 1.Inconveniences
of compulsory
winding up.

WHEN a company is wound up by the Court, everything is done under the immediate superintendence of the chief clerk of the judge to whose court the winding up is attached. This necessarily involves issuing summonses and obtaining appointments, and consequent delay and expense, even in matters of routine. In addition to this, the power of adjourning every question before the judge is frequently exercised for the mere purpose of gaining time; and every such adjournment, whether reasonable or not, increases the delay and expense of winding up.

Winding up
voluntarily and
subject to super-
vision.

To avoid these inconveniences as far as practicable, the Companies act, 1862 (following in this respect the acts of 1856—58) provides for two other methods of winding up, viz., 1st, purely voluntarily, that is, without the intervention of the Court at all, and 2dly, voluntarily, but at the same time under an order and subject to the supervision of the Court.

Differences
between these
and compulsory
winding up.

The practical differences between these two methods on the one hand, and winding up by the Court on the other, are, that when a company is wound up voluntarily, or subject to the supervision of the Court, all the business is done by the liquidator, without consulting the judge or his chief clerk, who are only appealed to on matters of difficulty or for the purpose of exercising powers which the liquidator does not possess (*a*).

(*a*) See the judgment of V.-C. Wood, in the *Inns of Court Hotel Co.*, W. N. 1866, 348.

This at once saves much delay and expense. On the other hand, the liquidator being able to act without the direction of the judge or his chief clerk, is more likely to take steps which have afterwards to be rectified, perhaps by litigation (*b*). Moreover, notwithstanding the power of invoking the aid of the Court, creditors and contributories complain that, practically, they have not the same facilities for ascertaining what is being done by the liquidator under a voluntary winding up, or winding up subject to supervision, as they have when a company is wound up compulsorily.

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The theoretical difference between winding up voluntarily and winding up subject to supervision appears to be that the first is supposed to be carried on without any aid from the Court, except when that aid is invoked for some special and limited purpose; whilst when a company is wound up subject to supervision, the extent to which the winding up shall be carried on without consulting the judge or his chief clerk depends upon the order which has been made (*c*). It is not usual, however, to impose any restrictions, unless some necessity for so doing is shown to exist (*d*); and consequently the practical difference between the two methods of winding up consists mainly, if not entirely, in the comparative facilities for obtaining the assistance of the Court, and in the comparative ease with which the liquidator can be controlled, and executions against the company be prevented.

Difference between winding up voluntarily and subject to supervision.

SECTION II.—OF WINDING UP VOLUNTARILY.

All companies registered under the Companies act, 1862, and also all companies which, though not so registered, have been registered under the acts of 1856—1858 (*e*), and also all industrial and provident societies registered under 25 & 26

Companies capable of being wound up voluntarily.

(*b*) See the observations of L. J. Turner, as to the expense of voluntary liquidations in *National Savings Bank Association*, 1 Ch., p. 553.

(*c*) See § 147.

(*d*) See the form of order in schedule 3 to the rules, No. 4.

(*e*) *Torquay Bath Co.*, 32 Beav. 581; *London India Rubber Co.*, 1 Ch. 329.

Bk. IV. Chap. 2. Vict. c. 87, or under 39 & 40 Vict. c. 45, and building societies
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under 37 & 38 Vict. c. 42 (*f*), may be wound up voluntarily (*g*). But no other company can (*h*). But although unregistered companies cannot be wound up voluntarily under the act, there is, theoretically, nothing to prevent the members of such companies, if unincorporated, from dissolving the partnership which subsists between them, and from applying their joint assets in discharging their joint liabilities, and dividing the surplus amongst themselves. It is seldom, however, that this can be done (*i*); for the successful carrying out of such a scheme is liable to be defeated not only by disagreement amongst the shareholders, but also by the importunity of creditors. Practically, therefore, and excepting a few rare cases, unregistered companies must be wound up by the Court.

Circumstances
under which a
company may
be wound up
voluntarily.

A company capable of being wound up voluntarily under the act may be so wound up,—

1. When the time, if any, fixed by the articles for the duration or dissolution of the company has expired or arrived, and the members have passed a resolution requiring the company to be wound up voluntarily (*k*).

2. When the members have passed a special resolution requiring the company to be so wound up (*l*).

3. When the members have passed an extraordinary resolution to the effect that it has been proved to their satisfaction that the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind it up (*m*).

The resolution in this last case must be passed in the manner required for a special resolution, but no confirmation of it is necessary (*n*).

The resolution must, in the second and third of the above cases, be advertised in the *Gazette* (*o*).

(*f*) § 32, sub-s. (4), and *Sunderland, &c., Building Socy.*, 21 Q. B. D. 349.

(*g*) See §§ 129, 176, 177, and 196 of the Companies act, 1862; and, as to Industrial and Provident societies, Appendix.

(*h*) § 200, cl. 2.

(*i*) See as to Friendly societies,

38 & 39 Vict. c. 60, § 25. As to the registration of such societies under the Companies acts, see ib. § 24.

(*k*) §§ 129 and 130.

(*l*) § 129.

(*m*) Ib.

(*n*) Ib. and § 51.

(*o*) § 132.

With respect to extraordinary resolutions, the following case is important:—In the case of the *Bridport Old Brewery Company* (*p*) notice was given that an extraordinary meeting would be held to consider, and, if so determined, to pass a resolution to wind up the company voluntarily. The meeting passed a resolution that it had been proved that the company could not, by reason of its liabilities, continue its business, and that it was advisable to wind up the company. This resolution was never confirmed, and could not, therefore, be supported as a special resolution. It was held that it could not be supported as an extraordinary resolution, inasmuch as the notice was so framed as to lead to the supposition that a special resolution, requiring confirmation, was to be proposed, and did not sufficiently disclose an intention to proceed by way of extraordinary resolution.

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Extraordinary
resolution.

Bridport Old
Brewery Com-
pany.

A notice, however, may be good in part and bad in part; and if it is good so far as it relates to the passing of a resolution to wind up, a resolution to that effect may be valid, although the rest of the notice may relate to some proposed resolution which is *ultra vires*, and such resolution may also be passed (*q*).

The effect of a valid resolution to wind up voluntarily, when a compulsory winding-up order is sought to be obtained, has been considered already (*r*). It is only necessary here to add that, although a company may be in course of winding up voluntarily, any creditor who can satisfy the Court that his rights are prejudiced, is entitled to have the company wound up by the Court (*s*); but the Court may adopt all or any of the proceedings taken in the course of the voluntary winding up (*t*).

Effect of resolu-
tion to wind up.

The time at which the winding up is deemed to commence

Commencement
of winding up.

(*p*) 2 Ch. 191. See, also, *Silkstone Fall Colliery Co.*, 1 Ch. D. 38; *National Savings Bank Assoc.*, 1 Ch. p. 553; *Inns of Court Co.*, W. N. 1866, 348.

(*q*) *Cleve v. Financial Corporation*, 16 Eq. 363; *Stone v. City and County Bank*, 3 C. P. D. 282, at pp. 307 and 313.

(*r*) *Ante*, pp. 636, 640. In the case of the *Bridport Old Brewery Co.*, *supra*, the Court made a compulsory order on the petition of a creditor. See, further, *infra*, p. 886.

(*s*) § 145. As to the right of contributories in this respect, see *Gold Co.*, 11 Ch. D. 701, and *ante*, p. 640.

(*t*) § 146.

Bk. IV. Chap. 2. is the time at which the resolution to wind up is passed (*u*);
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and this, when the resolution is special, means when the second resolution confirming the first is passed (*x*). After the commencement of the winding up the company must cease to carry on business, except for the purpose of winding up its affairs (*y*). The onus of proving that a contract entered into by a company, which is being wound up voluntarily, is not required for the purposes of the winding up, lies on the party disputing the validity of the contract (*z*).

The company retains its corporate character until its affairs are wound up, and it has been actually dissolved, as mentioned below (*a*). After the passing of the resolution to wind up, no shares can be lawfully transferred, except to or with the sanction of the liquidators (*b*); nor can the property of the company be dealt with without their sanction (*c*).

Liquidators.

The first thing to be done after a resolution to wind up is passed is to appoint one or more liquidators, for the purpose of carrying the resolution into effect (*d*). The appointment lies with the members (*e*); but they are empowered to delegate the appointment to the creditors of the company, or to a committee of them (*f*). If there is no liquidator, the Court may appoint one or more, on the application of a contributory (*g*). The Court, moreover, may, on due cause shown, remove any liquidator and appoint another (*h*): and it is not essential to

(*u*) § 130. For the effect of a subsequent order for a compulsory winding up, see *Taurine Co.*, 25 Ch. D. 118; *Thomas v. Patent Lionite Co.*, 17 Ch. D. 250. See *ante*, p. 664.

(*x*) *Emperor Life Assurance Co.*, 31 Ch. D. 78, and *ante*, p. 664; *Dawes' case*, 6 Eq. 232; *Ex parte Colborne and Strawbridge*, 11 Eq. 478; *Weston's case*, 4 Ch. 20.

(*y*) § 131.

(*z*) *Hire Purchase Co. v. Richens*, 20 Q. B. D. 387.

(*a*) *Ib.* and § 143.

(*b*) § 131. See *ante*, pp. 832 *et seq.*

(*c*) See §§ 131, 133, and *ante*, p.

666.

(*d*) § 133, cl. 2, 4, 6. A liquidator cannot be appointed except when there is a valid resolution to wind up. *Indian Zoedone Co.*, 26 Ch. D. 70.

(*e*) § 133, cl. 3, and § 140.

(*f*) § 135.

(*g*) § 141.

(*h*) *Ib.* *Sir John Moore Gold Mining Co.*, 12 Ch. D. 325; *British Nation Life Ass. Assoc.*, 14 Eq. 492; *Marseilles Extension, &c., Co.*, 4 Eq. 692. And see *Ex parte Charlesworth*, 36 Ch. D. 299; and *ante*, p. 703. *Ex parte Pulbrook*, 2 De G. J. & S. 349.

prove misconduct or unfitness on the part of a liquidator, in order to induce the Court to remove him (i). Bk. IV. Chap. 2.
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Liquidators may, it seems, be appointed at a meeting convened for the purpose of passing a resolution to wind up voluntarily, although no notice has been given that their appointment will be proposed at such meeting (k); but if the resolution to wind up is a special resolution requiring confirmation the resolution by which the liquidator was appointed must also be confirmed (l). Whether acts done by liquidators improperly appointed are null and void, or whether they are valid notwithstanding the defect in their appointment, is not so clear as might be desired. It seems, however, that when their appointment is proved to have been invalid, acts done by them are void (m). But it is conceived that it is by no means every irregularity in the appointment which will vitiate it; in many cases the maxim *fieri non debuit, sed factum valet*, may apply (n). Resolutions
appointing
liquidators.

Upon the appointment of liquidators, the powers of the directors cease, except so far as their continuance may be sanctioned by the members in general meeting, or by the liquidators (o).

The duties of the liquidators are—

1. To apply the property of the company in satisfaction of its liabilities, *pari passu* (p). Duties of
liquidators.
2. To pay the debts of the company, and adjust the rights of the contributories amongst themselves (q).

(i) *Marseilles Extension, &c., Co.*, 4 Eq. 692; *British Nation Life Ass. Assoc.*, 14 Eq. 492; and cases in last note.

(k) *Welsh Flannel Co.*, 20 Eq. 360, and see Lord Chelmsford's observations in L. R. 2 H. L. 355. But see, *contra*, *Stearic Acid Co.*, 9 Jur. N. S. 1066; *Anglo-Californian Co. v. Lewis*, 6 H. & N. 174. In that case the invalidity of the appointment of the liquidators enabled a shareholder to defeat an action for calls made by them.

(l) *Indian Zoedone Co.*, 26 Ch. D.

70.

(m) See note (k), and § 67 of the act. In the case of the *Bridport Old Brewery Co.*, 2 Ch. 191, the effect of that section was discussed.

(n) See *ante*, p. 173.

(o) § 133, cl. 5. *James v. May*, L. R. 6 H. L. 328. See *infra*, p. 881, note (l).

(p) § 133, cl. 1.

(q) § 133, cl. 10. Though the words in this section differ from those in § 109, which applies to a winding up by the Court, their

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3. To pay the costs of winding up (*r*).

4. As soon as the affairs of the company are fully wound up, to make up an account showing the manner in which such winding up has been conducted (*s*).

5. To call a meeting of the company (*t*) for the purpose of having this account laid before them, and hearing any explanation that may be given by the liquidators (*u*).

6. To make a return to the registrar of joint-stock companies of such meeting having been held (*x*).

If the winding up continues more than a year, the liquidators must, at the end of the first and each succeeding year, summon a general meeting of the company (*y*), and lay before such meeting an account showing their acts and dealings, and the manner in which the winding up has been conducted during the preceding year (*z*).

In order to enable the liquidators to perform their duties, they are authorised—

1. To exercise all powers given by the act to the official liquidator (*a*).

2. To exercise the powers given to the Court of settling the list of contributories (*b*) ;

3. To make calls upon all or any of the contributories settled on the list to the extent of their liability (*c*) ;

4. To apply to the Court to determine any question arising in the winding up, or to exercise any of the powers which the

meaning is the same : *Bridgewater Navigation Co.*, 39 Ch. D. pp. 21 and 26.

(*r*) Ib. cl. 9, and § 144.

(*s*) § 142.

(*t*) *Qu.* members or the contributories ?

(*u*) § 142.

(*x*) § 143.

(*y*) *Qu.* members or the contributories ?

(*z*) § 139.

(*a*) § 133, cl. 7. See *ante*, p. 708. It is apprehended that the voluntary liquidators can, without the sanction of the Court, do any

of those things which the official liquidator can do under § 95, with the sanction of the Court.

(*b*) § 133, cl. 8. See *ante*, pp. 745—750.

(*c*) § 133, cl. 9. See *ante*, p. 846. A liquidator can also, by giving notice, enforce calls made by the directors before the commencement of the winding up, although no notice of the call had been given by them : *Stone v. City and County Bank*, 3 C. P. D. 282. As to orders for the payment of calls, see *ante*, p. 847.

Court might exercise if the company were being wound up by it (*d*). Bk. IV. Chap. 2.
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5. To summon general meetings of the company (*e*).

The liquidators are also empowered, with the sanction of an extraordinary resolution of the company, to make arrangements with creditors and contributories, and to compromise all claims by or against the company (*f*); and with the sanction of a special resolution to sell the business of the company, in consideration of shares, policies or other like interests, for the purpose of distribution amongst the members (*g*).

Lastly, the liquidators are empowered, with the sanction of the Court, to prosecute delinquent directors, managers, officers, or members of the company (*h*).

Where there are more liquidators than one, the powers given to them by the act may be exercised by such one or more of them as may be determined at the time of their appointment, or, in default of such determination, by any number not less than two (*i*). There is no necessity, however, to appoint more than one (*k*). Where, however, there are more than one, and one is not empowered by the company to act for all, the liquidators cannot themselves delegate their powers to one of their own body; and if they do, his acts will not bind the company (*l*). Moreover, if several liquidators are appointed the survivor cannot act alone (*m*). Where there are
more than one.

The exercise by the liquidators of the foregoing powers is subject to be controlled by the company and its creditors; for the company is empowered by an extraordinary resolution to Control of
members and
creditors over
liquidators.

(*d*) § 138, and rule 51. This enables the Court to do in a voluntary winding up whatever it can do in a compulsory winding up. See *Rance's case*, 6 Ch. 104; *Union Bank of Kingston upon Hull*, 13 Ch. D. 808; *Heiron's case*, 15 Ch. D. 139; *Gold Co.*, 12 Ch. D. 77.

(*e*) § 139.

(*f*) §§ 159 and 160. See *ante*, p. 709, as to compromises, and *Wedge-wood Coal and Iron Co.*, 6 Ch. D. 627.

(*g*) § 161. See *infra*, as to this.

(*h*) § 168. To obtain this sanction a petition must be presented. See rule 51.

(*i*) § 133, cl. 6.

(*k*) § 133, cl. 4.

(*l*) See the next note and *Ex parte Birmingham Bank*, 3 Ch. 651; *Bo-lognesi's case*, 5 ib. 567; *Ex parte Agra and Masterman's Bank*, 6 ib. 206, where bills were accepted by one out of four.

(*m*) *Metropolitan Bank v. Jones*, 2 Ch. D. 366.

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enter into any arrangement, with three-fourths in number and value of its creditors, with respect to the powers to be exercised by the liquidators, and the manner in which they are to be exercised (*n*). Moreover, any arrangement so made is binding as well on the contributories as on the creditors, if not appealed against within three weeks from the date of its completion (*o*). Moreover, any contributory may apply to the Court to determine any question arising in the winding up (*p*), or to stay the winding up and all proceedings therein (*q*); and any creditor can apply for a compulsory order to wind up under § 145, at any time before the company is dissolved (*r*).

Sale of assets.

With respect to the sale of the assets of the company, the liquidators apparently have power to sell them for money as best they can; at the same time, if any particular sale is opposed by any of the creditors or contributories, it may be prudent to apply to the Court to sanction it (*s*).

Transfer of business to another company.

One of the most important powers of the liquidators under a voluntary winding up is that of selling the business and goodwill of the company being wound up to another company, in consideration of shares, policies, or other like interests in the purchasing company. This power is conferred by §§ 161 and 162 of the Companies act, 1862 (*t*), from which it will be seen—

1. That the power can only be exercised under the authority of a special resolution of the company (*u*) being wound up;

(*n*) §§ 135 and 136.

(*o*) § 137. The appeal may be by petition or motion. See rule 51.

(*p*) § 138, by motion or petition, see rule 51. See, for examples, *Anglesea Colliery Co.*, 2 Eq. 350; *Crookhaven Mining Co.*, 3 Eq. 69.

(*q*) *Schunsschiff Electric Battery Syndicate*, W. N. 1888, 165; and see *South Barrule Slate Quarry Co.*, 8 Eq. 688.

(*r*) See § 143. *London and Caledonian Marine Insurance Co.*, 11 Ch. D. 140; *Pinto Silver Mining Co.*, 8 Ch. D. 273.

(*s*) This was done in the *Scinde, &c., Bank Corporation*, W. N. 1867, 41, and the agreement for sale was confirmed. As to compelling the liquidators to accept the best of two offers, see *The Colonial and Gen. Gas Co.*, ib. 42, where, however, the company was being wound up subject to supervision.

(*t*) See also 31 & 32 Vict. c. 68, which, however, only applies to companies being wound up when the act passed.

(*u*) *Qu.* members or contributories?

2. That if so sanctioned, the transfer can be made notwithstanding the opposition of the minority (*x*) ;

3. That any dissentient can require the liquidators, at their option, to abstain from carrying the resolution into effect, or to purchase the interest of the dissentient (*y*) ;

4. That this requisition must be made by leaving a notice in writing, addressed to the liquidators, and left at the registered office of the company not later than seven days after the passing of the resolution (*z*) ;

5. That in the event of the liquidators electing to purchase the interest of a dissentient, the price, if not agreed upon, must be ascertained by arbitration, as provided by 8 & 9 Vict. c. 16, §§ 128—134 (*a*).

The decisions on these sections and the mode of winding up and reconstructing companies under them will be noticed in the next Chapter (*infra*, p. 891).

A purely voluntary winding up does not, *per se*, prevent a creditor of the company from suing it, or issuing execution against it; it is not, therefore, in any case necessary for him to apply for leave so to do (*b*). But as already stated, he may be restrained as well from issuing execution as from suing (*c*).

A resolution to wind up voluntarily may disable a company from performing its contracts; and if this is the case, the company may be sued for a breach of them (*d*). But, generally speaking, a winding-up order is not equivalent to a breach of contract (*e*).

(*c*) *Imp. Merc. Credit Ass.*, 12 Eq. 504; *Tunis Railways Co.*, 10 Ch. D. 270, note; affd. W. N. 1874, 165.

(*y*) *Ex parte Fox*, 6 Ch. 176, where a resolution depriving a shareholder of this right was held void.

(*z*) *Union Bank of Kingston-upon-Hull*, 13 Ch. D. 808.

(*a*) The judge can appoint an umpire, if the arbitrators do not agree. See *Re Lord*, 24 L. J. Ch. 145. So can a judge of the Queen's Bench Division. *Re Anglo-Italian Bank and De Rosaz*, L. R. 2Q. B. 452.

As to costs, see *Imp. Merc. Credit Assoc.*, 12 Eq. 504.

(*b*) See §§ 85, 87, and 163, which only apply to winding up by the Court, or subject to its supervision.

(*c*) § 138. See *ante*, p. 678, and as to appointing a receiver in a creditor's action, *Boyle v. Bettors Llantwit Coll. Co.*, 2 Ch. D. 726.

(*d*) *Inchbald v. Western Neilgherry Coffee Co.*, 17 C. B. N. S. 733. See, also, as to a voluntary winding up being equivalent to a dismissal of a servant, *ante*, pp. 729, 730.

(*e*) *Ante*, p. 728.

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Staying actions,
&c.

Winding up a
breach of con-
tract.

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Payment of
debts.

The debts to be paid out of the assets of the company are the same as those which would have to be paid under a compulsory winding up (*f*). But in order to exclude creditors who do not prove within a given time, such time must apparently be fixed by the Court; the fixing of such time not being one of those things which liquidators alone can do (*g*). The rules as to set-off are the same as in a compulsory winding up (*h*).

The list of contributories.

The contributories in a voluntary winding up are those persons who would be contributories on a compulsory winding up having the same date for its commencement. The liquidators settle the list, and they have all the powers of the Court for this purpose (*i*). But whether under these words the liquidators have power to rectify the register of members may well be doubted (*k*). The liquidators, however, have power to sanction transfers of shares and alterations in the status of members made after the commencement of the winding up (*l*). In exercising this power regard ought to be had to the principles acted upon by the Court in like cases (*m*).

Calls.

The liquidators are also empowered to make calls on the contributories (*n*); and they have the same discretion both as to when to make a call, and as to its amount, as the Court has under a compulsory winding up (*o*). The liquidators, however, have no power to enforce payment without judicial assistance. The methods of enforcing payment are either by an action in the name of the company (*p*); or, if the contributory is already settled on the list, by an application to the Chancery Division of the High Court to order payment under the

(*f*) See *ante*, pp. 713 *et seq.*

(*g*) See § 107.

(*h*) See §§ 38 and 101, and *infra*, note (*r*).

(*i*) § 133, cl. 8. As to giving notice of settling the list, see the *London Bank of Scotland*, W. N. 1867, 114; *Brighton Arcade Co. v. Dowling*, L. R. 3 C. P. pp. 175, 184.

(*k*) Compare § 133, cl. 8, with §§ 38, 95, and 98; and see *Gilbert's case*, 5 Ch. 559; *Brighton Arcade Co. v.*

Dowling, *ubi sup.*

(*l*) See § 131.

(*m*) See *ante*, pp. 831—837.

(*n*) § 133, cl. 7.

(*o*) Compare § 133, cl. 7, with § 202. See *ante*, p. 849.

(*p*) See, for instance, *Brighton Arcade Co. v. Dowling*, L. R. 3 C. P. 175, which shows that no notice of being on the list of contributories is necessary; *General Discount Co. v. Stokes*, 17 C. B. N. S. 765; *Hull Flux Co. v. Wellesley*, 6 H. & N. 38;

powers conferred upon it by the Companies act, 1862 (*q*). In the event of death or bankruptcy payment can be obtained wholly or in part, as the case may be, by administering the estate of the deceased, or by proof against the bankrupt's estate. The same rules as to set-off against calls apply when a company is being wound up voluntarily as when it is being wound up compulsorily (*r*). Bk. IV. Chap. 2.
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The costs of winding up are payable out of the assets of the company in priority to all other claims (*s*); and the costs of the liquidators incurred in prosecuting delinquent directors, &c., are entitled to like priority (*t*). Costs.

In distributing the surplus assets care must be taken to put the contributories as far as practicable on an equality, regard being had to the amounts paid up on their respective shares (*u*). Surplus assets.

A company which has been wound up voluntarily is dissolved at the end of three months from the date of the registration of the return which the liquidators are required to make as before mentioned (*r*). After the liquidator has made his return the Court has sufficient jurisdiction to make calls on the contributories for the payment of the debts of the company or the adjustment of the rights of the contributories, *inter se*, if an application be made before the three months have expired (*x*). After the expiration of the three months the Court has no jurisdiction to make any order unless the dissolution of the company was obtained by fraud (*y*). A company, moreover, will be restrained from dissolving without Dissolution of
company.

Garnett and Moseley Gold Mining Co. v. Sutton, 3 B. & Sm. 321.

(*q*) See § 138. *Rance's case*, 6 Ch. 104.

(*r*) *Brighton Arcade Co. v. Dowling*, L. R. 3 C. P. 175, is opposed to this; but this case is now overruled by *Black & Co.'s case*, 8 Ch. 254; and see also, *ante*, p. 744.

(*s*) § 144. See *ante*, pp. 859 *et seq.*

(*t*) § 168. See *ante*, pp. 867 *et seq.*

(*u*) See *Exchange Drapery Co.*, 38

Ch. D. 171; *Ex parte Maude*, 6 Ch. 51, and *ante*, pp. 852 and 869.

(*r*) § 143.

(*x*) See *Crookhaven Mining Co.*, 3 Eq. 69.

(*y*) *Pinto Silver Mining Co.*, 8 Ch. D. 273; *London and Caledonian Marine Ins. Co.*, 11 Ch. D. 140, where the Court refused to make an order for the compulsory winding up of the company. See, also, *Westbourne Grove Drapery Co.*, W. N. 1878, 195.

Bk. IV. Chap. 2. notice to those persons to whom it may in future become
 Sect. 3. liable (z).

SECTION III.—OF WINDING UP SUBJECT TO THE SUPERVISION OF THE COURT.

Winding up sub-
 ject to super-
 vision of Court.

After a resolution has been passed for winding up a company voluntarily, the Court may make an order directing that the voluntary winding up shall continue, but subject to such supervision of the Court and with such liberty for creditors, contributories, or others to apply to the Court, and generally upon such terms and subject to such conditions as the Court thinks just (*a*).

The application for such an order is made by a petition (*b*), which must be advertised, verified, and served as required in the case of a petition for winding up by the Court (*c*). It must also be served on the liquidators if there are any (*d*).

In determining what ought to be done upon such a petition, the Court may consult the wishes of the creditors and contributories, and may summon meetings for the purpose of ascertaining their wishes (*e*).

Winding up
 subject to
 supervision
 preferred to
 compulsory
 winding up.

The circumstances which influence the Court in determining what order to make on petitions to wind up have been already noticed (*f*); and in addition to what has there been stated it is only necessary to observe that the Court is reluctant to interfere with a voluntary winding up, and will not at the instance of a contributory convert a voluntary winding up into

(z) See *Haytor Granite Co.*, 1 Ch. 77, a claim for rent, where the company being lessee had assigned; and see *Gooch v. London Banking Association*, 32 Ch. D. 41; *Lord Elphinstone v. Monkland Iron Co.*, 11 App. Ca. 332. As to the jurisdiction of the Court to restrain the dissolution of a company being wound up voluntarily under the acts of 1856-8, see *Lowndes v. Garnett & Moseley Gold Mining Co.*, 2 J. & H. 282.

(a) § 147. See the form of the order No. 4, in schedule 3 to the rules, and as to who may petition, *Pen-y-Van Colliery Co.*, 6 Ch. D. 477, *ante*, p. 624.

(b) § 148. See *infra*, p. 888, note (*p*).

(c) Rules 1-5, *ante*, p. 654.

(d) Rule 3. See *ante*, p. 656.

(e) § 149, and see rules 45 & 46.

(f) *Ante*, pp. 624, *et seq.*

a compulsory winding up unless the resolution to wind up voluntarily is impeachable or unless creditors support the petition (*g*); and will not convert a voluntary winding up into a winding up subject to supervision unless there is misconduct on the part of the liquidators or some other good reason for so doing (*h*). Where there is no proper resolution to wind up voluntarily, the Court cannot make an order to wind up subject to supervision; for such an order presupposes, and, in fact, continues a pre-existing voluntary winding up. Where, therefore, there is no such winding up, all that the Court can do is to make a compulsory order (*i*), or to dismiss the petition, or to allow it to stand over in order to give the shareholders an opportunity of passing a resolution to wind up voluntarily (*k*). Where, however, the Court is satisfied that a proper resolution to wind up has been passed, it will make an order to continue the winding up subject to supervision in preference to a compulsory order, unless a compulsory order is desired by a majority of creditors or there is some other good reason for making it.

A strong illustration of this is afforded by the case of the *London and Mediterranean Bank* (*l*). That bank had been amalgamated with the *London and Bombay Bank*. A resolution to wind up the London and Mediterranean Bank voluntarily was passed, and liquidators were appointed; a petition for an order to continue this winding up under the supervision of the Court, and to continue the voluntary liquidators, was afterwards presented by a contributory, and was supported by the company: but was opposed by another contributory, on the ground that a petition to wind up the London and Bombay

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London and
Mediterranean
Bank.

(*g*) *Gold Co.*, 11 Ch. D. 701. The Court will not make a compulsory order against the consent of the petitioner even if his petition asks for it, *Chepstow Bobbin Mills Co.*, 36 Ch. D. 563.

(*h*) See *Imperial Bank of China, &c.*, 1 Ch. 339; *Beaufolais Wine Co.*, 3 Ch. 15. As to applications by creditors, see *infra*, notes (*l*) to (*p*).

(*i*) As in the case of the *Bridport Old Brewery Co.* 2 Ch. 191, noticed

ante, p. 877, and *The National Savings Bank Association*, 1 Ch. 547. See, also, *Patent Floor Cloth Co.*, 8 Eq. 664, where an order for winding up subject to supervision was discharged, and a compulsory order made. As to building societies, see 37 & 38 Vict. c. 42, § 32 (4).

(*k*) See the cases collected, *ante*, pp. 644 *et seq.*

(*l*) W. N. 1866, 207 and 317.

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Bank was pending ; and that petition disclosed facts tending to show that the continuance of the voluntary winding by the voluntary liquidators was not for the interests of the contributories. The Court, nevertheless, made the order for continuing the voluntary winding up, subject to supervision (*m*). On a subsequent occasion another petition was presented by two creditors and a contributory in the London and Mediterranean Bank, praying for a compulsory winding-up order, on the ground that the voluntary winding up was not being conducted properly. The petition was supported by other creditors ; but the Court, nevertheless, dismissed the petition (*n*), on the ground that a compulsory winding-up order would not be more advantageous to the creditors, or contributories, than the order which already existed ; and that if sufficient grounds were shown, the liquidators could be removed as easily under one order as the other.

Conflicting
winding-up
orders.

In this case it was objected that a compulsory order could not be made until the former order for winding up, subject to supervision, had been discharged on a rehearing or on appeal : but this objection was overruled (*o*). Instances have also occurred in which proceedings, under a compulsory winding-up order, have been stayed, and an order to wind up, subject to supervision, has been substituted for it (*p*). Where this is done, care ought to be taken not to disturb the date of the commencement of the winding up (*q*).

Effect of order
to wind up
subject to
supervision.

The general effect of an order to wind up, subject to supervision, is to continue the voluntary winding up with such restrictions, if any, as the Court may impose (*r*). The presentation of the petition gives the Court the same jurisdiction over actions as a petition for winding up compulsorily (*s*), and has the same effect as such a petition on fraudulent convey-

(*m*) W. N. 1866, 207.

(*n*) W. N. 1866, 317.

(*o*) W. N. 1866, 317.

(*p*) This was done by Lord Romilly, M. R., in the case of the *General Exchange Bank*, May, 1867. The application was made by summons, not by petition. See *ante*, p.

886, note (*b*).

(*q*) See, as to this, *ante*, p. 664.

(*r*) § 147, and see the form of the order No. 4, in the 3rd schedule to the rules. *London Quays, &c., Co.*, 3 Ch. 394.

(*s*) See §§ 148 and 85, *ante*, p. 672.

ances by the company of its assets (*t*). Moreover, speaking generally, an order to wind up, subject to supervision, appears to be equivalent to an order to wind up compulsorily, except that the liquidators can, unless restricted by the Court, exercise, without its sanction, all the powers of liquidators acting in a winding up which is purely voluntary (*u*). The liquidators should, however, apply to the Court for its sanction before doing anything of unusual importance, or which is opposed on grounds not obviously unreasonable. They have power to sell the assets of the company under § 161, if such sale is authorised by a special resolution (*x*).

When a company is ordered to be wound up, subject to supervision, the commencement of the winding up dates from the passing of the resolution on which it is founded (*y*) ; *i.e.*, where there is a special resolution, from the passing of the confirming resolution (*z*). This is so even where, as frequently happens, the petition on which the order is made precedes the resolution (*a*) : so where a provisional liquidator has been appointed upon an earlier petition for a compulsory order (*b*).

If an order is made for winding up, subject to the supervision of the Court, the Court may appoint one or more liquidators, in addition to or in the absence of any previously appointed (*c*). The additional liquidators have the same powers, are subject to the same obligations, and stand in the same position as if they had been appointed by the company (*d*). This power of appointing additional liquidators is sometimes exercised for the protection of creditors (*e*). An appointment of an additional liquidator chosen by the creditors, practically secures to them the same protection as the appoint-

(*t*) § 164. See *ante*, p. 667.

(*u*) § 151. *Wright's case*, 5 Ch. 437.

(*x*) *Imp. Merc. Credit Assoc.*, 12 Eq. 504, and see *ante*, p. 882, and *infra*, p. 849.

(*y*) See § 130.

(*z*) *Emperor Life Ass. Society*, 31 Ch. D. 78 ; *Ex parte Colborne and Strawbridge*, 11 Eq. 478 ; *Weston's case*, 4 Ch. 20 ; *Daves' case*, 6 Eq.

832.

(*a*) *Weston's case*, 4 Ch. 20, see further, *ante*, p. 664.

(*b*) *Emperor Life Ass. Society*, *ubi supra*.

(*c*) § 150. See *London Quays Co.*, 3 Ch. 394.

(*d*) § 150.

(*e*) See an instance under the acts of 1856-58. *Llanfyrnach Silver Lead Mining Co.*, 9 W. R. 500.

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ment of an official liquidator under an order to wind up compulsorily; and by appointing such additional liquidator the necessity of making a compulsory winding-up order is frequently obviated. Not only can the Court appoint additional liquidators to act with those appointed by the contributories, but it can also remove any liquidator whom they have appointed (*f*). This power, however, can only be exercised on due cause shown; but to induce the Court to exercise it, misconduct on the part of the liquidators need not be proved (*g*).

If an order for winding up, subject to the supervision of the Court, is superseded by an order for winding up by the Court, the old liquidators, or any of them, may be appointed official liquidators, either with or without other persons, and either provisionally or permanently (*h*).

An order for winding up, subject to supervision, may be stayed in a proper case to enable the company to resume business (*i*).

(*f*) §§ 141 and 150, and next note.

(*g*) *Ex parte Charlesworth*, 36 Ch. D. 299; *Marseilles Extension, &c.*, Co., 4 Eq. 692, and *British Nation Life Ass. Ass.*, 14 Eq. 492, *ante*, p. 878.

(*h*) § 152.

(*i*) *South Barrule Slate Co.*, 8 Eq. 688, where one contributory dissenting was put to his election to retire on payment of the value of his share.

CHAPTER III.

AMALGAMATION AND RECONSTRUCTION OF COMPANIES (*a*).

ALTHOUGH the word amalgamation is frequently used in connection with companies it does not seem to have acquired any technical or well defined meaning (*b*). It is perhaps generally understood to express or imply a transfer by one or more companies of their assets and liabilities either to a new company formed to take them, or to an already existing company, in consideration of shares in such company, which are given or are at least offered to the members of the transferring companies.

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Meaning of the
word amalga-
mation.

A power to amalgamate would probably be held to authorise a purchase of the assets and liabilities of another company (*c*); or a transfer of assets and liabilities in consideration of shares in a company to which such assets are transferred (*d*). But it does not enable directors to compel their shareholders to become members in a new company with wider objects, whereby their liability may be increased, and probably not in any new company (*e*).

How far, apart from statute, companies have or have not powers enabling them to amalgamate depends upon the terms of their charters, articles, or deeds of settlement (*f*). Unless these contain distinct provisions for the purpose such powers do not exist (*g*). A company incorporated by charter or

Power to amal-
gamate indepen-
dently of statute.

(*a*) Parts of this chapter will be found in other portions of the work; but it has been thought convenient to bring the whole subject together even at the expense of some repetition.

(*b*) *Higg's case*, 2 H. & M. 666; *Ex parte Bagshaw*, 4 Eq. 347. See, as to the meaning in the Railway Clauses act, 26 & 27 Vict. c. 92, § 37.

(*c*) *Era Assurance Soc.*, 1 De

G. J. & Sm. 29; *Pulbrook v. New Civil Service Co-operation*, 26 W. R. 11.

(*d*) *Dougan's case*, 8 Ch. 545.

(*e*) See cases in note (*b*) above, and *Clinch v. Financial Corporation*, 5 Eq. 450; *Imperial Bank of China v. Bank of Hindustan*, 6 Eq. 91.

(*f*) See *ante*, pp. 183 and 207.

(*g*) *Ernest v. Nicholls*, 6 H. L. C. 401, and cases below, note (*k*).

Bk. IV. Chap. 3. special act of Parliament cannot delegate its powers (*h*), and cannot therefore transfer its business, even for a time, to another company (*i*); nor can the majority of the shareholders of any company bind the minority by an agreement to transfer its property and business (*k*), or to purchase the assets and liabilities of another company (*l*). Whence it follows that two companies cannot amalgamate with each other, unless such a transaction is authorised by the constitutions of both companies (*m*).

Where there is power to amalgamate the terms of the power must be observed (*n*). Thus a power to amalgamate with another company having the same objects will not authorise an amalgamation with a company with wider or different objects (*o*); and a power to amalgamate with the sanction of an extraordinary meeting will not enable an amalgamation to be effected without such sanction, although the amalgamation may have been acted on (*p*). A power to sell and dispose of a business will not authorise a sale in consideration of shares in another company (*q*); nor will general powers of management be sufficient for the purpose (*r*). But such powers need not necessarily be conferred by the original constitution of the company; if there is power to alter and amend

(*h*) *Great Northern Rail. Co. v. Eastern Counties Rail. Co.*, 9 Ha. 306.

(*i*) *Hattersley v. Skelburne*, 10 W. R. 881; 31 L. J. Ch. 873; *Charlton v. Newcastle and Carlisle Rail. Co.*, 5 Jur. N. S. 1096; *Winch v. Birkenhead, &c., Rail. Co.*, 5 De G. & S. 562; *Beman v. Rufford*, 1 Sim. N. S. 550; *Salomons v. Laing*, 12 Beav. 377. Compare *Clay v. Rufford*, 5 De G. & S. 768.

(*k*) *Ernest v. Nicholls*, 6 H. L. C. 401; *Era Assurance Soc.*, 2 J. & H. 400; 1 H. & M. 672; *Kearns v. Leaf*, 1 H. & M. 681.

(*l*) *Ib.*

(*m*) *Ib.*; and see *European Soc.*, 8 Ch. D. 679.

(*n*) *Clay v. Rufford*, 5 De G. &

Sm. 768; *Ernest v. Nicholls*, 6 H. L. C. 401. As to the construction of such powers, see *Stace & Worth's case*, 4 Ch. 682; *Bank of Hindustan v. Alison*, L. R. 6 C. P. 54, and 9 Ch. 1.

(*o*) *Clinch v. Financial Corporation*, 5 Eq. 450.

(*p*) *Stace and Worth's case*, 4 Ch. 682.

(*q*) *Dougan's case*, 8 Ch. 545.

(*r*) *Ernest v. Nicholls*, 6 H. L. C. 401; *Era Assurance Soc.*, 2 J. & H. 400; *Saxon Life Assur. Soc.*, ib. 408, and 1 De G. J. & Sm. 29; *Gilbert v. Cooper*, 10 Jur. 580; *Beman v. Rufford*, 1 Sim. N. S. 550; *Clay v. Rufford*, 5 De G. & S. 768.

the constitution of the company they may be subsequently acquired (s). Bk. IV. Chap. 3.

Whether, where no powers of amalgamation are given by the regulations of a company and no means of acquiring them are provided by such regulations, they can be conferred by a meeting of shareholders, has been much discussed. Amalgamation with another company must involve a complete change in, if not a destruction of, one at least of the companies intending to amalgamate; and even if such a transaction is one which could be effected by a unanimous agreement upon the part of the members, it is difficult to hold that it is one as to which the majority ought to be able to bind the minority (t). Power of majority.

But even a unanimous agreement of the members of a company to amalgamate with another company, unless permitted by the terms of its regulations, would be ineffectual except in the case of those companies which are in fact mere partnerships. Such bodies may alter or vary the agreements into which they have entered (u). But with respect to companies which are created by a special act of Parliament, by charter, by letters patent, or by registration, the case is very different: for every company so established is governed by a law defining its objects and limiting its powers, and such law cannot be abrogated by any agreement between the members of the company, however unanimous they may be (x).

Practically, however, amalgamation under a company's regulations is rarely attempted, recourse being usually had to one or other of the following statutory methods:— Amalgamation under statutory power.

1. Application may be made to Parliament for a special act to enable companies to amalgamate (y). This, however, is not often done now except in cases of companies formed by special acts.

2. An amalgamation may often be in effect carried out by

(s) *Argus Life Assur. Soc.*, 39 Ch. D. 571; *Doman's case*, 3 Ch. D. 21.

(t) *Beman v. Rufford*, 1 Sim. N. S. 550; and see further as to the powers of majorities *ante*, pp. 314 *et seq.*

(u) *Keene's Executors' case*, 3 De G. M. & G. 272.

(x) See, as to this, *ante*, pp. 314 *et seq.*

(y) See *ante*, pp. 186, 323, as to the right to apply to Parliament.

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an arrangement or compromise under the provisions of the Joint Stock Companies arrangement act, 1870 (z).

3. But by far the most usual method of proceeding is under sections 161 and 162 of the Companies act, 1862 (a). These sections apply to all companies which can register under the act. A company not already registered may register for the express purpose of winding up and selling its business under these sections (b); and provided the proposed sale is within the section no objection to it can be raised on the ground that it is not authorised by the companies regulations (c).

Mode of proceeding under §§ 161, 162 of the Companies act, 1862.

A company proposing to make use of the powers conferred by these sections passes special resolutions to wind up voluntarily, appoints liquidators, and gives them either a general or special authority to sell or transfer the whole or a part of its business to another company in consideration of shares, policies, or like interests in such company (d). The notices summoning the meeting at which the proposed transaction is to be submitted to the shareholders, should give distinct intimation that it is intended to proceed under these sections (e). The sale must be to a company (f); and not to a person who, though undertaking to form a company, is free to make any bargain he pleases for the sale of the assets to it (g). An agreement entered into with a person as the agent or trustee for an unformed company is good (h). A sale to a foreign

(z) See *infra*, p. 1027, and *ante*, p. 711.

(a) *Ante*, p. 882.

(b) *Southall v. British Mutual Life Assur. Soc.*, 11 Eq. 65, and 6 Ch. 614, which was the case of a mutual insurance society.

(c) *Ib.*, and *Clinch v. Financial Corporation*, 4 Ch. 117, and 5 Eq. 450.

(d) § 161. The resolution to wind up voluntarily may be valid although its object may have been to carry out an objectionable scheme: *Ex parte For*, 6 Ch. 176. See, also, *Cleve v. Financial Corporation*, 16 Eq. 363.

(e) *Imperial Bank of China v. Bank of Hindustan*, 6 Eq. 91; *Fox's case*, 6 Ch. 176.

(f) § 161. A sale may be to a company formed for the purpose of taking over the business and assets of the selling company: *Imperial Merc. Credit Co.*, 12 Eq. 504; *Agra & Masterman's Bank*, *ib.* 509, *note*; *Ex parte Poole's executors*, 8 Ch. 702, where the sale was to another company being wound up.

(g) *Bird v. Bird's Patent Sewage Co.*, 9 Ch. 358.

(h) *Hester & Co., Limited*, 44 L. J. N. S. Ch. 757.

company may be valid, at least where the company selling carries on business abroad (i). Bk. IV. Chap. 3.

The sale may be upon any terms which a majority of the members approve ; and which they are competent in point of law to approve on behalf of the company (k). Thus a sale may be made in consideration of shares in the purchasing company which are not fully paid up (l) ; and the agreement for the sale may provide that such shares shall be distributed directly among the shareholders of the selling company, and not given to the liquidator as part of the assets in the winding up (m). Again, it is no objection to a sale that it provides that the purchasing company shall take a portion only of the assets and liabilities of the selling company, leaving the rest of the debts to be paid for by the liquidator of the selling company (n).

But no transfer or sale under those sections can be valid against dissentient shareholders if the terms of the transfer or sale are such as to expose them to increased liability (o) ; *e.g.*, where they are made to guarantee that their assets will yield a certain sum, or to pay by calls for shares in the new company. Nor again can the terms of the sale or transfer deal with the distribution of what may be agreed upon as the consideration for the sale, whether it be shares or money ; it must be distributed, after payment of the debts and liabilities of the selling company, amongst the members according to their rights and interests in the company (p). But it has been held that a proper compensation may be made to the directors of the selling company out of the purchase-money (q).

A sale duly carried out under these sections binds both creditors and dissentient members. If a creditor thinks himself injured by the transaction he must apply within a year to have the company wound up either by the Court or subject to

(i) *Ex parte Foe*, 6 Ch. 183.

(k) See cases in note (f) above.

(l) *City and County Investment Co.*, 13 Ch. D. 475.

(m) *Ib.*

(n) *City and County Investment Co.*, 13 Ch. D. 475.

(o) *Clinch v. Financial Corporation*, 4 Ch. 117, and 5 Eq. 450,

where the sale was set aside after it had been carried out. See, also, *Imperial Bank of China, &c. v. Bank of Hindustan*, 6 Eq. 91.

(p) *Griffith v. Paget*, 5 Ch. D. 894, and 6 Ch. D. 511. See further, as to allowances to directors, *ante*, p. 388.

(q) *Southall v. British Mutual Life Assur. Co.*, 6 Ch. 614.

Terms and conditions.

Dissentients.

Distribution of the purchase money.

Remedies for creditors and dissentients.

Bk. IV. Chap. 3. its supervision (*r*). This will avoid the transaction unless sanctioned by the Court (*s*). The remedy for a dissentient member is to express his dissent in writing addressed to the liquidators and left at the registered office of the company not later than seven days after the passing of the special resolution; and he must further require the liquidators at their option either to abstain from carrying the resolution into effect or to purchase his interest (*t*).

If the liquidators elect to purchase the interest of a dissentient member, they should give him every facility for ascertaining its value (*u*); but he has no right to inspect the books of the selling company after they have been handed over to the purchasing company in order to see whether it would be better to accept the valuation of the liquidators or to go to arbitration (*x*). If the price cannot be agreed upon it must be settled by arbitration (*y*). As soon as the price has been fixed an action may be brought against the company for the amount (*z*).

Omission to
give notice of
dissent in time.

With respect to those who do not give the proper notice in due time, it has been decided that although they cannot impeach the transfer, they cannot be compelled to become shareholders in the purchasing company; and if they are registered as shareholders therein against their consent, they are entitled to have their names removed from the register (*a*). Moreover, in the absence of a proper and timely notice a dissentient loses his right to have his interest purchased, and it is said that he also loses all right to any share of the surplus assets of

(*r*) *City and County Investment Society*, 13 Ch. D. 475.

(*s*) *Ib.*, and § 161, *i.e.*, sanctioned by an order made in the compulsory winding up, or in the winding up subject to supervision: *Callao Bis Co.*, W. N. 1889, 97.

(*t*) The notice of dissent must contain a notice requiring the liquidators either to abstain from carrying the resolution into effect or to purchase the dissentient's share: *Union Bank of Kingston-upon-Hull*, 13 Ch. 808.

(*u*) *Imperial Mercantile Credit*

Assoc., 12 Eq. p. 515.

(*x*) *Morgan's case*, 28 Ch. D. 620.

(*y*) A judge can appoint an umpire if the arbitrators do not agree: *ante*, p. 883, note (*a*). As to costs, see *Imperial Mercantile Credit Assoc.*, 12 Eq. 504.

(*z*) *De Rosaz v. Anglo-Italian Bank* L. R. 4 Q. B. 462.

(*a*) *Higg's case*, 2 Hem. & M. 657; *Martin's case*, *ib.* 669; *Ex parte Los*, 11 Jur. N. S. 661. See, also, *Ex parte Fox*, 6 Ch. 176, and *Ex parte Bagshaw*, 4 Eq. 341; *Imperial Mercantile Credit Assoc.* 12 Eq. 504.

the company being wound up (b). This share, if he were entitled to it, would be practically represented by the shares in the purchasing company, which he might have taken if he had chosen, and which he might require the liquidators to sell for his benefit if he had any right to them at all. The general opinion, however, seems to be adverse to his having any such right; his choice being to assent; or to dissent and require his interest to be purchased; or to dissent and abandon all his interest in the company (c).

In a case where the business of a bank had been transferred under these sections, and dissentient shareholders presented a petition for a compulsory winding up, and impeached the validity of the resolution to wind up, and of all the subsequent transactions, the Court gave them leave to take such proceedings as they might be advised in the name of the company in order to set aside the transactions complained of; but the Court declined to order the bank to be wound up compulsorily, or subject to the supervision of the Court, and also declined to decide on the petition what the rights of the dissentients were (d).

But a shareholder whose interest has been purchased by the liquidators under section 161 does not cease to be liable to the creditors of the company; the section not contemplating any alteration of liability as between the dissentient shareholder and the creditors whose debts are to be contributed to by all the shareholders (e).

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Liability of
shareholders
to creditors.

(b) See *Higg's case*, 2 Hem. & M. 702. 657. The marginal note, however, is scarcely warranted by the judgment.

(c) See Buckley on § 161, p. 367, ed. 5.

(d) *Imperial Bank of China, &c.*, 1 Ch. 339. Compare *Ex parte Fox*, 6 Ch. 176. As a rule, however, the Court will have regard to the wishes of the majority of shareholders and creditors as against a dissentient minority unless they will be exposed to liability, *Imperial Credit Assoc.*, 12 Eq. 504; *Ex parte Poole's executors*, 8 Ch.

702. (e) *Vining's case*, 6 Ch. 96, where the liquidators had taken a transfer of the shares, which was not in fact authorised by the agreement they had to carry out; it seems, however, that under § 131 the liquidators may take a transfer of shares; the effect of which would be to relieve the shareholder from any future liability, not only with respect to the costs of the winding up, but any costs of any liabilities incurred by reason of the transaction in question. See *Ex parte Poole's executors*, 8 Ch. p. 710.

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Companies
being wound up
by the Court.

Where a company is already being wound up by the Court, these sections are not applicable, as they are expressly limited to a voluntary winding up (*f*). But the Court has as wide, if not wider, powers under § 95 of the act, and in any case where it might seem desirable the Court could, it is conceived, effect an amalgamation by a sale under such last-mentioned section (*g*).

Life Insurance
Companies.

The amalgamation and transfer of the business of life insurance companies is expressly provided for by the Life insurance companies act, 1870 (*h*), §§ 14, 15. These sections are as follows :—

33 & 34 Vict.
c. 61, §§ 14, 15.

14. Where it is intended to amalgamate two or more companies, or to transfer the life assurance business of one company to another, the directors of any one or more of such companies may apply to the Court, by petition, to sanction the proposed arrangement, notice of such application being published in the Gazette, and the Court, after hearing the directors and other persons whom it considers entitled to be heard upon the petition, may confirm the same if it is satisfied that no sufficient objection to the arrangement has been established.

Before any such application is made to the Court (*i*), a statement of the nature of the amalgamation or transfer, as the case may be, together with an abstract containing the material facts embodied in the agreement or deed under which such amalgamation or transfer is proposed to be effected, and copies of the actuarial or other reports upon which such agreement or deed is founded, shall be forwarded to each policy holder of both companies in case of amalgamation, or to each policy holder of the transferred company in case of transfer by the same being transmitted in manner provided by section one hundred and thirty-six of the Companies clauses consolidation act, 1845, for the transmission to shareholders of notices not requiring to be served personally; and the agreement or deed under which such amalgamation or transfer is effected shall be open for the inspection of the policy holders and shareholders at the office or offices of the company or companies for a period of fifteen days after the issuing of the abstract herein provided.

The Court shall not sanction any amalgamation or transfer in any case in which it appears to the Court that policy holders representing one-tenth or more of the total amount assured in any company which it is proposed to amalgamate, or in any company the business of which it is proposed to transfer, dissent from such amalgamation or transfer.

(*f*) It has, however, been held that they extend to a winding up under supervision. See *Imperial Mercantile Credit Assoc.*, 12 Eq. 504. See, as to this, Buckley, ed. 5, p. 368.

(*g*) See *Agra and Masterman's Bank*, 12 Eq. 509, note; and *ante*, book iv., c. 1, § 8, p. 712.

(*h*) 33 & 34 Vict. c. 61.

(*i*) See *Briton Life Assoc.*, W. N. 1887, p. 122.

No company shall amalgamate with another, or transfer its business to another, unless such amalgamation or transfer is confirmed by the Court in accordance with this section. Bk. IV. Chap. 3.

Provided always, that this section shall not apply in any case in which the business of any company which is sought to be amalgamated or transferred does not comprise the business of life assurance (*k*).

15. When an amalgamation takes place between any companies, or when the business of one company is transferred to another company, the combined company or the purchasing company, as the case may be, shall, within ten days from the date of the completion of the amalgamation or transfer, deposit with the Board of Trade certified copies of statements of the assets and liabilities of the companies concerned in such amalgamation or transfer, together with a statement of the nature and terms of the amalgamation or transfer and a certified copy of the agreement or deed under which such amalgamation or transfer is effected, and certified copies of the actuarial or other reports upon which such agreement or deed is founded; and the statement and agreement or deed of amalgamation or transfer shall be accompanied by a declaration under the hand of the chairman of each company and the principal managing officer of each company, that to the best of their belief every payment made or to be made to any person whatsoever on account of the said amalgamation or transfer is therein fully set forth, and that no other payments beyond those set forth have been made or are to be made either in money, policies, bonds, valuable securities, or other property by or with the knowledge of any parties to the said amalgamation or transfer.

The effect of the amalgamation of life insurance companies on their policy holders has been already pointed out (*l*).

The amalgamation of companies working mines within the Stannaries is dealt with by 50 & 51 Vict. c. 43, § 27, which Cost-book companies. enacts—

When the limits of any mine join those of any other mine the 50 & 51 Vict. companies respectively working the said mines may, with the consent in c. 43, § 27. writing of the respective lessors thereof in all cases where such consent is by law or custom necessary, amalgamate and become one company, provided that no such amalgamation shall take place unless each of the said companies shall authorise the same by a special resolution, to which two-thirds in value of the shareholders in the said company shall consent in writing; such resolution shall be registered in the Court, and the amalgamation shall not take effect until such registration, and shall be advertised in such manner as the Court directs.

(*k*) See *Argus Life Assur. Co.*, 39 Ch. D., which was the case of a petition under this section. (*l*) See *ante*, pp. 259 *et seq.* and p. 737.

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The act, however, contains no definition of amalgamation ; nor are there any provisions dealing with the rights of dissentients ; and although the resolution authorising the amalgamation requires to be registered in the Court, it does not appear that the Court has any discretion as to withholding the registration if it is duly sanctioned.

The effect of amalgamation on the debts of the amalgamating companies has been already discussed (*m*).

Reconstruction.

Where a company wishes to alter the nature of its business or effect anything which is *ultra vires*, and which cannot be authorised by an alteration of its constitution under powers conferred upon it, recourse is commonly had to reconstruction. Reconstruction differs from amalgamation in that, as a rule, there is only one transferring company, and the company to which the property in question is transferred is practically the same company with some alterations in its constitution. In point of law, the two companies are, however, distinct persons.

The method of proceeding to a reconstruction is similar to that described above in cases of amalgamation. The most usual way of proceeding is under §§ 161 and 162 of the Companies act, 1862, a new company being formed to take over the assets and liabilities of the old company.

(*m*) See *ante*, pp. 258 *et seq.* and 734 *et seq.* As a rule, a person who becomes surety to a corporation for the conduct of one of its servants is discharged by the amalgamation of that corporation with another. See *The Eastern Union*

Rail. Co. v. Cochrane, 9 Ex. 197, and *L. B. & S. C. Rail. Co. v. Goodwin*, 3 Ex. 320, where the surety was not discharged ; but the statute amalgamating the two contained an express provision on the subject.

CHAPTER IV.

ON THE ABANDONMENT OF RAILWAYS, AND THE WINDING UP AND DISSOLUTION OF RAILWAY COMPANIES.

THE last winding-up acts to which it is necessary to advert, Bk. IV. Chap. 4. are, "The Abandonment of Railways Act, 1850" (a), "The Railway Companies Act, 1867," (b), and "The Abandonment of Railways Act, 1869" (c).

1. *Abandonment of Railways.*

The first of these acts was passed in 1850, and only applied to railway companies incorporated by Act of Parliament, and empowered to make a railway by an act passed before the 14th of August, 1850 (d).

Other railways, incorporated by act of Parliament could, until the passing of the Railways Companies act, 1867 (e), only be wound up (if at all) under 7 & 8 Vict. c. 111 (f). The Railway Companies act, 1867, amended the act of 1850, and extended the operation of it to all companies authorised to

(a) 13 & 14 Vict. c. 83.

(b) 30 & 31 Vict. c. 127.

(c) 32 & 33 Vict. c. 114. Lord Dalhousie's act (9 & 10 Vict. c. 28), which applied only to unincorporated railway companies projected before July, 1846, has ceased to be of any practical importance. See, upon it, *Jones v. Charlemont*, 16 Sim. 271; *Coupland v. Challis*, 2 Ex. 682; *Owen v. Challis*, 6 C. B. 115; and *Ex parte Clarke*, 12 Jur. 471; and *Ex parte Green*, ib. 534, and 13 ib. 775, as to proof of debts.

(d) 13 & 14 Vict. c. 83, § 1. As to its retrospective operation, see

Mackenzie v. Sligo, &c., Rail. Co., 18 Q. B. 862.

(e) 30 & 31 Vict. c. 127.

(f) Whether railway companies incorporated by special act, were within 7 & 8 Vict. c. 111, was doubtful. See *Bright v. Hutton*, 3 H. L. C. 366; *Ex parte Burge*, 1 De G. & S. 588; *Ex parte Spackman*, ib. 599. Such companies were expressly excepted from the Winding-up acts, 1848-9. See as to the Companies act, 1862, *Ennis and West Clare Rail. Co.*, 3 L. R. Ir. 94, and *ante*, p. 618.

Bk. IV. Chap. 4. make railways by any act passed before the session 30 & 31 Vict. These acts were amended by the Abandonment of Railways act, 1869 (*g*).

The joint effect of the three acts with respect to the abandonment of railways is in substance as follows :—

If any company authorised to make a railway by act of Parliament passed before the session 30 & 31 Vict. (*h*) desires to abandon the railway in whole or in part, the company may, by the authority and with the consent of the holders of three-fifths of its shares or stock apply to the Board of Trade (*i*) for liberty to abandon the same (*k*). If less than three-fifths of the share capital of the company has been subscribed, the Board of Trade may, if it think fit, without the preliminary consent of a meeting of the shareholders, proceed under the act of 1850, on the application of any person named in the special act as a member or director, or of any person named in a warrant or order directing payment of any deposit, or who has lent the deposit or any part thereof, or who has entered into any bond conditioned for the completion of the railway, or for payment of any money in default thereof (*l*), or in the case of a company, no part of whose railway is open for traffic, on the application of a judgment creditor (*m*).

If the Board of Trade entertains the application, the fact of its having been made must be publicly notified by the company in the manner directed by the act, so that persons desirous of opposing the application may have an opportunity of doing so (*n*). After due notice has been given and the time thereby fixed for opposing the application has expired, the Board of Trade may by warrant under seal, and signed by two or more of the members of the board, authorise the abandonment of the railway, or the portion of it described in the warrant, as the board may think fit (*o*). The warrant is required to be advertised (*p*) ; and after it has been duly advertised (of which a

(*g*) 32 & 33 Vict. c. 114.

(*h*) 30 & 31 Vict. c. 127, § 31.

(*i*) These powers were originally vested in the commissioners of railways, but were transferred to the Board of Trade by ¹²⁷14 & 15 Vict. c. 83, § 1.

(*k*) 13 & 14 Vict. c. 83, § 1.

(*l*) 30 & 31 Vict. c. 127, § 32.

(*m*) 32 & 33 Vict. c. 114, § 8.

(*n*) 13 & 14 Vict. c. 83, § 13.

(*o*) 13 & 14 Vict. c. 83, § 15.

(*p*) Ibid. § 17, as amended by 32 & 33 Vict. c. 114, § 9.

certificate of the Board of Trade is sufficient evidence (*q*), the ^{Bk. IV. Chap. 4.} company is released from the obligation of making the abandoned railway (*r*). The acts contain various provisions for regulating the manner in which the sense of the shareholders is to be taken (*s*); for prohibiting the directors from proceeding with the undertaking after a resolution has been passed to apply to the Board of Trade (*t*); for enabling the Board to ascertain the true state of the company's affairs (*u*); for protecting and compensating persons who have acquired rights against the company (*x*); for reducing the capital of the company if the Board of Trade think it expedient so to do (*y*); and for dealing with the money deposited for the purpose of securing the completion of the railway (*z*).

The exercise of the powers of the Board of Trade is discretionary (*a*).

Upon the granting of a warrant for the abandonment of a railway, the powers of the company cease; and the company exists only for the purpose of winding up its affairs (*b*).

When a warrant has been granted for the abandonment of the whole of a railway, a petition may be presented under the Companies acts of 1862 and 1867, either by the company or by any person who, under the Companies acts, is authorised to present a petition to wind up a company (see ante, p. 624), or by any person upon whose application the Board of Trade may proceed in pursuance of 30 & 31 Vict. c. 127, § 32 (*c*); and for the purpose of the winding up the company shall be deemed an unregistered company, which may be wound up under the Companies acts (*d*).

(*q*) 13 & 14 Vict. c. 83, § 18.

(*r*) § 19.

(*s*) §§ 2-11.

(*t*) §§ 4 and 12.

(*u*) 13 & 14 Vict. c. 83, § 14.

(*c*) *Ib.* §§ 16, 19-28, 35 and 36. § 35 is amended by 30 & 31 Vict. c. 127, § 31, by substituting 21st

May, 1867, for 11th Feb. 1850.

(*y*) *Ibid.* § 28.

(*z*) *Ibid.* § 31, cl. 3, 32 & 33 Vict. 114, § 5. See *Waterford, &c.*,

Rail. Co., Ir. Rep. 4 Eq. 538, as to the rights of the depositors.

(*a*) 30 & 31 Vict. c. 127, § 31, cl. 3.

(*b*) 13 & 14 Vict. c. 83, § 29, amended by 32 & 33 Vict. c. 114, § 10, now repealed 46 & 47 Vict. c. 39.

(*c*) The substance of which is given *ante*, p. 902.

(*d*) 32 & 33 Vict. c. 114, § 4.

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Application of
deposit.

Under the joint operation of these acts and special acts, the deposit money may usually be applied in compensating land-owners for loss occasioned by the abandonment of the undertaking (*e*); and in paying creditors if the money to pay them cannot be raised by calls (*f*); but the deposit is not applicable to pay promoters, parliamentary agents, and people employed in the promotion of the company (*g*).

2. Arrangements between railway companies and their creditors.

In addition to the provisions relating to the abandonment of railway undertakings noticed above, the Railway Companies act, 1867 (*h*), contains provisions relating to railway companies unable to meet their engagements with their creditors. Until this act was passed, railway companies which had exhausted their capital and powers of borrowing, and were desirous of raising further capital to meet their engagements, were compelled to apply to Parliament for a special act conferring further powers of raising money. Parliament in dealing with these applications was in the habit of considering how far the arrangements proposed as to the new capital were assented to or dissented from by the proprietors of the existing capital of the company. The object of the Railway Companies act, 1867, is to dispense with special applications to parliament, and to give a parliamentary sanction to a scheme approved by the Chancery Division of the High Court, and assented to by certain majorities of the various classes of persons interested in the undertaking (*i*). The act provides that where a rail-

(*e*) *Ruthin and Cerrig-y-Druiddion Rail. Act*, 32 Ch. D. 438; *Potteries, Shrewsbury and North Wales Rail. Co.*, 25 Ch. D. 251.

(*f*) *Bradford Tramways Co.*, 4 Ch. D. 18, and the next note.

(*g*) See as to promoters, &c., *Birmingham and Lichfield Junction Rail. Co.*, 28 Ch. D. 652; *Lowestoft and Yarmouth Tramways Co.*, 6 Ch. D.

484; *Barry Rail. Co.*, 4 Ch. D. 315; *Brampton and Loughton Rail. Co.*, 10 Eq. 613. A solicitor and parliamentary agent was paid in *Kensington Station Act*, 20 Eq. 197; but query this case, see *ante*, 147, note (*u*), and the cases just cited.

(*h*) 30 & 31 Vict. c. 127.

(*i*) See *Cambrian Rail. Co.*, 3 Ch. 278, 294.

way company (*k*) is unable to meet its engagements, the directors may prepare a scheme of arrangement between the company and its creditors, and may file such scheme in Court (*l*). After the filing of the scheme, and until its enrolment as directed in a subsequent section of the act, the Court may, on the application of the company, restrain any proceeding against the company (*m*), whether by persons bound by the scheme, or by those not so bound (*n*). The Court, however, in the exercise of its discretion, will not suspend the proceedings of any outside creditor, unless the scheme proposed will, if it reaches maturity, afford a reasonable prospect of providing for the payment of the claims of creditors, and thus compensate them for a temporary suspension of their remedies (*o*), nor will it compel creditors to accept securities instead of money in payment of their debts, except with their consent (*p*).

Notice of the scheme is directed to be published in the "Gazette" (*q*), and after such publication no process against the company is available without leave of the Court (*r*). After the filing of the scheme, or within such extended time as the Court has allowed, the directors may apply to the Court to confirm the scheme. Notice of that application must, however, be published in the "Gazette" (*s*).

The scheme is to be taken to be assented to by the holders of mortgages or bonds or debenture stock (*t*), by holders of

(*k*) For definition of the word "Company," see § 3. A tramway company is not a railway, *Brentford and Isleworth Tramways Co.*, 26 Ch. D. 527; but a dock company may be also a railway company. See *East and West India Docks Co.*, 38 Ch. D. 596. These were not, however, decisions on the act in question.

(*l*) § 6. See, too, *Potteries, &c., Rail. Co.*, 5 Ch. 67.

(*m*) § 7.

(*n*) *Cambrian Rail. Co. Scheme*, 3 Ch. 278.

(*o*) See *per* V.-C. Giffard, in *Bristol and North Somerset Rail. Co.*, 6 Eq. 448, 453. In *Letterkenny*

Rail. Co., Ir. Rep. 4 Eq. 538, the Court declined to sanction a scheme which made no provision for paying the creditors of the company.

(*p*) *West Cork Railway*, Ir. Rep. 7 Eq. 96; and cases in note (*o*).

(*q*) § 8.

(*r*) § 9. A *sci. fu.*, against a shareholder under the Companies clauses act, 1845, § 36, may be restrained under this section. *Devon and Somerset Rail. Co.*, 6 Eq. 610.

(*s*) § 16.

(*t*) § 10. A debenture holder who has obtained judgment is, for the purposes of this sect., precisely in the same position as those who

Bk. IV. Chap. 4. rent-charges (*u*), and by preference shareholders (*x*) respectively, when it is assented to in writing by three-fourths in value of the class in question; and by the ordinary shareholders of the company, when it is assented to at an extraordinary general meeting of the company specially called for that purpose (*y*). If the company is a lessee of a railway, the scheme is to be taken to be assented to by the lessors, if three-fourths in value of the holders of mortgages, bonds, and debenture stock, and of each class of preference shareholders in the leasing company have given their assent in writing to the scheme, and if the ordinary shareholders of the leasing company have, at an extraordinary general meeting, called for that purpose, assented to it (*z*).

The Court may then confirm the scheme, upon being satisfied that it has been duly assented to by all the classes of interests mentioned above (*a*).

Railway Companies' acts,
1867-9.

The scheme when confirmed must be enrolled in the Chancery Division of the High Court, and then becomes as effectual as an act of Parliament (*b*): and in the absence of fraud (*c*) the scheme, when enrolled, binds the company, and all the persons whose assents were necessary to it; but it does not bind any outside creditor unless he has actually assented to it (*d*). After the enrolment no appeal can be made against the order confirming the scheme (*e*); but in order to prevent an appeal from being defeated, the Court will suspend the enrolment (*e*). Upon the enrolment the summary powers given

have not. *Potteries, &c., Rail. Co. v. Minor*, 6 Ch. 621.

(*u*) § 11.

(*x*) § 12.

(*y*) § 13.

(*z*) § 14.

(*a*) § 17. There is no clause expressly requiring all these assents, but § 17 implies that they are necessary. See *The Cambrian Rail. Co.'s Scheme*, 3 Ch. 278, 284, V.-C. Wood's judgment.

(*b*) § 18.

(*c*) *East and West Junction Rail. Co.*, 8 Eq. 87.

(*d*) *Cambrian Rail. Co. Scheme*, 3 Ch. 278; *Bristol and North Somerset Rail. Co.*, 6 Eq. 448; *East and West Junction Rail. Co.*, 8 Eq. 87, 91; *Stevens v. Mid Hants Rail. Co.*, 8 Ch. 1069; and compare *Navan and Kingscourt Rail. Co.*, 17 L. R., Ir. 410. See, also, *Re Stevens, Ir. Rep.* 6 Eq. 604, where a judgment creditor and statutory mortgagee of the company was held not bound by its scheme, though duly confirmed by the Court.

(*e*) *Devon and Somerset Rail. Co.* 6 Eq. 615, 618.

to the Court by §§ 7 and 9 cease; and afterwards no injunction can be obtained by the company to restrain proceedings against it except upon bill filed (*f*). Bk. IV. Chap. 4.

The confirmation and enrolment of the scheme must be published in the "Gazette" (*g*).

The practice of the Court under this act is regulated by the General Order and Rules, dated 24th January, 1868 (*h*), which, however, it has not been considered necessary to print in the present treatise.

(*f*) *Potteries, &c., Rail. Co.*, 5 Ch.
67.

(*h*) These rules are issued under
the authority given by § 22.

(*g*) § 19.

APPENDIX.

No. I.

FOREIGN COMPANIES.

It is an established rule of private international law that a corporation duly created according to the laws of one state may sue and be sued in its corporate name in the courts of other states (*a*). This rule was recognised by our own courts in the case of *The Dutch West India Company v. Moses* (*b*), and since that decision there have been several instances of actions and suits instituted both by and against foreign incorporated companies (*c*). APPENDIX I.
Foreign companies.
Privileges of foreign companies.

The individual members of a foreign incorporated company cannot be sued for the debts of the company contracted in another country where it carries on business (*d*). This was decided in the case of a company incorporated in Victoria and carrying on business in Western Australia, but not registered there : nor was it material that by the laws of that state the members of a native company which had never been registered were liable to be sued individually for the company's debts (*d*).

But a corporation created by a government, not recognised by her Majesty, cannot be recognised as a corporation by the courts of this country (*e*).

A foreign corporation may sue here by the name it has acquired by reputation (*f*).

As regards procedure (*g*), and parties to actions, the law of the country

(*a*) See Story, Conflict of Laws, § 565 ;
2 Kent's Com. p. 284, ed. 6.

(*b*) 1 Str. 611.

(*c*) See, for example, *Westman v. Aktiebolaget, &c., Fabrik*, 1 Ex. D. 237 ; *The National Bank of St. Charles v. Barnales*, 1 Car. & P. 569 ; *South Carolina Bank v. Case*, 8 B. & Cr. 427 ; *Lewis v. Baldwin*, 11 Beav. 153 ; *Sudlow v. Dutch Rhenish Rail. Co.*, 21 Beav. 43 ; *Maclaren v. Stainton*, 16 Beav. 279 ; *Mackenzie v. Sligo and Shannon Rail. Co.*, 8 Q. B. 862. As to actions for calls, see *Welland Rail. Co. v. Blake*, 6

H. & N. 410.

(*d*) *Bateman v. Service*, 6 App. Ca. 386, and see *infra*, p. 913.

(*e*) *The City of Berne v. Bank of England*, 9 Ves. 347.

(*f*) *Dutch West India Co. v. Moses*, 1 Str. 611.

(*g*) See, as to service of writs on agent, &c., here, *Mackereth v. Glasgow and S.-W. Rail. Co.*, L. R. 8 Ex. 149 ; *Lhoneux Limon & Co. v. Hong Kong Banking Corp.*, 33 Ch. D. 446 ; *Baillie v. Goodwin & Co.*, ib. 604.

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in which the action is brought prevails; and consequently a company empowered by a foreign or colonial government to sue and be sued by a public officer, cannot so sue or be sued here (*h*).

It has been decided that where a company formed in a colony is empowered by an act of the Colonial legislature to sue and be sued by a public officer, and an action is brought against that officer in the colony, and judgment is recovered against him there, such judgment may be enforced in this country against a member of the company resident here, although he was not in fact party to the proceedings in the colony (*i*).

Contracts with
foreign corpora-
tions in
England.

Notwithstanding some Canadian decisions to the contrary (*k*), it is conceived that a foreign corporation can sue in this country on all contracts entered into with it in this country, provided such contracts are warranted by the constitution of the corporation and are not illegal by English law (*l*). The Canadian decisions are based on the theory, that as no state can validly authorise a body corporate to transact business out of its own territory, no corporation can sue in a foreign country on a contract entered into there. But the true question is, not whether one state can legally grant powers of contracting, &c., in another state, but to what extent does one state recognise the acts of another? The right of a foreign corporation to sue in this country is conferred by English law, and not by the law of the state creating the corporation. The right of a corporation to sue in a foreign country, as well as its right to contract in a foreign country, are both based, not on the law of the state creating the body corporate, but on the extent to which the foreign country chooses to recognise that law. It is curious, however, that this point should never have been discussed or decided in this country.

Calls made under a Colonial act are simple contract debts (*m*); and under the old practice never indebted might have been pleaded in an action for such calls (*n*).

Residence of
companies.

The residence and domicile of an incorporated company are determined by the situation of its principal place of business. This is not only the opinion of the most recent writers on private International law (*o*), but is

(*h*) See *Alivon v. Furnival*, 1 Cr. M. & R. 277, where two out of three Syndics sued successfully, although it was objected that the other ought to have joined. A company empowered by a colonial statute to sue and be sued is not a corporation; *Aldridge v. Cato*, L. R. 4 P. C. 312, which see as to the construction of such a statute. See also *Bullock v. Caird*, L. R. 10 Q. B. 276, where one member of a Scotch firm was sued here on a contract made in Scotland with the firm.

(*i*) *Bank of Australasia v. Harding*, 9 C. B. 661; *Bank of Australasia v. Nias*, 16 Q. B. 717; *Kelsall v. Marshall*, 1 C. B. N. S. 241.

(*k*) *Bank of Montreal v. Bathune*, 4 Up. Can. Q. B. 341; *Genesee Mutual*

Ins. Co. v. Westman, 8 ib. 487; *Union Rubber Co. v. Hibbard*, 6 Up. Can. C. P. 77. If carefully examined, these cases only decide what is unquestionably true, viz., that a corporation formed to carry on a particular business in one country exceeds its powers if it carries on a similar business out of that country. At the same time the judges who decided those cases based their judgments on supposed grounds of international law.

(*l*) See acc. *Bank of Augusta v. Earle*, 13 Peters, 519.

(*m*) *Welland Rail. Co. v. Blake*, 6 H. & N. 415.

(*n*) *Ib.*

(*o*) See 4 Phill. Int. Law, pp. 138, 128, 129; and Westlake, Priv. Int. Law §§ 55 *et seq.*

supported by the decisions of our own courts (*p*). By the principal place of business is meant the place where the administrative business of the company is conducted; this may not be where its manufacturing or other business operations are carried on (*q*). APPENDIX I.

A company registered under the Companies act, 1862, is for all the purposes of that act, resident in that part of the United Kingdom in which the company's registered office is situate (see §§ 8—10); and for the purpose of determining the Court in which an unregistered company is to be wound up under that act, the company is to be treated as registered in that part of the United Kingdom in which its principal place of business is situate (see § 199) (*r*). Residence of registered companies.

As regards payment of income tax, it has been decided that income tax is payable by an English registered company carrying on business abroad on the whole of its profits wherever earned, and not only on so much of them as are received in England (*s*); but that foreign companies carrying on business here are only assessable in respect of their profits earned here (*t*), or remitted here for division amongst the shareholders (*u*). These cases turn on the language of the income tax acts, and illustrate the meaning of reside and carry on business as applied to companies and their agents. *See additions & corrections p. lxxv.* Residence for purposes of income-tax.

But although a foreign company may have its principal place of business abroad, and be therefore domiciled abroad, it may be sued in the courts of this country if it is in fact amenable to the process of our courts. There is no difference in this respect between a foreign individual and a foreign corporation, except that the individual may be amenable to process both in his person and in his property, whilst a corporation domiciled abroad can, it is conceived, only be amenable to process through its property and its agents. In neither case, however, does the simple fact of a foreign domicile exclude the jurisdiction (*x*). Jurisdiction over foreign companies.

Service of writs out of the jurisdiction is now governed by R. S. C. 1883, Ord. XI., to which the reader is referred. A Scotch Insurance Service of writs out of the jurisdiction.

(*p*) In *Taylor v. Crowland Gas Co.*, 11 Ex. 1; *Adams v. The Great Western Rail. Co.*, 6 H. & N. 404; and *Shields v. The Great Northern Rail. Co.*, 7 Jur. N. S. 631, it was held that a company dwells (in the sense in which the word is used in the County Court acts) at its principal place of business, e.g., in the case of the Great Western Rail. Co. at Paddington. Again, in *Minor v. The London and North-Western Rail. Co.*, 1 C. B. N. S. 325, and *Corbett v. The General Steam Navigation Co.*, 4 H. & N. 482, it was held that a company, whose principal place of business was in London, but which had an office in a country town, did not carry on business there within the meaning of the same acts. See also, *Le Taillieur v. South-Eastern Rail. Co.*, 3 C. P. D. 18; *Keynsham Blue Lias Lime Co. v. Barker*, 2

H. & C. 729.

(*q*) See the cases in the last note, and in the next two notes.

(*r*) *Jones v. Scottish Accident Ass. Co.*, 17 Q. B. D. 421, noticed *infra*, and see the next note.

(*s*) *Cesena Sulphur Co. v. Nicholson*, and *Caleutta Jute Mills Co. v. Nicholson*, 1 Ex. D. 428; *Alexander Water Co. v. Musgrave*, 11 Q. B. D. 174.

(*t*) *Att.-Gen. v. Alexander*, L. R. 10 Ex. 20; *Werle & Co. v. Colquhoun*, 20 Q. B. D. 753.

(*u*) *Gilbertson v. Fergusson*, 7 Q. B. D. 562. See also, as to this, *Colquhoun v. Brooks*, 21 Q. B. D. 52, and 19 ib. 174, as to profits remitted from a firm abroad to a partner here.

(*x*) See *Maclaren v. Stainton*, 1£ Beav. 279, and the judgment of Lord St. Leonards, 5 H. L. C. 450.

APPENDIX I.

Jurisdiction
over foreign
companies.

office registered in Scotland, but having an agency and a chief office in England, and issuing policies here, was held not to be domiciled or ordinarily resident in England so as to authorize the service of a writ on it in Scotland under this rule (*y*).

The jurisdiction of English courts over foreign companies was discussed in *Norris v. Chambers*, 29 Beav. 246, aff. on appeal, 7 Jur. N. S. 689, in which it was held that a mere lien on property situate abroad cannot be enforced here, unless such lien is founded on some contract or transaction creating a personal obligation on the part of the defendant in favour of the plaintiff.

The question whether a foreign company having its principal place of business abroad, but having an agent and an office for the sale of its goods here, was within the jurisdiction of the English courts, was much discussed in *The Carron Company v. Maclaren* (*z*); and although in that case there was a difference of opinion as to the propriety of making a decree against the company, there appears to have been no difference of opinion as to the mere question of jurisdiction.

Companies formed in this country, for the purpose of carrying on business abroad, but having their principal place of business here, are clearly subject to the jurisdiction of English courts (*a*); and may be wound up in this country (*b*).

The jurisdiction of the courts of one country over companies domiciled in another country, appears therefore to depend upon whether those companies are, through their property or their agents, amenable to the process of the courts in which the companies are sued. Assuming a foreign company to be amenable to the process of our courts, there is nothing to prevent its being sued or even adjudicated bankrupt here, if it could be so adjudicated were it an English company (*c*).

A foreign company cannot be registered as an existing company under the Companies act, 1862 (*d*); nor can it be wound up under that act unless it has a branch office (not merely agents) in England, and assets which an English court can reach (*d*). Practically it would be impossible to wind it up completely; and if it were a corporation there would be no jurisdiction to dissolve it.

Interference
with foreign
companies.

A foreign company which is amenable to the jurisdiction of the courts of this country may be restrained from suing its own members in the courts of the country where its principal place of business is situate (*e*). But if disputes between the members, or between the company and strangers,

(*y*) *Jones v. Scottish Accident Ass. Co.*, 17 Q. B. D. 421.

(*z*) 5 H. L. C. 416; *Maclaren v. Stainton*, 16 Beav. 279. See also as to income tax the cases in note (*s*).

(*a*) See *Buenos Ayres Rail. Co. v. North Rail. Co. of Buenos Ayres*, 2 Q. B. D. 210, where an action was held to lie for rent of land abroad; *Madrid and Valencia Rail. Co.*, 3 De G. & S. 127, and 2 Mac. & G. 169; *Butt v. Monteaux*, 1 K. & J. 98.

(*b*) *Princess Reuss v. Bos*, L. R. 5 H. L. 176.

(*c*) See, as to bankruptcy, *Royal Bank of Scotland v. Cuthbert*, 1 Rose, 462; and *Forth Marine Ins. Co.*, 9 Beav. 469.

(*d*) See *Bulkeley v. Schutz*, L. R. 3 P. C. 764; *Lloyd Generale Italiano*, 29 Ch. D. 219, and compare *Matheson Brothers, Limited*, 27 Ch. D. 225; *Commercial Bank of South Australia*, 33 Ch. D. 174, and 36 ib. 522, and *ante*, p. 622. See also *Bateman v. Service*, 6 App. Ca. 386.

(*e*) *Carron Co. v. Maclaren*, 5 H. L. C. 416.

have arisen and been the subject of litigation and been adjudicated upon by a foreign court of competent jurisdiction, its decision will not be reviewed here at the instance of a member resident here and not a party to the proceedings abroad (*f*).

It has also been decided that an application by a company to a foreign government for further powers ought not to be restrained by the courts of this country (*g*).

Again, although a corporation duly created in one State, is recognised as a corporation by other States, the transactions of that corporation are governed, not by the law of the State creating it, but by the law of the place where those transactions occur, and by the constitution of the corporation (*h*). This last is important; for the capacity of a corporation to acquire rights and incur obligations is limited by the objects to attain which it is created, and these limits must be regarded whenever and wherever the extent of the corporate powers has to be judicially decided (*i*). But it by no means follows that what a corporation can lawfully do in the State where it was created, it can also lawfully do in every other State which recognises its existence. This must always be borne in mind when, as frequently occurs, a company is formed here for the purpose of transacting business in the colonies or in foreign countries. Suppose, for example, that a registered company is formed in England for the purpose of working mines or cultivating estates in a colony. If, by the laws of that colony, a corporation cannot hold lands, the company will not be able to attain its object without obtaining special authority from the proper quarter to hold lands in the colony.

Laws applicable to the transactions of foreign companies.

The proper mode of transferring shares in a foreign incorporated company depends on the laws by which the company is incorporated. But foreign laws of estoppel do not govern transactions in this country; nor are documents which are treated abroad as negotiable instruments necessarily so treated here (*k*).

Dealings in shares.

One of the most important questions which arise with reference to foreign companies, relates to the personal liabilities of their members. If a company is incorporated by a foreign government, so that by the constitution of the company the members are rendered wholly irresponsible, or only to a limited extent responsible, for the debts and engagements of the company, the liability of the members, as such, will be the same in this

Liabilities of the members of foreign companies.

(*f*) See *Sudlow v. Dutch Rhenish Rail. Co.*, 21 Beav. 43; *Bank of Australasia v. Harding*, 9 C. B. 661, and *v. Nias*, 16 Q. B. 717; *Kelsall v. Marshall*, 1 C. B. N. S. 241. As to suits here and abroad concurrently, see *Bent v. Young*, 9 Sim. 180, and *Transatlantic Co. v. Pietroni*, Johns. 604; and as to the two suits being for the same matter, see *Hunter v. Stewart*, 10 W. R. 176, L. J.

(*g*) *Bill v. Sierra Nevada, &c., Co.*, 1 De G. F. & J. 177.

(*h*) In *Brandley v. South-Eastern Rail. Co.*, 12 C. B. N. S. 63, a contract made by an English company in Boulogne, and

valid by the law of France, was held valid, whatever might have been the case if the contract had been made in England. See, also, *Maunder v. Lloyd*, 2 J. & H. 718. It will be assumed in the absence of proof to the contrary, that general principles of commercial and mercantile law are the same abroad as here. *Pickering v. Stephenson*, 14 Eq. 322.

(*i*) See the *Canadian cases*, noticed *ante*, p. 910, note (*k*).

(*k*) *Williams v. Colonial Bank*, 38 Ch. D. 388, and other cases noticed *ante*, pp. 481-3.

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country as in the country which created the corporation (*l*). But with respect to unincorporated companies, the measure of liability in respect of any given transactions, seems, upon principle, to depend upon the law of the place where the transactions in question occurred (*lex loci contractus*). The law of agency, as administered in that place, would, it is conceived, have to be applied; and the law of the place where the company might be considered as domiciled would only be material for the purpose of determining the authority given by the members to the agents by whom the transactions in question were conducted. See, upon this difficult subject, *Story's Conflict of Laws*, § 320 *a*, and *Westlake's Private Intern. Law*, § 222 *et seq.*; *Mauder v. Lloyd*, 2 J. & H. 718.

Enforcing
foreign
judgments.

If a judgment has been obtained abroad against a company (*m*), or a member of a company (*n*), such judgment may be enforced here, although, by reason of service having been substituted or dispensed with, the judgment may have been obtained without actual notice to the defendant (*o*).

The following convention upon the subject to which this note relates has been concluded between England and France:—

Convention
with France,

“Art. I. The high contracting parties declare that they mutually grant to all companies and other associations, commercial, industrial, or financial, constituted and authorised in conformity with the laws in force in either of the two countries, the power of exercising all their rights, and of appearing before the tribunals whether for the purpose of bringing an action, or for defending the same, throughout the dominions and possessions of the other power, subject to the sole condition of conforming to the laws of such dominions and possessions.

“Art. II. It is agreed that the stipulations of the preceding article shall apply as well to companies and associations, constituted and authorised previously to the signature of the present convention, as to those which may subsequently be so constituted and authorised.

“Art. III. The present convention is concluded without limit as to duration. Either of the high powers shall, however, be at liberty to terminate it by giving to the other a year's previous notice. The two high powers, moreover, reserve to themselves the power to introduce into the convention, by common consent, any modifications which experience may show to be desirable.”

and other
countries.

Similar conventions have been made with Belgium (see *Parl. Papers* for 1862, vol. xxii. p. 1), with Italy (see *Parl. Papers* for 1867—8, vol. lxxiii. p. 533), with Germany (see *Parl. Papers* for 1874, vol. lxxvi. p. 139), with Spain (see *Parl. Papers* for 1883, vol. lxxxii. p. 659), and with Greece (see *Parl. Papers* for 1888, C. 5556).

(*l*) *General Steam Nav. Co. v. Guillan*, 11 M. & W. 877. And see *Bateman v. Service*, 6 App. Ca. 386.

(*m*) *Sheehy v. Professional Life Ass. Co.*, 3 C. B. N. S. 579.

(*n*) See *Vallée v. Dumergue*, 4 Ex. 290. See, also, *Copin v. Adamson*, 1

Ex. D. 17, affirming L. R. 9 Ex. 345, where a French company had obtained judgment in France against an English member.

(*o*) *Ib.*; compare *Meens v. Thelussou*, 8 Ex. 638; and *Schibsky v. Westenholtz*, L. R. 6 Q. B. 155.

No. II.

INDUSTRIAL AND PROVIDENT SOCIETIES.



INDUSTRIAL and Provident Societies, as governed by the Industrial and provident societies act, 1876 (39 & 40 Vict. c. 45) (*a*), are a peculiar kind of limited joint-stock company. They are societies formed for the purpose of carrying on any labour, trade, or handicraft, whether wholesale or retail, including the buying and selling of land and banking, but subject to certain restrictions ; but no member other than a registered Industrial and Provident Society can have a greater interest in the funds of the society than 200*l.* (§ 6). There must be seven members at least (§ 7) ; and infants over sixteen may be members (§ 11, cl. 9). Such a society is formed by being registered by the registrar of friendly societies (§§ 7 and 8) ; and, when registered, it becomes a body corporate by its registered name, having a perpetual succession and a common seal, with power to hold lands and buildings, and with limited liability (§ 11). It can bind itself by promissory notes and contracts in the same way as companies registered under the Companies act, 1862 (§ 11, cl. 10 and 12).

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The registrar's certificate vests in the society all property that may at the time be vested in any person in trust for it (§ 11) (*b*).

The society, being incorporated, must sue and be sued by its corporate name ; and its members are individually liable for its debts and engagements only so far as the statute declares. As in the case of companies registered under the Companies act, 1862, so in the case of societies registered under the act now in question, the members are not liable to have executions issued against them in respect of judgments obtained against the society. The members can only be reached individually by the process of winding up (*c*). For the protection of creditors, however, the society is bound to have a registered office (§ 10), and to use the word limited as is required in the case of companies registered, with limited liability, under the Companies act, 1862 (§ 7), and to make certain annual returns to the registrar (§ 10) ; and to have its accounts audited (*ib.*). A register of members is required to be kept, and is *prima facie* evidence that the persons named in it are members (§ 11, cl. 11).

(*a*) Amended by 43 Vict. c. 14, § 8, as to income tax ; 46 & 47 Vict. c. 47, § 3, which extends the power of nomination given by § 11, cl. 5 & 6 ; 47 & 48 Vict. c. 43, § 4, which repeals § 19, cl. 5, and part of cl. 6.

(*b*) See *Queensbury Industrial Society v. Pickles*, L. R. 1 Ex. 1.

(*c*) See, under the older acts, *Dean v. Mollard*, 15 C. B. N. S. 19 ; *Linton v. Blakeney Industrial School*, 3 H. & C. 853, and *Gray v. Raper*, L. R. 1 C. P. 694, as to debts contracted before registration ; and see the last case as to staying actions when the society is being wound up.

APPENDIX II.

Rules, &c. The Industrial and provident societies act, 1876, contains little respecting the management of the affairs of a society registered under it or the rights of its members. Provision, however, is made for the settlement of disputes by arbitration (§ 14) (*d*); for the official inspection of the affairs of the company upon the application of a certain proportion of the members (§ 15); for the inspection by the members of the books of the company (§ 10); and for the nomination by members not entitled to more than 50*l.*, of persons to succeed to their shares on their death (§ 11, cl. 5). Subject, however, to these enactments, the rights of the members *inter se*, and the management of the society's affairs, are left to be provided for by the rules of the society. The rules bind the members as if they had entered into a covenant to observe them (§ 11, cl. 2). They may be altered from time to time, and must be registered by the registrar, and a copy of them must be delivered by the society to any person on demand, on payment of a sum not exceeding one shilling (§ 9).

The act in question does not contain any form of rules; but the schedule to the act contains a list of the matters to be provided for by the rules of societies established under it.

A society registered under the act is empowered to amalgamate with a similar society (§ 16, cl. 3); and to register itself as a company under the Companies act, 1862 (§ 16, cl. 4); but a special resolution is necessary for these purposes (*ib.*).

Winding up. Societies registered under the act in question may be wound up either by the court or voluntarily: but the court having jurisdiction over the winding up, is the county court of the district in which the society's registered office is situate (§ 17). Societies not registered under the act, but capable of being registered under it, may apparently be wound up either in the Chancery division of the High Court or in the county court (*e*).

Contributories and their liabilities. With respect to contributories and their liabilities, there is no substantial difference between societies registered under this act, and companies registered under the Companies act, 1862 (see 39 & 40 Vict. c. 45, § 17) (*f*).

Arbitration. (*d*) Upon the corresponding provisions in the older acts, the leading cases are *Fleming v. Self*, Kay, 518, and 3 De G. M. & G. 997; *Farmer v. Giles*, 5 H. & N. 753; *Morrison v. Glover*, 4 Ex. 430; *Cutbill v. Kingdom*, 1 Ex. 494; *R. v. Trafford*, 4 E. & B. 122; *Kelsall v. Tyler*, 11 Ex. 543; *Smith v. Lloyd*, 26 Beav. 507, in which it was held that the provisions as to arbitration did not apply; and *Crisp v. Banbury*, 8 Bing. 394; *Reeves v. White*, 17 Q. B. 995; *R. v. Mildenhall Savings Bank*, 6 A. & E. 952; *Timms v. Williams*, 3 Q. B. 413; *Thompson v. Planet Building Society*, 15 Eq. 333; *Wright v. Monarch Investment Building Society*, 5 Ch. D. 726; *Huckle v. Wilson*, 2 C. P. D. 410; where it was held that they did. See,

also, *Armitage v. Walker*, 2 K. & J. 211; *Wright v. Desley*, 4 H. & C. 209; *Edwards v. Aberayron Soc.*, 1 Q. B. D. 563. As to Friendly Societies, *Royal Liver Friendly Society*, 35 Ch. D. 332. As to Building Societies, see *infra*, p. 921, notes (*e*) and (*d*). (See *addenda* p. 107.)

(*e*) See *Midland Counties Benefit Building Soc.*, 4 De G. J. & Sm. 468, reversing S. C., 10 Jur. N. S. 505; *Chatham Industrial Co-operative Soc.*, 10 Jur. N. S. 983; *Rotherhithe, &c., Soc.*, 32 Beav. 57; *Fountain's case*, 11 Jur. N. S. 553.

(*f*) See *Fountain's case*, 11 Jur. N. S. 553, L. C. as to liability in respect of debts contracted before registration.

A society under the act is, however, dissolved by the order or the resolution to wind it up as the case may be, or by an instrument of dissolution signed by three-fourths of the members (§ 17). The notice of dissolution must be advertised in the *Gazette*, and, unless steps are taken within three months in the county court to set aside the dissolution, the society is to be treated as dissolved from the date of the advertisement (*ib. cl. 3 e*). But this must mean dissolved so far as is consistent with the proper winding up of its affairs (*g*).

Trade union societies, being in restraint of trade, were illegal before Trades Union 34 & 35 Vict. c. 31 (*h*). Now, however, such societies may be registered under the act last cited; but neither the Friendly societies acts nor the Industrial and provident societies act, nor the Companies acts, apply to them (*i*).

(*g*) See *ante*, p. 870. As to paying the whole assets to the last surviving member, see *Spiller v. Maude*, 10 Jur. N. S. 1089.

(*h*) See *Hornby v. Close*, L. R. 2 Q. B. 153; *Farrer v. Close*, L. R. 4 Q. B. 602; *Hilton v. Eckersley*, 6 E. & B. 47;

but compare *R. v. Stainer*, L. R. 1 Cr. Ca. Res. 230, as to protection against embezzlement.

(*i*) 34 & 35 Vict. c. 31, § 5. See *R. v. Registrar of Friendly Societies*, L. R. 7 Q. B. 741.

APPENDIX II.
Dissolution.

No. III.

BENEFIT BUILDING SOCIETIES.

APPENDIX III.	BENEFIT Building Societies are associations of a special kind, formed and regulated under particular acts of Parliament for particular purposes ; and are distinct as well from joint-stock companies and common law partnerships (<i>a</i>), as from friendly industrial and provident societies (<i>b</i>).
Benefit Building Societies.	The acts now in force are the principal act of 1874, 37 & 38 Vict. c. 42, together with the amending acts, 38 Vict. c. 9, 40 & 41 Vict. c. 63, and 47 & 48 Vict. c. 41 (<i>c</i>).
Acts now in force.	The object of these societies is defined by the principal act (37 & 38 Vict. c. 42) to be the raising by subscriptions of the members a stock or fund for making advances to members out of the funds of the society upon mortgage security (§ 13), and they may be either terminating or permanent (§§ 1, 3, 5). There is no limit to the number of members (§ 13) (<i>d</i>) ; and infants may be members, but cannot vote or hold office while under age (§ 37).
Objects of such societies.	The society is formed by receiving a certificate (<i>e</i>) of incorporation from the registrar of friendly societies (<i>f</i>), and when registered it becomes a body corporate by its registered name, having perpetual succession and a common seal (§ 9), with power to hold land with right of foreclosure (§ 13) and to purchase or lease buildings for its business purposes (§ 37). The liability of the members is limited (§ 14) (<i>g</i>). Societies existing at the date of the principal act and certified and enrolled under the act of Will. 4, are upon the enrolled transcript or a certified copy of the rules
Formation of societies.	<p>(<i>a</i>) See <i>per</i> Lord Selborne in <i>Brownlie v. Russell</i>, 8 App. Ca. p. 248 ; <i>Auld v. Glasgow Working Men's Building Soc.</i>, 12 App. Ca. p. 201.</p> <p>(<i>b</i>) The acts governing such societies seem applicable only to societies whose object is combination for labour and trade. See <i>Midland Counties B. B. Soc.</i>, 4 De G. J. & S. 468, <i>per</i> Turner, L. J.</p> <p>(<i>c</i>) The earlier act, 6 & 7 Will. 4, c. 32, is now repealed ; see 37 & 38 Vict. c. 41 (§ 7) ; but the repeal is not to affect any subsisting society certified under the act until such society shall have obtained a certificate of incorporation under the new act. See, also, 38 Vict. c. 9.</p> <p>(<i>d</i>) But it seems that there must be at least four ; see § 17, which requires before registration a copy of the rules to be signed by three intending members and the secretary.</p> <p>(<i>e</i>) As to the form of the certificate, see schedule to 40 & 41 Vict. c. 63.</p> <p>(<i>f</i>) The Court cannot declare the certificate of incorporation void on the ground that it has been obtained irregularly, <i>Glover v. Giles</i>, 18 Ch. D. 173. See, with respect to the registrar, 38 & 39 Vict. c. 60 (§ 10).</p> <p>(<i>g</i>) <i>Brownlie v. Russell</i>, 8 App. Ca. 235 ; <i>Doncaster Permanent B. Soc.</i>, 3 Eq. 158.</p>

of such society being delivered to and registered by the registrar entitled to a certificate of registration; provided the application to the registrar is made by authority of a general meeting of the society (§§ 10, 11, 12).

Persons intending to establish a society after the date of the act (Nov. 2, 1874) are entitled to a certificate of registration on transmitting to the registrar two copies of the rules agreed on signed by three such persons; provided such rules contain all the provisions set out in § 16 of the act and conform to the act, and the proposed name is not identical or similar to that of a subsisting society (§ 17).

On the incorporation of the society all rights of action and other rights and interests in real and personal estate belonging to or held in trust for the society vest in it (*h*).

Any society registered under the principal act is empowered to amalgamate with a similar society upon such terms as may be agreed upon (§ 33); but creditors are not to be prejudiced. Notice of such amalgamation is to be sent to the registrar and registered by him, and such registration is to operate as an effectual conveyance of the funds and property of the uniting society to the united society (*i*).

The matters required by § 16 to be set forth in the rules of such societies, and the provisions of the act relating to such matters are—

1. The name of the society and chief office or place of meeting for the business of the society. Name of society.

§ 22 of the principal act enables a society to change its name: and 40 & 41 Vict. c. 63, § 2, enables a change to be made in the chief offices. Notice of the change is in each case to be given to the registrar, who is to register the change, and give a certificate of registration: see the form given in the schedule to the last mentioned act

2. The manner in which the stock or funds of the society are to be raised, the terms upon which paid-up shares (if any) are to be issued and repaid, and whether preferential shares (*k*) are to be issued, and if so within what limits, if any; and whether the society intends to avail itself of the borrowing powers contained in the act, and if so within what limits, not exceeding the limits presented by the act. Funds of the society.

The power to borrow is given by § 15 of the act (*l*), sub-sect. 5 of which requires §§ 14 and 15 of the act to be printed or written on all securities given for any deposit or loan by a society (*m*). If a society borrows without power, or exceeds its borrowing power, the society is not bound (*n*); but by § 43 the directors or committee of management of the society are to be personally liable for the amount so received in excess (*o*).

(*h*) 37 & 38 Vict. c. 42, §§ 27 & 28. and 40 & 41 Vict. c. 63, §§ 3 & 4.

(*i*) 40 & 41 Vict. c. 63, § 5.

(*k*) See, as to preference shares, *Murray v. Scott*, 9 App. Ca. 519.

(*l*) See, as to the power of borrowing apart from the act, *Ex parte Williamson*, 5 Ch. 309; *Blackburn Benefit Building Soc. v. Cunliffe Brooks*, 22 Ch. D. 61, 9 App. Ca. 859, 29 Ch. D. 902; *Murray v. Scott*, 9 App. Ca. 519; *Hill's case*, 9 Eq. 605; *Davis' case*, 12 Eq. 516; *Laing v. Reed*, 5 Ch. 4, *ante*, p. 189.

(*m*) This is, however, merely directory, and the security will be valid, *Hawkins' case*, 23 Ch. D. 452.

(*n*) *Ex parte Watson*, 21 Q. B. D. 301; *Blackburn Benefit Building Soc. v. Cunliffe Brooks*, *ubi supra*; *Chapleo v. Brunswick Soc.*, 6 Q. B. D. 696, and *ante*, p. 189. See, as to the right to recover from the society any money spent in paying the societies' debts, *ante*, pp. 189 *et seq.*, and 236 *et seq.*

(*o*) See, as to this section, *Looker v. Wrigley*, 9 Q. B. D. 397. As to the

APPENDIX III.

Application
and investment
of funds.

Withdrawal of
shares.

Mortgages
of such
societies.

Alteration of
rules.

3. The purposes to which the funds of the society are to be applied, and the manner in which they are to be invested (*p*).

§§ 25 and 26 of the principal act deal with the manner of investing the surplus funds of a society and the transference of such investments.

4. The terms upon which shares may be withdrawn and upon which mortgages may be redeemed (*q*).

a. As to withdrawal of shares.—The right of a member to withdraw and the terms upon which he may do so depend upon the contract to be found in the rules (*r*). The right of withdrawal in the case of members who have given mortgages to the society, is intimately connected with their right to redeem their mortgages, which depends in each case on the terms of the mortgage and on the rules (*s*).

b. As to the mortgages of a society.—Mortgages are excepted from the general exemption from stamp duty in respect of instruments required or authorised by the act or rules of the society given by § 41 of the principal act (*t*). § 42 enacts that a receipt endorsed on any mortgage shall be a sufficient discharge without reconveyance (*u*), but the act allows a reconveyance to be made (*x*).

As to the terms on which a mortgage can be redeemed see the cases collected in note (*s*).

5. The manner of altering and rescinding the rules of the society, and of making additional rules.

§ 18 provides for the way in which the rules may be altered (*y*). All rules must be registered by the registrar and a copy of them must be supplied by the society to any person on demand on payment of a sum

liability of directors apart from the act, see *Richardson v. Williamson*, L. R. 6 Q. B. 276, and *Chapleo v. Brunswick Soc.*, 6 Q. B. D. 696, and *ante*, p. 189.

(*p*) See, as to the power to invest in land under the earlier acts, *Mallock v. Jenkins*, 14 Beav. 633; *Guinness v. Harrison*, 26 Beav. 435; *Re Kent B. B. Soc.*, 1 Dr. & Sm. 417.

(*q*) See, on this subject, *Fleming v. Self*, 3 De G. M. & G. 997, Kay, 518; *Smith v. Pilkington*, 1 De G. F. & J. 120; *Archer v. Harrison*, 7 De G. M. & G. 404; *Matterson v. Elderfield*, 4 Ch. 207.

(*r*) See *ante*, pp. 523, 872; *Auld v. Glasgow Working Men's Building Soc.*, 12 App. Ca. 197; *Brownlie v. Russell*, 8 App. Ca. 235; *Walton v. Edye*, 10 App. Ca. 33; *Tosh v. North British Building Soc.*, 11 App. Ca. 489; *Walker v. General Mutual Building Soc.*, 36 Ch. D. 780.

(*s*) The leading cases on this subject are *Fleming v. Self*, 3 De G. M. & G. 997; *Archer v. Harrison*, 7 ib. 404; *Smith v. Pilkington*, 1 De G. F. & J.

120; *Matterson v. Elderfield*, 4 Ch. 207; *Farmer v. Smith*, 4 H. & N. 196; *Handley v. Farmer*, 29 Beav. 362; *Sparrow v. Farmer*, 26 ib. 511.

(*t*) See, under the earlier acts, *Williams v. Hayward*, 22 Beav. 220; *Thorn v. Croft*, 3 Eq. 193, which decided that mortgages did not require a stamp. This is now altered by 33 & 34 Vict. c. 97, § 112.

(*u*) As to the effect of a statutory receipt, see *Pease v. Jackson*, 3 Ch. 576; *Fourth City Mutual Benefit Building Society v. Williams*, 14 Ch. D. 146; *Robinson v. Trevor*, 12 Q. B. D. 423; *Sangster v. Cochrane*, 28 Ch. D. 298; *Carlisle Banking Co. v. Thompson*, ib. 399. For the form of the receipt, see the schedule to the act of 1874.

(*x*) As to the effect of a reconveyance as distinguished from a receipt, see *Carlisle Banking Co. v. Thompson*, 28 Ch. D. 399.

(*y*) As to the form of a certificate of alteration, see 40 & 41 Vict. c. 63, schedule.

not exceeding 1s. (§ 17). By § 21 the rules are made to bind all members and officers of the society, and all persons claiming on account of a member or under the rules (z). A certified copy is *prima facie* evidence, § 20. APPENDIX III.

6. The manner of appointing, remunerating and removing the board of directors or committee of management, auditors, and other officers. Appointment, &c., of directors.

See generally as to this, *ante*, p. 298 *et seq.*

7. The manner of calling general and special meetings of the members. Calling of meetings.

See generally as to this, *ante*, p. 303 *et seq.*

8. Provision for an annual or more frequent audit of the accounts and inspection by the auditors of the mortgages and other securities belonging to the society. Audit of accounts.

§ 40 provides for an annual audit and statement of the funds, and a copy of such accounts and statement is to be sent to each member (a) and also to the registrar.

9. Whether disputes between the society and any of its members or any persons claiming through any member or under the rules, shall be settled by reference to the Court (b), or to the registrar, or by arbitration. Provisions as to arbitration.

What sort of disputes must be referred and what may be the subject of an action, has given rise to much controversy. By 47 & 48 Vict. c. 41, § 2, disputes which must be referred are confined to those which arise between the society and a member in his capacity of member (c), and do not include disputes arising out of any mortgage he may have given unless the rules so provide (d).

The rules having settled to which tribunal disputes are to be referred, §§ 34-36 provide for the regulation of such tribunal and enable its determination to be enforced. Such determination is to be final: but any one of the tribunals may state a case for the opinion of the Supreme Court on any question of law.

10. Provision for the device, custody, and use of the seal of the society, which shall in all cases bear the registered name thereof. Seal of company.

11. Provision for the custody of the mortgage deeds and other securities belonging to the society. Custody of deeds.

12. The powers and duties of the board of directors or committee of management, and other officers. Liabilities and duties of directors.

§ 23 requires all officers of a society who have charge of money to give security (e), and by § 24, such officers are bound to account for and

(z) As to the liability of members to new rules, see *Re Norwich and Norfolk Permanent B. B. Soc.*, 1 Ch. D. 481.

(a) As to how far audited accounts bind the members, see *Holgate v. Shutt*, 28 Ch. D. 111.

(b) This means the County Court, see 37 & 38 Vict. c. 42.

(c) See, as to this, *Municipal Building Soc. v. Richards*, 39 Ch. D. 372; *Walker v. General Mutual Building Soc.*, 36 ib. 777; *Thompson v. Planet Building Soc.*, 15 Eq. 332. See, also, the cases on other acts collected, *ante*, p. 916, note (d).

(d) See, as to this, *Western Suburban Building Soc. v. Martin*, 17 Q. B. D. 609. The enactment in the text has altered the law laid down in some previous cases relating to mortgages, viz., *Municipal Permanent, &c., Soc. v. Kent*, 9 App. Ca. 260; *Hack v. London Build. Soc.*, 23 Ch. D. 103; *Wright v. Monarch, &c., Soc.*, 5 Ch. D. 726, and restores the law as it stood under older enactments, *Mulkern v. Lord*, 4 App. Ca. 182; *Fleming v. Self*, 3 De G. M. & G. 997.

(e) For the form of the security to be given, see the schedule to the act of 1874.

APPENDIX III. pay over all moneys in their hands. §§ 29 & 30 contain provisions enabling the directors to deal with the share of a member dying intestate. But any person withholding or misapplying money or making false returns is liable to a penalty (§§ 31, 43) (*f*).

Fines and forfeitures. 13. As to the fines and forfeitures to be imposed on members of the society (*g*).

Dissolution. 14. The manner in which the society, whether terminating or permanent, shall be terminated or dissolved.

§ 32 provides that any society under the act may be terminated or be dissolved—

(1.) Upon the happening of any event declared by its rules to be the determination of the society.

(2.) By dissolution in manner prescribed by its rules.

(3.) By dissolution with the consent of three-fourths of the members holding not less than two-thirds of the number of shares in the society.

(4.) By winding up either voluntarily or under the supervision of the Court: if the Court shall so order on the petition of any member authorised by three-fourths of the members present at a general meeting of the society or on the petition of any judgment creditor for not less than £50, but not otherwise, and notice of the commencement and termination of every dissolution and winding up must be sent to the registrar, and registered by him.

No reference is made to the Companies acts, but the winding up must be under those acts (*h*).

The principal difficulties which arise on winding up have been noticed already, see as to

Proof of debts, *ante*, bk. iv. c. 1, § 9.

Contributories, *ante*, ib. § 10.

Distribution of assets amongst advanced and unadvanced members, *ante*, p. 871.

(*f*) As to the general rights and liabilities of directors and others, see *ante*, p. 298 *et seq.*; and *Small v. Smith*, 10 App. Ca. 119, where it was held the directors had no power to give a guarantee.

(*g*) As to the construction of rules imposing fines, see *Re Tierney*, 9 Ir. R. Eq. 1. As to forfeiture of shares, see *Card v. Carr*, 1 C. B. N. S. 197; *Moore v. Rawlins*, 6 C. B. N. S. 289; and *ante*,

p. 528, &c.

(*h*) *Midland Counties B. B. Soc.*, 4 De G. J. & S. 468; *Andrew or Jones v. Swansea Cambrian B. B. Soc.*, 50 L. J. Q. B. 428; *Re Queen's B. B. Soc.*, 6 Ch. 815; *Re Professional, &c., B. B. Soc.*, ib. 856; *Sunderland Universal Build. Soc.*, 21 Q. B. D. 349, a voluntary winding up.

No. IV.

CHRONOLOGICAL LIST OF STATUTES RELATING TO COMPANIES.

THE following is a chronological list of (it is believed) all the general statutes which have from time to time been passed, governing English joint-stock and other companies, and having any direct bearing on the law of partnership as applied to them ^(a) :—

APPENDIX IV.
List of statutes.

1541. 33 Hen. 8, c. 27. This act renders void rules tending to restrict the power of majorities of certain corporate bodies to make grants or to elect governors, &c.

1719. 6 Geo. 1, c. 18.—This is the celebrated “Bubble act.” (See *ante*, p. 130).

Section 4 was repealed as to the recovery of double damages by 8 Geo. 1, c. 15, § 25; section 12, prohibiting marine insurance by partners, was repealed by 5 Geo. 4, c. 114; and sections 18 & 19, prohibiting joint-stock companies with transferable shares, were repealed by 6 Geo. 4, c. 91, and sections 2, 3, 12, 18—28, were repealed by the Statute law revision act, 1867, 30 & 31 Vict. c. 59.

1721. 8 Geo. 1, c. 15.—Section 25 repealed so much of section 4 of 6 Geo. 1, c. 18, as gave a right to recover double damages.

Repealed (except § 25) by the Statute law revision act, 1867, 30 & 31 Vict. c. 59.

1766. 7 Geo. 3, c. 48.—The object of this act was to prevent the multiplication of votes by splitting stock and distributing shares, and to prevent the declaration of dividends except half yearly. The act only applies to certain companies formed before the act came into operation. The manufacture of votes in the way forbidden by this act is not illegal where the act itself does not apply. See *ante*, pp. 309 and 465.

1788. 28 Geo. 3, c. 53.—Section 2 (repealed by 6 & 7 Wm. 4, c. 109) prohibited partnerships of coal merchants.

Repealed by the Statute law revision act, 1861, 24 & 25 Vict. c. 101.

1800. 39 & 40 Geo. 3, c. 28.—Section 15 prohibited banking partnerships of more than six persons; but the act was, in this respect, repealed by 7 Geo. 4, c. 46.

Sections 1—12, and part of § 13, were repealed by the

(a) See *ante*, p. 2, for a sketch of the history of companies. The acts relating to Friendly Societies and Building Societies are not collected in this list, although one or two of them are noticed.

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List of statutes.

- Statute law revision act, 1871, 34 & 35 Vict. c. 116, and section 17 was repealed by the Statute law revision act, 1887, 50 & 51 Vict. c. 59.
1824. 5 Geo. 4, c. 114.—This act repealed 6 Geo. 1, c. 18, § 2.
Repealed by the Statute law revision act, 1873, 36 & 37 Vict. c. 91.
1825. 6 Geo. 4, c. 91.—This repealed 6 Geo. 1, c. 18, §§ 18 & 19.
Section 2 (repealed by 7 Wm. 4 & 1 Vict. c. 73) empowered the Crown, in charters of incorporation, to provide that the members of the incorporated body should be individually liable for its debts.
Repealed by the Statute law revision act, 1873, 36 & 37 Vict. c. 91.
1826. 7 Geo. 4, c. 46.—Repealed 39 & 40 Geo. 3, c. 28, § 15.
Provided for the establishment of joint-stock banking companies with public officers, by whom they could sue and be sued.
Amended by 1 & 2 Vict. c. 96, and 3 & 4 Vict. c. 111; and as to the issue of notes, &c., by bankers, by 3 & 4 Wm. 4, c. 83; ib. c. 98; 4 & 5 Vict. c. 50; 7 & 8 Vict. c. 32; 8 & 9 Vict. c. 76.
Repealed, as to companies formed since May, 1844, by 7 & 8 Vict. c. 113; and as to companies formed before that time, but registered under the acts of 1856 and 1857, by 20 & 21 Vict. c. 49.
Still in force as to companies formed before May, 1844, and not registered under the acts of 1856—8 or 1862.
1833. 3 & 4 Wm. 4, c. 83.—An act to compel banks issuing promissory notes, payable to bearer on demand, to make returns of their notes in circulation, and to authorise banks to issue notes payable in London for less than 50*l*.
See too 3 & 4 Wm. 4, c. 98; 4 & 5 Vict. c. 50; 7 & 8 Vict. c. 32; 8 & 9 Vict. c. 76.
Repealed as to §§ 1 and 3 by 37 & 38 Vict. c. 35.
1833. 3 & 4 Wm. 4, c. 98.—Relates to the issue of notes, &c., by bankers. See the note on the last act.
Repealed as to §§ 5, 9, to 13, and 15 by 37 & 38 Vict. c. 35.
Section 7 repealed by the Statute law revision act, 1861, 24 & 25 Vict. c. 101.
1834. 4 & 5 Wm. 4, c. 94.—Authorised the Crown, by letters patent, to empower companies to sue and be sued by their principal officers.
Repealed by 7 Wm. 4 & 1 Vict. c. 73.
1836. 6 & 7 Wm. 4, c. 109.—Repealed 28 Geo. 3, c. 53.
Repealed by the Statute law revision act, 1874, 37 & 38 Vict. c. 35.
1837. 7 Wm. 4 & 1 Vict. c. 73.—The Companies letters patent act.
Repealed 6 Geo. 4, c. 91, § 2, and 4 & 5 Wm. 4, c. 94.
Empowers the Crown to grant companies the privilege of suing and being sued in the name of an officer of the company, and to limit the liability of the shareholders to creditors.
Section 1 repealed by the Statute law revision act, 1874, 37 & 38 Vict. c. 35.
Construction of § 29 declared by 47 & 48 Vict. c. 56.

1838. 1 & 2 Vict. c. 10.—This act resembled the 4 & 5 Vict. c. 14, but applied only to companies formed before the then Session of Parliament. APPENDIX IV.
List of statutes.
Repealed by the Statute law revision act, 1861, 24 & 25 Vict. c. 101.
1838. 1 & 2 Vict. c. 96.—Amended 7 Geo. 4, c. 46.
Continued by 2 & 3 Vict. c. 68; and 3 & 4 Vict. c. 111.
Made perpetual by 5 & 6 Vict. c. 85.
1838. 1 & 2 Vict. c. 110.—Sections 14 and 15 rendered shares of debtors, held in public companies, available for the payment of judgment creditors, by means of charging orders.
Amended by 3 & 4 Vict. c. 82.
Though various parts of 7 & 8 Vict. c. 110 have been repealed, §§ 14 and 15 are still in force. See rules of the Supreme Court, 1883, O. XLVI.
1839. 2 & 3 Vict. c. 68.—Continued 1 & 2 Vict. c. 96; as to which see above. Repealed by the Statute law revision act, 1874 (No. 2), 37 & 38 Vict. c. 96.
1840. 3 & 4 Vict. c. 82.—Amended 1 & 2 Vict. c. 110, §§ 14 & 15.
1840. 3 & 4 Vict. c. 111.—Continued 1 & 2 Vict. c. 96; and further amended 7 Geo. 4, c. 46.
Section 1 is repealed, and section 2 is partly repealed by the Statute law revision act, 1874 (No. 2), 37 & 38 Vict. c. 96.
1841. 4 & 5 Vict. c. 14.—Authorises spiritual persons to hold shares in companies.
Sections 2 & 3 repealed by 37 & 38 Vict. c. 96.
1841. 4 & 5 Vict. c. 50.—Relates to the issue of notes by bankers. See observations on 3 & 4 Wm. 4, c. 83.
Repealed by 37 & 38 Vict. c. 96.
1841. 5 Vict. c. 5, § 4.—Authorises the restraining of transfers of shares.
1842. 5 & 6 Vict. c. 85.—Perpetuated 1 & 2 Vict. c. 96.
Repealed by 37 & 38 Vict. c. 96.
1844. 7 & 8 Vict. c. 110.—Commonly called the Joint-stock companies registration act of 1844.
The first act which provided for incorporation by mere registration.
Amended by 10 & 11 Vict. c. 78; 18 & 19 Vict. c. 133.
Repealed by the acts of 1856–8, and by the Companies act, 1862.
1844. 7 & 8 Vict. c. 111.—Provided for the winding up of companies in bankruptcy.
Amended by 11 & 12 Vict. c. 45, and 20 & 21 Vict. c. 78.
Repealed by the Companies act, 1862.
1844. 7 & 8 Vict. c. 113.—An act to regulate Joint-stock banks in England.
Repealed 7 Geo. 4, c. 46, as regards companies formed since May, 1884.
Extended to Scotland and Ireland by 9 & 10 Vict. c. 75.
Amended by 19 & 20 Vict. c. 100.
Repealed by 20 & 21 Vict. c. 49, and by the Companies act, 1862.

- APPENDIX IV.** 1845. 8 & 9 Vict. c. 16.—An act for consolidating in one act certain provisions usually inserted in acts, with respect to the constitution of companies incorporated for carrying on undertakings of a public nature.
- List of statutes.**
- The Companies clauses consolidation act.
Amended by 26 & 27 Vict. c. 118 ; 30 & 31 Vict. c. 127 ; 32 & 33 Vict. c. 48 ; and 51 & 52 Vict. c. 48.
- Sections 152 and 164 are partially, and section 165 is wholly, repealed by the Statute law revision act, 1875 (38 & 39 Vict. c. 66).
- Sections 147, 155, and 159 are partially, and sections 148, 149, 153, and 157, and Schedule G. are wholly, repealed by 47 & 48 Vict. c. 43.
- The Lands clauses consolidation act (8 & 9 Vict. c. 18), and the Railways clauses consolidation act (8 & 9 Vict. c. 20), do not form part of the law of partnership.
1846. 9 & 10 Vict. c. 28.—An act to facilitate the dissolution of certain railway companies.
- This act (Lord Dalhousie's) only applied to railway companies projected before July, 1846, and never incorporated by act of parliament.
- Repealed by the Companies act, 1862.
1846. 9 & 10 Vict. c. 75.—Extended 7 & 8 Vict. c. 113, to Scotland and Ireland.
- Repealed by the Companies act, 1862.
1847. 10 & 11 Vict. c. 78.—Amended 7 & 8 Vict. c. 110.
- Repealed by the Companies act, 1862.
1848. 11 & 12 Vict. c. 45.—Amended 7 & 8 Vict. c. 111.
- Amended by 12 & 13 Vict. c. 108 ; and by 20 & 21 Vict. c. 78.
- Repealed by the Companies act, 1862.
- This act and the next are usually called the Winding-up acts of 1848–9.
1849. 12 & 13 Vict. c. 108.—Amended the last act.
- Repealed by the Companies act, 1862.
1850. 13 & 14 Vict. c. 83.—Facilitates the abandonment of railways, and the dissolution of railway companies, empowered to make railways by acts passed before August, 1850.
- Amended and extended by 30 & 31 Vict. c. 127 ; and 32 & 33 Vict. c. 114.
- Section 34 is partially, and section 40 is wholly, repealed by the Statute law revision act, 1875, 38 & 39 Vict. c. 66.
1852. 15 & 16 Vict. c. 31.—Industrial and provident societies act, 1852.
- Repealed by 25 & 26 Vict. c. 87.
1855. 18 & 19 Vict. c. 133.—The first limited liability act.
- Repealed by 19 & 20 Vict. c. 47.
1856. 19 & 20 Vict. c. 47.—The Joint-stock companies act, 1856.
- Repealed, as to all companies registered under it, 7 & 8 Vict. cc. 110 and 111 ; 11 & 12 Vict. c. 45 ; 12 & 13 Vict. c. 108 ; 18 & 19 Vict. c. 133.
- Explained, as to insurance companies, by 20 & 21 Vict. c. 80.
- Extended to banking companies by 20 & 21 Vict. c. 49.

Amended by 20 & 21 Vict. c. 14 ; and 21 & 22 Vict. c. 60. APPENDIX IV.

Repealed by the Companies act, 1862.

List of statutes.

1856. 19 & 20 Vict. c. 100.—Amended 7 & 8 Vict. c. 113, now repealed.

1857. 20 & 21 Vict. c. 14.—Amended 19 & 20 Vict. c. 47, as to which see above.

Repealed by the Companies act, 1862.

1857. 20 & 21 Vict. c. 49.—The Joint-stock banking companies act, 1857.

Extended 19 & 20 Vict. c. 47, to banking companies.

Repealed as to companies registered under it, 7 Geo. 4, c. 46 ; 7 & 8 Vict. cc. 111, 113 ; 11 & 12 Vict. c. 45 ; 12 & 13 Vict. c. 108.

Amended by 21 & 22 Vict. cc. 60, 91.

Repealed by the Companies act, 1862.

1857. 20 & 21 Vict. c. 54.—An act to make better provision for the punishment of frauds committed by trustees, bankers, and other persons entrusted with property.

Applied to frauds by directors of companies.

Repealed by 24 & 25 Vict. c. 95.

1857. 20 & 21 Vict. c. 78.—Amended the act 7 & 8 Vict. c. 111, and also the “Joint-stock companies winding-up acts, 1848 and 1849.”

Repealed by the Companies act, 1862.

1857. 20 & 21 Vict. c. 80.—Explained 19 & 20 Vict. c. 47, as regards insurance companies.

Repealed by Companies act, 1862.

1858. 21 & 22 Vict. c. 60.—Amended the Joint-stock companies acts, 1856 and 1857, and the Joint-stock banking companies act, 1857.

Repealed by the Companies act, 1862.

1858. 21 & 22 Vict. c. 91.—Enabled Joint-stock banking companies to be formed on the principle of limited liability.

Amended 20 & 21 Vict. c. 49.

Repealed by the Companies act, 1862.

1861. 24 & 25 Vict. c. 96. The Larceny act, applies to frauds by directors, &c.

Sections 105 and 112 are wholly, and sections 107, 110, and 111, are partially repealed by 47 & 48 Vict. c. 43, but §§ 81—86 which relate to fraudulent directors are unaltered.

1862. 25 & 26 Vict. c. 87.—The Industrial and provident societies act, 1862.

Amended by 30 & 31 Vict. c. 117 ; and 34 & 35 Vict. c. 80.

Repealed by 39 & 40 Vict. c. 45.

1862. 25 & 26 Vict. c. 89.—The Companies act, 1862.

Amended by 30 & 31 Vict. cc. 47 and 131 ; 32 & 33 Vict. c. 19, § 38 ; 33 & 34 Vict. c. 104 ; 40 & 41 Vict. c. 26 ; 42 & 43 Vict. c. 76 ; 43 Vict. c. 19 ; 46 & 47 Vict. c. 28, which, however, has been repealed except as to Ireland by 51 & 52 Vict. c. 62 : and as to Scotch liquidations, by 49 & 50 Vict. c. 23.

Repealed as to §§ 35 (in part) and 170, by 44 & 45 Vict. c. 59 ; as to §§ 126 (in part), 206 (4), 207, 211 and 212, by the Statute law revision act, 1875, 38 & 39 Vict. c. 66.

- APPENDIX IV. 1863. 26 & 27 Vict. c. 118.—Amended 8 & 9 Vict. c. 16.
 List of statutes. Amended by 30 & 31 Vict. c. 127; and 32 & 33 Vict. c. 48.
 Sections 21 and 22 are repealed in part by the Statute law revision act, 1875, 38 & 39 Vict. c. 66.
1864. 27 & 28 Vict. c. 19.—The Companies seals act.
1865. 28 & 29 Vict. c. 78.—Mortgage debenture act, 1865.
 Amended by 33 & 34 Vict. c. 20.
1865. 28 & 29 Vict. c. 86.—Law of partnership amendment act.
1867. 30 & 31 Vict. c. 29.—Makes contracts for the sale of shares in Joint-stock banking companies void unless the numbers of the shares are specified (Leeman's act).
 30 & 31 Vict. c. 47.—Repealed § 114 of the Companies act, 1862.
 30 & 31 Vict. c. 117.—Amended the Industrial and provident societies acts.
 Amended by 34 & 35 Vict. c. 80.
 Repealed by 39 & 40 Vict. c. 45.
- 30 & 31 Vict. c. 127.—Relates to railway companies. Restricts executions against their rolling stock and plant. Enables binding schemes of arrangement to be made.
 Amends 13 & 14 Vict. c. 83, as to the abandonment of railways, &c.
 Amended by 32 & 33 Vict. c. 114.
 Section 37 repealed by the Statute law revision act, 1875; 38 & 39 Vict. c. 66.
 The temporary protection given to rolling stock and plant by this act was made perpetual by 38 & 39 Vict. c. 31.
- 30 & 31 Vict. c. 131.—The Companies act, 1867, amends the Companies act, 1862.
 Amended by 40 & 41 Vict. c. 26, and 46 & 47 Vict. c. 28.
 Section 20 is repealed in part by the Statute law revision and civil procedure act, 1881; 44 & 45 Vict. c. 59.
1868. 31 & 32 Vict. c. 68.—An act to facilitate liquidation in certain cases of bankruptcy, arrangement, and winding up.
 This act applies only to liquidations, &c., pending when it passed.
1869. 32 & 33 Vict. c. 19.—The Stannaries act, 1869.
 Amended by the Stannaries act, 1887; 50 & 51 Vict. c. 43.
 Section 39 is repealed in part by the Statute law revision act, 1883; 46 & 47 Vict. c. 39.
- 32 & 33 Vict. c. 48.—Amended the Companies clauses act, 1863.
- 32 & 33 Vict. c. 114.—Relates to the abandonment of railways.
 Amends 13 & 14 Vict. c. 83; and 30 & 31 Vict. c. 127.
 Section 10 is repealed by the Statute law revision act, 1883; 46 & 47 Vict. c. 39.
1870. 33 & 34 Vict. c. 20.—Mortgage debenture (amendment) act, 1870.
 Amends 28 & 29 Vict. c. 78.
- 33 & 34 Vict. c. 61.—The Life assurance companies act, 1870.
 Amended by 34 & 35 Vict. c. 58; 35 & 36 Vict. c. 41; and 38 & 39 Vict. c. 60, §§ 4, 28, and 30.
 Section 8 is repealed in part by the Statute law revision act, 1883; 46 & 47 Vict. c. 39.

33 & 34 Vict. c. 104.—Amends the Companies act, 1862, so far as regards compromises and arrangements between creditors and shareholders of Joint-stock and other companies in liquidation.

APPENDIX IV.

List of statutes.

1871. 34 & 35 Vict. c. 58.—Amends the Life assurance companies act, 1870.

Amended by 35 & 36 Vict. c. 41.

34 & 35 Vict. c. 80.—The Industrial and provident societies act, 1871.

Amends 25 & 26 Vict. c. 87; and 30 & 31 Vict. c. 117.

Repealed by 39 & 40 Vict. c. 45.

1872. 35 & 36 Vict. c. 41.—Amends the Life assurance companies acts, 1870–1871.

1874. 37 & 38 Vict. c. 42.—Building societies act, 1874.

Section 32, clause 4, provides for the winding up of a society governed by that act voluntarily, under the supervision of the Court or by the Court.

Amended by 38 & 39 Vict. c. 9; 38 & 39 Vict. c. 60, § 10; 40 & 41 Vict. c. 63; and 47 & 48 Vict. c. 41.

Sections 27 and 44 and the schedule are repealed in part by the Statute law revision act, 1883; 46 & 47 Vict. c. 39.

1875. 38 & 39 Vict. c. 60.—Friendly societies act, 1875.

Amends 33 & 34 Vict. c. 61; and 37 & 38 Vict. c. 42, § 3.

38 & 39 Vict. c. 31 made § 4 of 30 & 31 Vict. c. 127 perpetual.

1876. 39 & 40 Vict. c. 45.—The Industrial and provident societies act, 1876.

Repeals 25 & 26 Vict. c. 87; 30 & 31 Vict. c. 117; 34 & 35 Vict. c. 80.

Amended by 43 Vict. c. 14, § 8; and 46 & 47 Vict. c. 47.

Section 4 and schedule 1 repealed by Statute law revision act, 1883; 46 & 47 Vict. c. 39; and section 19 repealed in part as to England by 47 & 48 Vict. c. 43, § 4.

1877. 40 & 41 Vict. c. 26.—The Companies act, 1877.

Amends the Companies acts, 1862 and 1867.

Is amended by 42 & 43 Vict. c. 76; and 43 Vict. c. 19.

1879. 42 & 43 Vict. c. 76.—The Companies act, 1879.

Repeals § 182 of 25 & 26 Vict. c. 89.

Amends 40 & 41 Vict. c. 26.

1880. 43 Vict. c. 19.—The Companies act, 1880.

Amends 25 & 26 Vict. c. 89; and 40 & 41 Vict. c. 26.

1883. 46 & 47 Vict. c. 28.—Companies act, 1883.

Amends 25 & 26 Vict. c. 89.

Repealed, except as to Ireland, by 51 & 52 Vict. c. 62.

46 & 47 Vict. c. 30.—The Companies (colonial registers) act.

46 & 47 Vict. c. 47.—Amends 39 & 40 Vict. c. 45.

1884. 47 & 48 Vict. c. 41.—Building societies.

Amends 37 & 38 Vict. c. 42.

47 & 48 Vict. c. 56.—Chartered companies act, 1884.

Declares construction of § 29 of 7 Will. 4 & 1 Vict.

1886. 49 Vict. c. 23.—*The Companies act, 1886*

1887. 50 & 51 Vict. c. 43.—Stannaries act, 1887.

Amends 32 & 33 Vict. c. 19.

APPENDIX IV.

List of statutes.

50 & 51 Vict. c. 47.—Trustee savings bank act, 1887.

Section 3 declares that a trustee savings bank is an un-registered association which may be wound up under the provisions of the Companies acts.

1888. 51 Vict. c. 8.—Customs and inland revenue act, 1888.

Sections 11—17 relate to the stamp duties payable on the capital of limited companies, and on various dealings with bonds and share certificates.

51 & 52 Vict. c. 48.—Companies clauses consolidation act, 1888, relating to votes by proxy.

51 & 52 Vict. c. 62.—Preferential payments in Bankruptcy act, 1888.

Repeals the Companies act, 1883 (46 & 47 Vict. c. 28), except as to Ireland.

Note on
these acts.

An examination of the above list will show that in addition to the Companies clauses consolidation act (8 & 9 Vict. c. 16, and the acts amending it), there were, prior to the passing of the Companies act, 1862, no less than seven classes of acts regulating Joint-stock companies. These acts were as follows :—

1. 7 Geo. 4, c. 46, and acts amending it ; as to banking companies established before May, 1844, and not registered under 20 & 21 Vict. c. 49.

2. 7 Wm. 4 & 1 Vict. c. 73, as to companies established by letters patent from the Crown.

3. 7 & 8 Vict. c. 110, and acts amending it : as to insurance companies, and such other companies, if any, as were registered under it, and not under 19 & 20 Vict. c. 47.

4. The Winding-up acts, 7 & 8 Vict. c. 111 ; 11 & 12 Vict. c. 45 ; 12 & 13 Vict. c. 108 ; 20 & 21 Vict. c. 78 ; as to companies not registered under 19 & 20 Vict. c. 47, and not a railway company incorporated by act of Parliament.

5. The Winding-up act, 13 & 14 Vict. c. 83 : as to railway companies incorporated by act of Parliament, and empowered to make a railway by an act passed before August, 1850.

6. The Joint-stock companies acts of 1856 and 1857 ; as to all joint-stock companies registered under them.

7. The Joint-stock banking companies acts of 1857 and 1858 ; as to banking companies formed since May, 1844, or formed previously thereto and registered under these acts.

Of these the 3d, 4th, 6th, and 7th are all repealed by the Companies act, 1862.

The following tabular view of the acts now in force is appended for facility of reference :—

PRINCIPAL ACTS NOW IN FORCE.

AMENDING ACTS.

					3 & 4 Wm. 4, c. 98.
				generally by	1 & 2 Vict. c. 96 (c).
					3 & 4 Vict. c. 111.
7 Geo. 4, c. 46	Banking Companies (b)				25 & 26 Vict. c. 89.
	Amended			as to issue of	7 & 8 Vict. c. 32.
				notes, &c., by	8 & 9 Vict. c. 76.
					19 & 20 Vict. c. 20.
					37 & 38 Vict. c. 96.
7 Wm. 4 & 1 Vict. c. 73	Companies empowered by letters patent to sue and be sued			Section 29 is construed by 47 & 48 Vict. c. 56.	
1 & 2 Vict. c. 110	Charging shares by Judge's order			Amended by 3 & 4 Vict. c. 82 ; and see R. S. C., 1883, Ord. XLVI.	
4 & 5 Vict. c. 14	Spiritual persons			§§ 2 & 3 repealed by 37 & 38 Vict. c. 96.	
5 Vict. c. 5	Restraining transfers, &c.				
8 & 9 Vict. c. 16	The Companies clauses consolidation act			Amended by 26 & 27 Vict. c. 118 ; 32 & 33 Vict. c. 48 ; 38 & 39 Vict. c. 66 ; 47 & 48 Vict. c. 43 ; and 51 & 52 Vict. 48.	
13 & 14 Vict. c. 83	Winding-up act for railway companies incorporated by a special act of Parliament			Amended by 30 & 31 Vict. c. 127, 32 & 33 Vict. c. 114 ; and 38 & 39 Vict. c. 66.	
24 & 25 Vict. c. 96	Fraudulent directors, &c. See §§ 81 to 86.				
				Amended by 30 & 31 Vict. cc. 47 and 131 ; 32 & 33 Vict. c. 19, § 38 ; 33 & 34 Vict. c. 104 ; 38 & 39 Vict. cc. 66 and 77, § 10 ; 40 & 41 Vict. c. 26 ; 42 & 43 Vict. c. 76 ; 43 Vict. c. 19 ; 44 & 45 Vict. c. 59 ; 51 & 52 Vict. c. 62 ; as to Ireland, by 46 & 47 Vict. c. 28 (see 51 & 52 Vict. c. 62) ; and as to Scotch liquidations, by 49 & 50 Vict. c. 23.	
25 & 26 Vict. c. 89	The Companies act, 1862				
28 & 29 Vict. c. 78	The Mortgage debenture act, 1865			Amended by 33 & 34 Vict. c. 20.	
30 Vict. c. 29	An act to prevent the making of contracts for the sale of shares in joint-stock banking companies unless the shares sold are numbered.				

(b) The 7 Geo. 4, c. 46, is still in force. But having regard to the subsequent acts, 7 & 8 Vict. c. 113, 20 & 21 Vict. c. 49, and 25 & 26 Vict. c. 89, those provisions of 7 Geo. 4, c. 46, which relate to the constitution of companies and their powers of suing and being sued by public officers, appear to apply only to companies formed before May, 1844, and

not registered under 20 & 21 Vict. c. 49, or 25 & 26 Vict. c. 89.

(c) The 1 & 2 Vict. c. 96, was continued by 2 & 3 Vict. c. 68, and 3 & 4 Vict. c. 111, and was made perpetual by 5 & 6 Vict. c. 85, and by 37 & 38 Vict. c. 96, which repealed 5 & 6 Vict. c. 85, and those clauses in 1 & 2 Vict. c. 96, which limited its duration.

PRINCIPAL ACTS NOW IN FORCE.		AMENDING ACTS.
30 & 31 Vict. c. 127	Schemes of arrangement between railway companies and their creditors, &c.	Amended by 32 & 33 Vict. c. 114 ; § 4 made perpetual by 38 & 39 Vict. c. 31 ; § 37 repealed by 38 & 39 Vict. c. 66.
32 & 33 Vict. c. 19	An act to amend the law relating to mining partnerships, within the Stan- naries	Amended by 46 & 47 Vict. c. 39, and 50 & 51 Vict. c. 43.
33 & 34 Vict. c. 61	The Life assurance com- panies act, 1870	Amended by 34 & 35 Vict. c. 58 ; 35 & 36 Vict. c. 41 ; 38 & 39 Vict. c. 60 ; and 46 & 47 Vict. c. 39.
39 & 40 Vict. c. 45	The Industrial and Provident societies act, 1876 . . .	Amended by 43 Vict. c. 14, § 8 ; 46 & 47 Vict. cc. 39 & 47 ; and 47 & 48 Vict. c. 43.
46 & 47 Vict. c. 30	The Companies (Colonial Register) act.	

No. V.

THE COMPANIES ACTS, 1862—1886.

THE COMPANIES ACT, 1862.

25 & 26 VICT. CAP. 89.*

An act for the incorporation, regulation, and winding up of trading companies and other associations.

[7th August, 1862.]

WHEREAS it is expedient that the laws relating to the incorporation, regulation, and winding up of trading companies and other associations should be consolidated and amended: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows :

APPENDIX V.

Preliminary.

1. This act may be cited for all purposes, as "The Companies act, Short title. 1862."

2. This act, with the exception of such temporary enactment as is hereinafter declared to come into operation immediately (a), shall not come into operation until the second day of November, one thousand eight hundred and sixty-two; and the time at which it so comes into operation is hereinafter referred to as the commencement of this act.

3. For the purposes of this act, a company that carries on the business of insurance in common with any other business or businesses shall be deemed to be an insurance company (b).

4. No company, association, or partnership consisting of more than ten persons shall be formed, after the commencement of this act, for the purpose of carrying on the business of banking (c), unless it is registered as a company under this act, or is formed in pursuance of some other act of Parliament or of letters patent; and no company, association, or partnership consisting of more than twenty persons shall be formed, after the commencement of this act, for the purpose of carrying on any other business that has for its object the acquisition of gain (d) by the company,

Commencement of act.

Definition of insurance company.

Prohibition of partnerships exceeding certain number.

[20 Vict. c. 47, § 4, and 21 Vict. c. 14, § 3, and c. 49, § 13.]

* The references in the margins of the sections are to the corresponding sections of the repealed Acts. The sections referred to have seldom been incorporated without some alteration of more or less importance.

(a) See § 209.

W. R. 138. See *ante*, pp. 114, 135.(b) See *ante*, p. 114.(d) See 10 Ch. 546, 7. See *ante*,(c) See *District Savings Bank*, 10 p. 114.

APPENDIX V. association, or partnership, or by the individual members thereof, unless it is registered as a company under this act, or is formed in pursuance of some other act of Parliament, or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the Stannaries (*e*).

Division of act. 5. This act is divided into nine parts, relating to the following subject matters :

The first part.—To the constitution and incorporation of companies and associations under this act :

The second part.—To the distribution of the capital and liability of members of companies and associations under this act :

The third part.—To the management and administration of companies and associations under this act :

The fourth part.—To the winding up of companies and associations under this act :

The fifth part.—To the registration office :

The sixth part.—To application of this act to companies registered under the Joint-stock companies acts ;

The seventh part.—To companies authorised to register under this act :

The eighth part.—To application of this act to unregistered companies :

The ninth part. To repeal of acts and temporary provisions.

PART I.

CONSTITUTION AND INCORPORATION OF COMPANIES AND ASSOCIATIONS UNDER THIS ACT.

Memorandum of association (f).

Mode of forming company. 6. Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this act in respect of registration, form an incorporated company, with or without limited liability (*g*).

Mode of limiting liability of members. 7. The liability of the members of a company formed under this act may, according to the memorandum of association, be limited either to the amount, if any, unpaid on the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound up.

Memorandum of association of a company limited by shares. 8. Where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares, the memorandum of association shall contain the following things ; (that is to say,) (*h*).

[20 Vict. c. 47, § 5.] (1.) The name of the proposed company, with the addition of the word "Limited" as the last word in such name (*i*) :

(*e*) See p. 114.

ante, p. 117.

(*f*) For Forms, see Sched. 2. See *ante*, p. 117.

(*h*) See § 179, cl. 1.

(*i*) See *ante*, p. 116.

(*g*) See Form A. in Sched. 2. See

APPENDIX V.

- (2.) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situate :
- (3.) The objects for which the proposed company is to be established :
- (4.) A declaration that the liability of the members is limited :
- (5.) The amount of capital with which the company proposes to be registered divided into shares of a certain fixed amount :

Subject to the following regulations :

- (1.) That no subscriber shall take less than one share :
- (2.) That each subscriber of the memorandum of association shall write opposite to his name the number of shares he takes.

9. Where a company is formed on the principle of having the liability of its members limited to such amount as the members respectively undertake to contribute to the assets of the company in the event of the same being wound up, hereinafter referred to as a company limited by guarantee, the memorandum of association shall contain the following things (*k*) ; (that is to say,)

Memorandum of association of a company limited by guarantee.

- (1.) The name of the proposed company, with the addition of the word " Limited " as the last word in such name (*l*) :
- (2.) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situate :
- (3.) The objects for which the proposed company is to be established :
- (4.) A declaration that each member undertakes to contribute to the assets of the company in the event of the same being wound up, during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and of the costs, charges, and expenses of winding up the company, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding a specified amount.

10. Where a company is formed on the principle of having no limit placed on the liability of its members, hereinafter referred to as an unlimited company, the memorandum of association shall contain the following things (*m*) ; (that is to say,)

Memorandum of association of an unlimited company.

- (1.) The name of the proposed company :
- (2.) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situate :
- (3.) The objects for which the proposed company is to be established.

[20 Vict. c. 47, § 10.]

11. The memorandum of association shall bear the same stamp as if it were a deed, and shall be signed by each subscriber (*n*) in the presence of and be attested by, one witness at the least, and that attestation shall be a sufficient attestation in Scotland as well as in England and Ireland : it shall, when registered, bind the company and the members thereof to the

Stamp, signature, and effect of memorandum of association.

[20 Vict. c. 47, §§ 7 and 11.]

(*k*) See Forms B. and C. Sched. 2 ; and as to the capital, see § 14.

(*m*) Form D. in Sched. 2 ; and see, as to capital, § 14.

(*l*) See, as to associations not having gain for their object, 30 & 31 Vict. c. 131, § 23 ; and *ante*, p. 114.

(*n*) Signature by an agent is sufficient, *Whitley Partners, Limited*, 32 Ch. D. 337.

APPENDIX V.

same extent as if each member had subscribed his name and affixed his seal thereto, and there were in the memorandum contained, on the part of himself, his heirs, executors, and administrators, a covenant to observe all the conditions of such memorandum, subject to the provisions of this act (see § 16).

Power of certain companies to alter memorandum of association.

[20 Vict. c. 47, §§ 13 and 37.]

12. Any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorised to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned (*o*), as to increase its capital, by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock; but, save as aforesaid, and save as is hereinafter provided in the case of a change of name (*p*), no alteration shall be made by any company in the conditions contained in its memorandum of association (*q*).

Power of companies to change name.

13. Any company under this act, with the sanction of a special resolution of the company passed in manner hereinafter mentioned (*r*), and with the approval of the Board of Trade, testified in writing under the hand of one of its secretaries or assistant secretaries, may change its name (*s*); and upon such change being made the registrar shall enter the new name on the register in the place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case; but no such alteration of name shall affect any rights or obligations of the company, or render defective any legal proceedings instituted or to be instituted by or against the company; and any legal proceedings may be continued or commenced against the company by its new name that might have been continued or commenced against the company by its former name.

Articles of association.

Regulations to be prescribed by articles of association.

[20 Vict. c. 47, § 9.]

14. The memorandum of association may, in the case of a company limited by shares, and shall, in the case of a company limited by guarantee or unlimited, be accompanied, when registered, by articles of association (*t*) signed by the subscribers to the memorandum of association, and prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient; the articles shall be expressed in separate paragraphs numbered arithmetically: they may adopt all or any of the provisions contained in the Table marked A. in the first schedule hereto: they shall, in the case of a company, whether limited by guarantee or unlimited, that has a capital divided into shares, state the amount of capital with which the company proposes to be registered (*u*), and in the

(*o*) See §§ 50 and 51.

(*p*) See §§ 13 and 20.

(*q*) The memorandum of association may be altered in some other respects, see *ante*, pp. 334 and 343; and 28 & 29 Vict. c. 78, § 3, as to mortgage debentures; 30 & 31 Vict. c. 131, § 9 *et seq.*, and 40 & 41 Vict. c. 26, 43 Vict. c. 19, and *ante*, p. 402, as to reduction of capital, and 30 & 31 Vict. c. 131, §§ 21 and 22 as to subdivision of shares,

and *ante*, p. 405. See as to altering the regulations of the company, §§ 50, 176, and 196; and see *ante*, pp. 334, 343.

(*r*) See § 51.

(*s*) See, further, as to changing name, § 20, and *ante*, p. 112.

(*t*) See Forms B. and C. in Sched. 2. See *ante*, p. 118.

(*u*) The capital of companies limited by shares appears in the memorandum of association. See § 8.

case of a company, whether limited by guarantee or unlimited, that has not a capital divided into shares, state the number of members with which the company proposes to be registered, for the purpose of enabling the registrar to determine the fees payable on registration: in a company limited by guarantee or unlimited, and having a capital divided into shares, each subscriber shall take one share at the least, and shall write opposite to his name in the memorandum of association the number of shares he takes.

15. In the case of a company limited by shares, if the memorandum of association is not accompanied by articles of association, or in so far as the articles do not exclude or modify the regulations contained in the Table marked A. in the first schedule hereto, the last-mentioned regulations shall, so far as the same are applicable, be deemed to be the regulations of the company in the same manner and to the same extent as if they had been inserted in articles of association, and the articles had been duly registered.

16. The articles of association shall be printed; they shall bear the same stamp as if they were contained in a deed, and shall be signed by each subscriber in the presence of, and be attested by, one witness at the least, and such attestation shall be a sufficient attestation in Scotland as well as in England and Ireland; when registered, they shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators to conform to all the regulations contained in such articles, subject to the provisions of this act (x); and all moneys payable by any member to the company, in pursuance of the conditions and regulations of the company, or any of such conditions or regulations, shall be deemed to be a debt due from such member to the company, and in England and Ireland to be in the nature of a specialty debt (y).

General provisions.

17. The memorandum of association (z) and the articles of association, if any, shall be delivered to the registrar of joint-stock companies hereinafter mentioned, who shall retain and register the same: there shall be paid to the registrar by a company having a capital divided into shares, in respect of the several matters mentioned in the Table marked B. in the first schedule hereto, the several fees therein specified, or such smaller fees as the Board of Trade may from time to time direct; and by a company not having a capital divided into shares, in respect of the several matters mentioned in the Table marked C. in the first schedule hereto the several fees therein specified, or such smaller fees as the Board of Trade may from time to time direct: all fees paid to the said registrar in pursuance of this act shall be paid into the receipt of her Majesty's exchequer, and be carried to the account of the consolidated fund of the United Kingdom of Great Britain and Ireland.

(x) See as to the nature of the contract entered into by becoming a member, *Eley v. Positive, &c., Ass. Co.* 1 Ex. D. 88; *Browne v. La Trinidad*, 37 Ch. D. 1; *Wheal Buller Consols*, 33 Ch. D. 42; *Boston Deep Sea Fishing Co. v. Ansell*,

39 Ch. D. 339; *ante*, pp. 147, 8.

(y) See § 75.

(z) 51 Vict. c. 8, § 11, requires a statement of the nominal capital to be sent to the registrar, and imposes an *ad valorem* stamp duty of 2s. per £100.

Application of Table A.

[20 Vict. c. 47, § 9.]

Stamp, signature, and effect of articles of association.

[20 Vict. c. 47, §§ 10 and 11.]

Registration of memorandum of association and articles of association, with fees as in Table B. or Table C.

[20 Vict. c. 47, § 12.]

APPENDIX V.

Effect of registration.

[20 Vict. c. 47,
§ 13, and 21
Vict. c. 14, § 4.]

18. Upon the registration of the memorandum of association, and of the articles of association in cases where articles of association are required by this act or by the desire of the parties to be registered, the registrar shall certify under his hand that the company is incorporated, and in the case of a limited company that the company is limited : the subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate by the name contained in the memorandum of association, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal with power to hold lands (a), but with such liability on the part of the members to contribute to the assets of the company in the event of the same being wound up as is hereinafter mentioned : a certificate of the incorporation of any company given by the registrar shall be conclusive evidence that all the requisitions of this act in respect of registration have been complied with (b).

Copies of memorandum and articles to be given to members.

[20 Vict. c. 47,
§ 27, and 21
Vict. c. 14,
§ 10.]

19. A copy of the memorandum of association, having annexed thereto the articles of association, if any, shall be forwarded to every member, at his request, on payment of the sum of one shilling or such less sum as may be prescribed by the company for each copy ; and if any company makes default in forwarding a copy of the memorandum of association and articles of association, if any, to a member, in pursuance of this section, the company so making default shall for each offence incur a penalty not exceeding one pound.

Prohibition against identity of names in companies.

[20 Vict. c. 47,
§ 6.]

20. No company shall be registered under a name identical with that by which a subsisting company is already registered, or so nearly resembling the same as to be calculated to deceive, except in a case where such subsisting company is in the course of being dissolved and testifies its consent in such manner as the registrar requires ; and if any company, through inadvertence or otherwise, is, without such consent as aforesaid, registered by a name identical with that by which a subsisting company is registered, or so nearly resembling the same as to be calculated to deceive, such first-mentioned company may, with the sanction of the registrar, change its name ; and upon such change being made the registrar shall enter the new name on the register in the place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case ; but no such alteration of name shall affect any rights or obligations of the company, or render defective any legal proceedings instituted or to be instituted by or against the company ; and any legal proceedings may be continued or commenced against the company by its new name that might have been continued or commenced against the company by its former name (c).

Prohibition against certain companies holding land.

[20 Vict. c. 47,
§ 38.]

21. No company formed for the purpose of promoting art, science, religion, charity, or any other like object, not involving the acquisition of gain by the company or by the individual members thereof, shall, without the sanction of the Board of Trade, hold more than two acres of land ; but the Board of Trade may, by licence (d), under the hand of one of their

(a) As to companies not having gain for their object, see § 21, and *ante*, p. 114.

(b) See, as to this, p. 111 ; see, also, § 192.

(c) See, further, as to changing name,

§ 13 ; and see *ante*, pp. 112, 113, and *R. v. Registrar of Friendly Societies*, L. R. 7 Q. B. 741.

(d) See Form F. in Sched. 2.

principal secretaries, or assistant secretaries, empower any such company to hold lands in such quantity and subject to such conditions as they think fit.

APPENDIX V.

PART II.

DISTRIBUTION OF CAPITAL AND LIABILITY OF MEMBERS OF COMPANIES AND ASSOCIATIONS UNDER THIS ACT.

Distribution of capital.

22. The shares or other interest of any member in a company under this act shall be personal estate (*e*), capable of being transferred in manner provided by the regulations of the company (*f*), and shall not be of the nature of real estate; and each share shall, in the case of a company having a capital divided into shares, be distinguished by its appropriate number (*g*).

23. The subscribers of the memorandum of association of any company under this act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members hereinafter mentioned; and every other person who has agreed to become a member of the company under this act, and whose name is entered on the register of members, shall be deemed to be a member of the company (*h*).

24. Any transfer of the share or other interest of a deceased member of a company under this act, made by his personal representative, shall, notwithstanding such personal representative may not himself be a member, be of the same validity as if he had been a member at the time of the execution of the instrument of transfer (*i*).

25. Every company under this act shall cause to be kept in one or more books a register of its members (*k*); and there shall be entered therein the following particulars:—

- (1.) The names and addresses, and the occupations, if any, of the members of the company, with the addition, in the case of a company having a capital divided into shares, of a statement of the shares held by each member, distinguishing each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each member;
- (2.) The date at which the name of any person was entered in the register as a member;
- (3.) The date at which any person ceased to be a member;

And any company acting in contravention of this section shall incur a

(*e*) See pp. 449 *et seq.*

(*f*) See Table A. Nos. 8-16, and 30 & 31 Vict. c. 131, § 26 *et seq.*, and as to transfers of shares, *ante*, p. 464 *et seq.*

(*g*) See *ante*, p. 50.

(*h*) See § 18, and *ante*, pp. 43, 119.

(*i*) See Table A. Nos. 12-16. and *ante*, pp. 468, 538.

(*k*) As to inspection of the register, see § 32; and as to its rectification, see §§ 35 and 98. When shares have been converted into stock, see § 29. When share warrants have been issued, see 30 & 31 Vict. c. 131, § 31.

As to registers generally, see *ante*, pp. 57 *et seq.*

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Annual list of members.
[20 Vict. c. 47, § 17.]

penalty not exceeding five pounds for every day during which its default in complying with the provisions of this section continues; and every director or manager of the company who shall knowingly and wilfully authorise or permit such contravention shall incur the like penalty.

26. Every company under this act, and having a capital divided into shares (*l*), shall make, once at least in every year, a list (*m*) of all persons who, on the fourteenth day succeeding the day on which the ordinary general meeting, or if there is more than one ordinary meeting in each year, the first of such ordinary general meetings is held, are members of the company; and such list shall state the names, addresses, and occupations of all the members therein mentioned, and the number of shares held by each of them, and shall contain a summary specifying the following particulars (*n*):

- (1.) The amount of the capital of the company, and the number of shares into which it is divided:
- (2.) The number of shares taken from the commencement of the company up to the date of the summary:
- (3.) The amount of calls made on each share:
- (4.) The total amount of calls received:
- (5.) The total amount of calls unpaid:
- (6.) The total amount of shares forfeited:
- (7.) The names, addresses, and occupations of the persons who have ceased to be members since the last list was made, and the number of shares held by each of them.

The above list and summary shall be contained in a separate part of the register, and shall be completed within seven days after such fourteenth day as is mentioned in this section, and a copy shall forthwith be forwarded to the registrar of joint stock companies (*o*).

Penalty on company, &c., not forwarding list of members, &c., to registrar.

[20 Vict. c. 47, § 18.]

27. If any company under this act, and having a capital divided into shares, makes default in complying with the provisions of this act with respect to forwarding such list of members or summary as is hereinbefore mentioned to the registrar, such company shall incur a penalty not exceeding five pounds for every day during which such default continues; and every director and manager (*p*) of the company who shall knowingly and wilfully authorise or permit such default shall incur the like penalty.

Company to give notice of consolidation, or of conversion of capital into stock.

[21 Vict. c. 14, § 6.]

28. Every company under this act, having a capital divided into shares, that has consolidated and divided its capital into shares of larger amount than its existing shares, or converted any portion of its capital into stock (*q*), shall give notice to the registrar of joint-stock companies of such consolidation, division, or conversion, specifying the shares so consolidated, divided, or converted (*r*).

Effect of conversion of shares into stock.

29. Where any company under this act, and having a capital divided into shares, has converted any portion of its capital into stock, and given

(*l*) As to other companies, see §§ 45 and 46.

(*m*) See the Form E. in Sched. 2.

(*n*) See, further, when shares have been converted into stock, § 29; when share warrants have been issued, 30 & 31 Vict. c. 131, § 32; when capital has been reduced by a return of paid-up capital, see 43 Vict. c. 19, § 6.

(*o*) As to their inspection, see §§ 32 and 174 (5).

(*p*) *I.e.*, manager *de facto*. See *Gibson v. Barton*, L. R. 10 Q. B. 329, and *Briton Medical and General Life Assoc.*, 39 Ch. D. 61.

(*q*) Under § 12.

(*r*) See § 34.

notice of such conversion to the registrar, all the provisions of this act which are applicable to shares only shall cease as to so much of the capital as is converted into stock (s) ; and the register of members hereby required to be kept by the company, and the list of members to be forwarded to the registrar, shall show the amount of stock held by each member in the list instead of the amount of shares and the particulars relating to shares hereinbefore required.

30. No notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the registrar, in the case of companies under this act and registered in England or Ireland (t).

31. A certificate under the common seal of the company, specifying any share or shares or stock held by any member of a company, shall be *prima facie* evidence of the title of the member to the share or shares or stock therein specified (u).

32. The register of members, commencing from the date of the registration of the company, shall be kept at the registered office of the company hereinafter mentioned : except when closed as hereinafter mentioned, it shall during business hours, but subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day be appointed for inspection, be open to the inspection of any member gratis, and to the inspection of any other person on the payment of one shilling, or such less sum as the company may prescribe, for each inspection ; and every such member or other person may require a copy of such register, or of any part thereof, or of such list or summary of members as is hereinbefore mentioned, on payment of sixpence for every hundred words required to be copied : if such inspection or copy is refused, the company shall incur for each refusal a penalty not exceeding two pounds, and a further penalty not exceeding two pounds for every day during which such refusal continues ; and every director and manager of the company who shall knowingly authorise or permit such refusal shall incur the like penalty ; and in addition to the above penalty, as respects companies registered in England or Ireland, any judge sitting in chambers, or the vice-warden of the Stannaries, in the case of companies subject to his jurisdiction, may by order compel an immediate inspection of the register (x).

33. Any company under this act may, upon giving notice by advertisement in some newspaper circulating in the district in which the registered office of the company is situated, close the register of members for any time or times not exceeding in the whole thirty days in each year.

34. Where a company has a capital divided into shares, whether such shares may or may not have been converted into stock, notice of any increase in such capital beyond the registered capital, and where a company has not a capital divided into shares, notice of any increase in the number of members beyond the registered number, shall be given to the registrar in the case of an increase of capital, within fifteen days from the date of the passing of the resolution by which such increase has been

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[21 Vict. c. 14,
§§ 5-7.]

No entry of trusts
on register.

[20 Vict. c. 47,
§ 19.]

Certificate of
shares or stock.

[20 Vict. c. 47,
§ 21.]

Inspection of
register.

[20 Vict. c. 47,
§ 23.]

Power to close
register.

[20 Vict. c. 47,
§ 24.]

Notice of in-
crease of capital
and of members
to be given to
registrar.

[20 Vict. c. 47,
§ 37.]

(s) See Table A. Nos. 23-25.

(t) See *Bradford Banking Co. v. Briggs*, 12 App. Ca. 29, *ante*, pp. 459 and 477.

(u) As to the right to require this, see Table A. Nos. 2 and 3. See as to these certificates, *ante*, p. 64 ; and in connec-

tion with transfers in blank, *ante*, pp. 471 *et seq.* ; and forged certificates, *ante*, p. 484.

(x) As to mandamus, see *ante*, p. 440 ; and the right to take copies, *ante*, p. 314.

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authorised, and in the case of an increase of members, within fifteen days from the time at which such increase of members has been resolved on or has taken place; and the registrar shall forthwith record the amount of such increase of capital or members; if such notice is not given within the period aforesaid, the company in default shall incur a penalty not exceeding five pounds for every day during which such neglect to give notice continues; and every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall incur the like penalty.

Remedy for improper entry or omission of entry in register.

[20 Vict. c. 47, § 25, and 21 Vict. c. 14, §§ 8-9.]

35. If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company under this act, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may, as respects companies registered in England or Ireland, by motion in any of her Majesty's superior courts of law or equity, or by application to a judge sitting in chambers, or to the vice-warden of the Stannaries in the case of companies subject to his jurisdiction, and as respects companies registered in Scotland by summary petition to the Court of Session, or in such other manner as the said courts may direct, apply for an order of the Court that the register may be rectified; and the Court may either refuse such application, with or without costs to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party aggrieved may have sustained: The Court may, in any proceeding under this section, decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the register, whether such question arises between two or more members or alleged members, or between any members or alleged members and the company; and generally the Court may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register; provided that the Court [if a court of common law] may direct an issue to be tried, in which any question of law may be raised, [and a writ of error or appeal, in the manner directed by "The common law procedure act, 1854," shall lie] (y).

Notice to registrar of rectification of register.

36. Whenever any order has been made rectifying the register, in the case of a company hereby required to send a list of its members to the registrar, the Court shall, by its order, direct that due notice of such rectification be given to the registrar.

Register to be evidence.

[20 Vict. c. 47, § 26.]

37. The register of members shall be *prima facie* evidence of any matters by this act directed or authorised to be inserted therein.

Liability of members (z).

Liability of present and past

38. In the event of a company formed under this act being wound up, every present and past member of such company shall be liable to con-

(y) See, also, *infra*, § 98; and as to rectifying registers generally, *ante*, p. 61; and as to this section more particularly, pp. 120 *et seq.*, and pp. 747, 748,

755. The words in brackets are repealed by 44 & 45 Vict. c. 59.

(z) See, further, as to the liability of members, §§ 42, 48, 180, 182, 195 and

tribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following; (that is to say,) APPENDIX V.
members of
company.
[20 Vict. c. 47,
§§ 61-63.]

- (1.) No past member shall be liable to contribute to the assets of the company if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding up (a) :
- (2.) No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member :
- (3.) No past member shall be liable to contribute to the assets of the company unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this act :
- (4.) In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member :
- (5.) In the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount of the undertaking entered into on his behalf by the memorandum of association (b) :
- (6.) Nothing in this act contained shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members upon any such policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of such policy or contract (c) :
- (7.) No sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company (d) ; but any such sum may be taken into account for the purposes of the final adjustment of the rights of the contributories amongst themselves (e).

196, cl. 5, and § 200 ; and see § 102 respecting calls in winding up. As to directors, where their liability is unlimited, see 30 & 31 Vict. c. 131, § 5. See *ante*, pp. 252, 253.

(a) See §§ 84 and 130, and as to past members generally, *ante*, p. 750 and 816 *et seq.*, and 855. See, also, *Taurine Co.*, 25 Ch. D. 118.

(b) See §§ 90 and 134, and *Lion Mutual Ins. Assoc. v. Tucker*, 12 Q. B. D. 176.

(c) See *ante*, p. 246 *et seq.*

(d) This applies to guaranteed dividends. *Stuart's trust*, 4 Ch. D. 213, and *ante*, p. 436.

(e) See § 101, and *ante*, pp. 741 *et seq.*, and 857.

APPENDIX V.

PART III.

MANAGEMENT AND ADMINISTRATION OF COMPANIES AND ASSOCIATIONS
UNDER THIS ACT.*Provisions for protection of creditors.*

- Registered office of company. [20 Vict. c. 47, § 28.] 39. Every company under this act shall have a registered office to which all communications and notices may be addressed; if any company under this act carries on business without having such an office, it shall incur a penalty not exceeding five pounds for every day during which business is so carried on.
- Notice of situation of registered office. [20 Vict. c. 47, § 29.] 40. Notice of the situation of such registered office, and of any change therein, shall be given to the registrar, and recorded by him: until such notice is given the company shall not be deemed to have complied with the provisions of this act with respect to having a registered office.
- Publication of name by a limited company. [20 Vict. c. 47, § 30.] 41. Every limited company under this act, whether limited by shares or by guarantee, shall paint or affix, and shall keep painted or affixed its name on the outside of every office or place in which the business of the company is carried on, in a conspicuous position, in letters easily legible, and shall have its name engraven in legible characters on its seal, and shall have its name mentioned in legible characters in all notices, advertisements, and other official publications of such company, and in all bills of exchange, promissory notes, endorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of such company, and in all bills of parcels, invoices, receipts, and letters of credit of the company (*f*).
- Penalties on non-publication of name. [20 Vict. c. 47, § 31.] 42. If any limited company under this act does not paint or affix, and keep painted or affixed, its name in manner directed by this act, it shall be liable to a penalty not exceeding five pounds for not so painting or affixing its name, and for every day during which such name is not so kept painted or affixed; and every director or manager of the company who shall knowingly and wilfully authorise or permit such default shall be liable to the like penalty; and if any director, manager, or officer of such company, or any person on its behalf, uses or authorises the use of any seal purporting to be a seal of the company whereon its name is not so engraven as aforesaid, or issues or authorises the issue of any notice, advertisement, or other official publication of such company, or signs or authorises to be signed on behalf of such company, any bill of exchange, promissory note, endorsement, cheque, order for money or goods, or issues or authorises to be issued any bill of parcels, invoice, receipt, or letter of credit of the company, wherein its name is not mentioned in manner aforesaid, he shall be liable to a penalty of fifty pounds, and shall further be personally liable to the holder of any such bill of exchange, promissory note, cheque, or order for money or goods, for the amount thereof, unless the same is duly paid by the company (*g*).
- Register of mortgages (*h*). 43. Every limited company under this act shall keep a register of all mortgages and charges specifically affecting property of the company, and shall enter in such register in respect of each mortgage or charge a short

(*f*) Neither this nor the next section, § 23.
 apply to companies licensed to omit the word limited under 30 & 31 Vict. c. 131, (*g*) See *ante*, p. 253.
 (*h*) See *ante*, pp. 175, 203.

description of the property mortgaged or charged, the amount of charge created, and the names of the mortgagees or persons entitled to such charge (*i*): if any property of the company is mortgaged or charged without such entry as aforesaid being made, every director, manager, or other officer of the company who knowingly and wilfully authorises or permits the omission of such entry shall incur a penalty not exceeding fifty pounds: the register of mortgages required by this section shall be open to inspection by any creditor or member of the company at all reasonable times; and if such inspection is refused, any officer of the company refusing the same, and every director and manager of the company authorising or knowingly and wilfully permitting such refusal, shall incur a penalty not exceeding five pounds, and a further penalty not exceeding two pounds for every day during which such refusal continues; and in addition to the above penalty, as respects companies registered in England and Ireland, any judge sitting in chambers, or the vice-warden of the Stannaries in the case of companies subject to his jurisdiction, may by order compel an immediate inspection of the register.

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[Inspection of register.]

44. Every limited banking company and every insurance company, and deposit, provident, or benefit society under this act shall, before it commences business, and also on the first Monday in February and the first Monday in August in every year during which it carries on business, make a statement in the Form marked D. in the 1st Schedule hereto, or as near thereto as circumstances will admit; and a copy of such statement shall be put up in a conspicuous place in the registered office of the company, and in every branch office or place where the business of the company is carried on; and if default is made in compliance with the provisions of this section the company shall be liable to a penalty not exceeding five pounds for every day during which such default continues, and every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall incur the like penalty.

Certain companies to publish statement in form D. in schedule.

[22 Vict. c. 11, § 4.]

Every member and every creditor of any company mentioned in this section shall be entitled to a copy of the above-mentioned statement on payment of a sum not exceeding sixpence.

45. Every company under this act, and not having a capital divided into shares (*k*), shall keep at its registered office a register containing the names and addresses and the occupations of its directors or managers, and shall send to the registrar of joint-stock companies a copy of such register, and shall from time to time notify to the registrar any change that takes place in such directors or managers.

List of directors to be kept and sent to registrar.

46. If any company under this act, and not having a capital divided into shares, makes default in keeping a register of its directors or managers, or in sending a copy of such register to the registrar in compliance with the foregoing rules, or in notifying to the registrar any change that takes place in such directors or managers, such delinquent company shall incur a penalty not exceeding five pounds for every day during which such default continues; and every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall incur the like penalty.

Penalty on company not keeping or sending register of directors, &c.

(*i*) In the case of debentures passing by delivery registration in the names of the original holders is sufficient, and there is no necessity to register the transfers, *semble* this rule applies to

other cases, *Dublin Drapery Co.*, 13 L. R. Ir. 174.

(*k*) As to other companies, see § 26.

As to the inspection of this register, see §§ 32 and 174 (5).

APPENDIX V.

Promissory
notes and bills
of exchange.

[20 Vict. c. 47,
§ 43.]

Prohibition
against carrying
on business with
less than seven
members.

[20 Vict. c. 47,
§ 39.]

47. A promissory note or bill of exchange shall be deemed to have been made, accepted, or endorsed on behalf of any company under this act, if made, accepted, or endorsed in the name of the company by any person acting under the authority of the company, or if made, accepted, or endorsed by or on behalf or on account of the company, by any person acting under the authority of the company (*l*).

48. If any company under this act carries on business when the number of its members is less than seven for a period of six months after the number has been so reduced, every person who is a member of such company during the time that it so carries on business after such period of six months, and is cognizant of the fact that it is so carrying on business with fewer than seven members, shall be severally liable for the payment of the whole debts of the company contracted during such time, and may be sued for the same, without the joinder in the action or suit of any other member (*m*).

Provisions for protection of members.

General meeting
of company.

[20 Vict. c. 47,
§ 32.]

Power to alter
regulations by
special resolution.

[20 Vict. c. 47,
§ 33.]

Definition of
special resolution.

[20 Vict. c. 47,
§ 34.]

49. A general meeting of every company under this act shall be held once at the least in every year (*n*).

50. Subject to the provisions of this act, and to the conditions contained in the memorandum of association, any company formed under this act may in general meeting from time to time, by passing a special resolution in manner hereinafter mentioned, alter all or any of the regulations of the company contained in the articles of association or in the Table marked A. in the first schedule, where such table is applicable to the company, or make new regulations to the exclusion of or in addition to all or any of the regulations of the company (*o*); and any regulations so made by special resolution shall be deemed to be regulations of the company of the same validity as if they had been originally contained in the articles of association, and shall be subject in like manner to be altered or modified by any subsequent special resolution.

51. A resolution passed by a company under this act shall be deemed to be special whenever a resolution has been passed by a majority of not less than three-fourths of such members of the company for the time being entitled according to the regulations of the company to vote as may be present, in person or by proxy (in cases where by the regulations of the company proxies are allowed), at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members for the time being entitled, according to the regulations of the company, to vote, as may be present, in person or by proxy, at a subsequent general meeting, of which notice has been duly given, and held at an interval of

(*l*) See *ante*, pp. 230 *et seq.*

(*m*) See § 79.

(*n*) See 30 & 31 Vict. c. 131. § 39. The year begins on the 1st Jan. See *Gibson v. Barton*, L. R. 10 Q. B. 329.

(*o*) As to altering the conditions in the memorandum of association, see § 12; and as to companies existing before the passing of this act, see §§ 176 and 196;

cl. 3, 4 and 6.

See, further, as to what can be done by special resolution, §§ 60, 79, 129, and Table A., Nos. 25, 26, and *ante*, pp. 333 and 343 *et seq.* The company cannot deprive itself of the power to alter its articles, *Trevor v. Whitworth*, 12 App. Ca. 409.

not less than fourteen days (*p*), nor more than one month, from the date of the meeting at which such resolution was first passed: At any meeting mentioned in this section, unless a poll is demanded by at least five members, a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the same: Notice of any meeting shall, for the purposes of this section, be deemed to be duly given and the meeting to be duly held, whenever such notice is given and meeting held in manner prescribed by the regulations of the company: In computing the majority under this section, when a poll is demanded, reference shall be had to the number of votes to which each member is entitled by the regulations of the company.

52. In default of any regulations (*q*) as to voting every member shall have one (*r*) vote; and in default of any regulations as to summoning general meetings a meeting shall be held to be duly summoned of which seven days' notice in writing has been served on every member in manner in which notices are required to be served by the Table marked A. in the first schedule hereto (*s*); and in default of any regulations as to the persons to summon meetings, five members shall be competent to summon the same (*t*); and in default of any regulations as to who is to be chairman of such meeting, it shall be competent for any person elected by the members present to preside (*u*).

Provision where
no regulations
as to meetings.

53. A copy of any special resolution that is passed by any company under this act shall be printed and forwarded to the registrar of joint-stock companies, and be recorded by him: If such copy is not so forwarded within fifteen days from the date of the confirmation of the resolution, the company shall incur a penalty not exceeding two pounds for every day after the expiration of such fifteen days during which such copy is omitted to be forwarded; and every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall incur the like penalty.

Registration of
special resolu-
tions.
[20 Vict. c. 47,
§ 35.]

54. Where articles of association have been registered, a copy of every special resolution for the time being in force shall be annexed to or embodied in every copy of the articles of association that may be issued after the passing of such resolution: Where no articles of association have been registered, a copy of any special resolution shall be forwarded in print to any member requesting the same on payment of one shilling, or such less sum as the company may direct: And if any company makes default in complying with the provisions of this section, it shall incur a penalty not exceeding one pound for each copy in respect of which such default is made; and every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall incur the like penalty.

Copies of special
resolutions.
[20 Vict. c. 47,
§ 36.]

55. Any company under this act may, by instrument in writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place not situate in the United Kingdom; and every deed signed by

Execution of
deeds abroad.
[20 Vict. c. 47,
§ 42.]

(*p*) As to computation of time, see *ante*, pp. 395 and 396.

(*q*) See as to the meaning of these words, *Brick and Stone Co.*, W. N. 1878, p. 140.

(*r*) See Table A., No. 44.

(*s*) See Table A., Nos. 35 and 95-7.

(*t*) See Table A., No. 34.

(*u*) See Table A., Nos. 39, 40.

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such attorney, on behalf of the company, and under his seal, shall be binding on the company, and have the same effect as if it were under the common seal of the company (*r*).

56. The Board of Trade may appoint one or more competent inspectors to examine into the affairs of any company under this act, and to report thereon, in such manner as the Board may direct, upon the applications following; (that is to say,)

[20 Vict. c. 47,
§ 48.]

(1.) In the case of a banking company that has a capital divided into shares, upon the application of members holding not less than one-third part of the whole shares of the company for the time being issued :

(2.) In the case of any other company that has a capital divided into shares, upon the application of members holding not less than one-fifth part of the whole shares of the company for the time being issued :

(3.) In the case of any company not having a capital divided into shares, upon the application of members being in number not less than one-fifth of the whole number of persons for the time being entered on the register of the company as members.

Application for inspection to be supported by evidence.

57. The application shall be supported by such evidence as the Board of Trade may require for the purpose of showing that the applicants have good reason for requiring such investigation to be made, and that they are not actuated by malicious motives in instituting the same: The Board of Trade may also require the applicants to give security for payment of the costs of the inquiry before appointing any inspector or inspectors.

Inspection of books and examination of officers.

[20 Vict. c. 47,
§ 49.]

58. It shall be the duty of all officers and agents of the company to produce for the examination of the inspectors all books and documents in their custody or power: Any inspector may examine upon oath the officers and agents of the company in relation to its business, and may administer such oath accordingly: If any officer or agent refuses to produce any book or document hereby directed to be produced, or to answer any question relating to the affairs of the company, he shall incur a penalty not exceeding five pounds in respect of each offence.

Report of result of examination, &c.

[20 Vict. c. 47,
§ 50.]

59. Upon the conclusion of the examination, the inspectors shall report their opinion to the Board of Trade: Such report shall be written or printed, as the Board of Trade directs: A copy shall be forwarded by the Board of Trade to the registered office of the company, and a further copy shall, at the request of the members upon whose application the inspection was made, be delivered to them or to any one or more of them: All expenses of and incidental to any such examination as aforesaid shall be defrayed by the members upon whose application the inspectors were appointed, unless the Board of Trade shall direct the same to be paid out of the assets of the company, which it is hereby authorised to do.

Power of company to appoint inspectors.

[20 Vict. c. 47,
§ 51.]

60. Any company under this act may, by special resolution (*s*), appoint inspectors for the purpose of examining into the affairs of the company. The inspectors so appointed shall have the same powers and perform the same duties as inspectors appointed by the Board of Trade, with this exception, that, instead of making their report to the Board of Trade, they shall make the same in such manner and to such persons as the

(*r*) See also 27 & 28 Vict. c. 19, and (s) See § 51.
30 & 31 Vict. c. 131, § 37.

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company in general meeting directs; and the officers and agents of the company shall incur the same penalties in case of any refusal to produce any book or document hereby required to be produced to such inspectors, or to answer any question, as they would have incurred if such inspector had been appointed by the Board of Trade.

61. A copy of the report of any inspectors appointed under this act, authenticated by the seal of the company into whose affairs they have made inspection, shall be admissible in any legal proceeding, as evidence of the opinion of the inspectors in relation to any matter contained in such report.

Report of inspectors to be evidence.
[20 Vict. c. 47, § 52.]

Notices.

62. Any summons, notice, order, or other document required to be served upon the company may be served by leaving the same, or sending it through the post in a prepaid letter addressed to the company at their registered office (*t*).

Service of notices, &c., on company.
[20 Vict. c. 47, § 53.]

63. Any document to be served by post on the company shall be posted in such time as to admit of its being delivered in the due course of delivery within the period (if any) prescribed for the service thereof; and, in proving service of such document, it shall be sufficient to prove that such document was properly directed, and that it was put as a prepaid letter into the post office (*u*).

Services of notices, &c., by post.
[20 Vict. c. 47, § 54.]

64. Any summons, notice, order, or proceeding requiring authentication by the company, may be signed by any director, secretary, or other authorised officer of the company, and need not be under the common seal of the company; and the same may be in writing or in print, or partly in writing and partly in print (*x*).

Authentication of notices of company, &c.
[20 Vict. c. 47, § 55.]

Legal Proceedings.

65. All offences under this act made punishable by any penalty may be prosecuted summarily before two or more justices, as to England, in manner directed by an act passed in the session holden in the eleventh and twelfth years of the reign of Her Majesty Queen Victoria, chapter forty-three, intituled "An act to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales with respect to summary convictions and orders," or any act amending the same; and as to Scotland, before two or more justices or the sheriff of the county, in manner directed by the act passed in the session of Parliament holden in the seventeenth and eighteenth years of the reign of her Majesty Queen Victoria, chapter one hundred and four, intituled "An act to amend and consolidate the acts relating to Merchant shipping;" or any act amending the same, as regards offences in Scotland against that act, not being offences by that act described as felonies or misdemeanors; and as to Ireland, in manner directed by the act passed in the session holden in the fourteenth and fifteenth years of the reign of her Majesty Queen Victoria, chapter ninety-three, intituled "An act to consolidate and amend the acts regulating the proceedings of petty sessions and the

Recovery of penalties.
[20 Vict. c. 47, § 56.]
11 & 12 Vict. c. 43.

17 & 18 Vict. c. 104.

11 & 15 Vict. c. 93.

(*t*) See Rules 63 and 64, and R. S. C. Order ix., r. 8.

(*u*) See Rules 63 and 64.

(*x*) See, as to proceedings in bank-

ruptcy, The Bankruptcy act, 1883, § 148, which seems to require the seal of the company.

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Application of penalties.

[20 Vict. c. 47, § 57.]

Evidence of proceedings at meetings, &c.

[20 Vict. c. 47, § 40.]

Jurisdiction of Court of vice-warden of Stannaries.

duties of justices of the peace out of quarter sessions in Ireland," or any act amending the same.

66. The justices or sheriff imposing any penalty under this act may direct the whole or any part thereof to be applied in or towards payment of the costs of the proceedings, or in or towards the rewarding the person upon whose information or at whose suit such penalty has been recovered; and, subject to such direction, all penalties shall be paid into the receipt of her Majesty's exchequer in such manner as the Treasury may direct, and shall be carried to and form part of the Consolidated Fund of the United Kingdom.

67. Every company under this act shall cause minutes of all resolutions and proceedings of general meetings of the company, and of the directors or managers of the company in cases where there are directors or managers, to be duly entered in books to be from time to time provided for the purpose; and any such minute as aforesaid, if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had, or by the chairman of the next succeeding meeting, shall be received as evidence in all legal proceedings; and until the contrary is proved, every general meeting of the company or meeting of directors or managers in respect of the proceedings of which minutes have been so made shall be deemed to have been duly held and convened, and all resolutions passed thereat, or proceedings had, to have been duly passed and had; and all appointments of directors, managers, or liquidators shall be deemed to be valid, and all acts done by such directors, managers, or liquidators shall be valid, notwithstanding any defect that may afterwards be discovered in their appointments or qualifications (*y*).

68. In the case of companies under this act, and engaged in working mines within and subject to the jurisdiction of the Stannaries, the court of the vice-warden of the Stannaries shall have and exercise the like jurisdiction and powers, as well on the common law as on the equity side thereof, which it now possesses by custom, usage, or statute in the case of unincorporated companies, but only so far as such jurisdiction or powers are consistent with the provisions of this act and with the constitution of companies as prescribed or required by this act; and for the purpose of giving fuller effect to such jurisdiction in all actions, suits, or legal proceedings instituted in the said Court, in causes or matters whereof the Court has cognizance, all process issuing out of the same, and all orders, rules, demands, notices, warrants, and summonses required or authorised by the practice of the Court to be served on any company, whether registered or not registered, or any member or contributory thereof, or any officer, agent, director, manager, or servant thereof, may be served in any part of England without any special order of the vice-warden for that purpose, or by such special order may be served in any part of the United Kingdom of Great Britain and Ireland, or in the adjacent islands, parcel of the dominions of the Crown, on such terms and conditions as the Court shall think fit; and all decrees, orders and judgments of the said Court made or pronounced in such causes or matters may be enforced in the same manner in which decrees, orders, and judgments of the Court may now by law be enforced, whether within or beyond the local limits of the Stan-

(*y*) See, as to meetings and the minutes of their proceedings, *ante*, pp. 304 *et seq.*, and Table A., Nos 29-43, and as to the last part of this section, *ante*, pp. 300 and 379.

naries; and the seal of the said Court, and the signature of the registrar thereof, shall be judicially noticed by all other courts and judges in England, and shall require no other proof than the production thereof: the registrar of the said Court, or the assistant-registrar, in making sales under any decree or order of the Court shall be entitled to the same privilege of selling by auction or competition without a licence, and without being liable to duty, as a judge of the Court of Chancery is entitled to in pursuance of the acts in that behalf.

69. Where a limited company is plaintiff or pursuer in any action, suit, or other legal proceeding, any judge having jurisdiction in the matter, may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence, the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given (z). APPENDIX V.
Power to order security for costs in actions brought by limited companies. [21 Vict. c. 14, § 24.]

70. In any action or suit brought by the company against any member to recover any call or other monies due from such member in his character of member, it shall not be necessary to set forth the special matter, but it shall be sufficient to allege that the defendant is a member of the company, and is indebted to the company in respect of a call made or other monies due whereby an action or suit hath accrued to the company (a). Allegations in actions against members.

Alteration of forms.

71. The forms set forth in the second schedule hereto, or forms as near thereto as circumstances admit, shall be used in all matters to which such forms refer; the Board of Trade may from time to time make such alterations in the tables and forms contained in the first schedule hereto, so that it does not increase the amount of fees payable to the registrar in the said schedule mentioned, and in the forms in the second schedule, or make such additions to the last-mentioned forms, as it deems requisite: any such table or form, when altered, shall be published in the "London Gazette," and upon such publication being made, such table or form shall have the same force as if it were included in the schedule to this act; but no alteration made by the Board of Trade in the table marked A. contained in the first schedule, shall affect any company registered prior to the date of such alteration, or repeal, as respects such company, any portion of such table. Forms in second schedule to be used. Board of Trade may alter forms in schedule. [20 Vict. c. 47, § 58, and 21 Vict. c. 14, § 22.]

Arbitrations.

72. Any company under this act may from time to time, by writing under its common seal, agree to refer and may refer to arbitration, in accordance with "The Railway companies arbitration act, 1859" (b), any existing or future difference, question, or other matter whatsoever in dispute between itself and any other company or person; and the companies parties to the arbitration may delegate to the person or persons to whom the reference is made power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by the directors or other managing body of such companies. Power for companies to refer matters to arbitration, in accordance with 22 & 23 Vict. c. 59.

(z) See *ante*, pp. 263 and 661.

(b) 22 & 23 Vict. c. 59.

(a) See *ante*, p. 427.

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Provisions of
22 & 23 Vict.
c. 59, to apply.

73. All the provisions of "The Railway companies arbitration act, 1859," shall be deemed to apply to arbitrations between companies and persons in pursuance of this act: and in the construction of such provisions "the companies" shall be deemed to include companies authorised by this act to refer disputes to arbitration.

PART IV.

WINDING UP OF COMPANIES AND ASSOCIATIONS UNDER THIS ACT (*e*).*Preliminary.*

Meaning of contributory.

[20 Vict. c. 47,
§ 65.]

74. The term "contributory" shall mean every person liable to contribute to the assets of a company under this act, in the event of the same being wound up (*d*): it shall also, in all proceedings for determining the persons who are to be deemed contributories, and in all proceedings prior to the final determination of such persons, include any person alleged to be a contributory (*e*).

Nature of liability of contributory.

[21 Vict. c. 14,
§ 13.]

75. The liability of any person to contribute to the assets of a company under this act in the event of the same being wound up, shall be deemed to create a debt (in England and Ireland of the nature of a specialty) accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as herein-after mentioned for enforcing such liability; and it shall be lawful in the case of the bankruptcy of any contributory to prove against his estate the estimated value of his liability to future calls, as well as calls already made (*f*).

Contributories in case of death.

[20 Vict. c. 47,
§ 65.]

76. If any contributory dies either before or after he has been placed on the list of contributories hereinafter mentioned, his personal representatives, heirs, and devisees shall be liable in a due course of administration to contribute to the assets of the company in discharge of the liability of such deceased contributory; and such personal representatives, heirs, and devisees shall be deemed to be contributories accordingly (*g*).

Contributories in case of bankruptcy.

77. If any contributory becomes bankrupt, either before or after he has been placed on the list of contributories, his assignees shall be deemed to represent such bankrupt for all the purposes of the winding-up, and shall be deemed to be contributories accordingly, and may be called upon to admit to proof against the estate of such bankrupt, or otherwise to allow to be paid out of his assets in due course of law, any monies due from such bankrupt in respect of his liability to contribute to the assets of the company being wound up (*h*); and for the purposes of this section any person who may have taken the benefit of any act for the relief of insol-

(*e*) See, as to companies registered under the acts of 1856-8, *infra*, §§ 176, 177; and as to companies registered under this act, but not formed under it or the last mentioned acts, *infra*, §§ 196-198; and as to companies not registered at all, *infra*, §§ 199-204.

(*d*) See §§ 38 and 76-78, and *ante*, pp. 750, 751 *et seq.*

(*e*) See Rules 58 and 60 to 62, and *ante*, p. 625.

(*f*) See *ante*, p. 556.

(*g*) See, also, § 105; and as to putting them on the list, see § 99, and *ante*, p. 812.

(*h*) See § 75 and *ante*, p. 556, and as to putting bankrupts, &c., on the list, p. 815.

vent debtors (*i*) before the eleventh day of October one thousand eight hundred and sixty-one shall be deemed to have become bankrupt. APPENDIX V.

78. If any female contributory marries, either before or after she has been placed on the list of contributories, her husband shall during the continuance of the marriage be liable to contribute to the assets of the company the same sum as she would have been liable to contribute if she had not married; and he shall be deemed to be a contributory accordingly (*k*). Contributories in case of marriage.

Winding up by court.

79. A company under this act (*l*) may be wound up by the Court as hereinafter defined, under the following circumstances; (that is to say,) Circumstances under which company may be wound up by court.

- (1.) Whenever the company has passed a special resolution requiring the company to be wound up by the Court:
- (2.) Whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year: [20 Vict. c. 47, § 67.]
- (3.) Whenever the members are reduced in number to less than seven (*m*):
- (4.) Whenever the company is unable to pay its debts:
- (5.) Whenever the Court is of opinion that it is just and equitable that the company should be wound up (*n*).

80. A company under this act (*o*) shall be deemed to be unable to pay its debts, Company when to be deemed unable to pay its debts.

- (1.) Whenever a creditor by assignment or otherwise, to whom the company is indebted, at law or in equity, in a sum exceeding fifty pounds then due, has served on the company, by leaving the same at their registered office, a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand neglected to pay such sum, or to secure or compound for the same to the reasonable satisfaction of the creditor: [20 Vict. c. 47, § 68.]
- (2.) Whenever, in England and Ireland, execution or other process issued on a judgment, decree, or order obtained in any court in favour of any creditor, at law or in equity, in any proceeding instituted by such creditor against the company, is returned unsatisfied in whole or in part:
- (3.) Whenever, in Scotland, the inducie of a charge for payment on an extract decree, or an extract registered bond, or an extract registered protest, have expired without payment being made:
- (4.) Whenever it is proved to the satisfaction of the Court that the company is unable to pay its debts (*p*):

81. The expression "the Court," as used in this part of this act, shall mean the following authorities; (that is to say,) (*q*) Definition of "the court."

(*i*) Viz., 1 & 2 Vict. c. 110; 5 & 6 Vict. c. 116; 7 & 8 Vict. c. 96, all repealed by 24 & 25 Vict. c. 134. wound up, pp. 628 *et seq.*, and as to just and equitable, p. 631.

(*k*) *Ante*, p. 42.

(*l*) *Ante*, p. 617. See § 199 (3), as to unregistered companies.

(*m*) See § 48.

(*n*) See as to the circumstances under which a company will be ordered to be

(*o*) See, as to unregistered companies, § 199 (4).

(*p*) See *ante*, pp. 631 and 634.

(*q*) See *ante*, p. 615, and as to Industrial and Provident Societies and Benefit Building Societies, see App. II., p. 916, and III., p. 922.

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[20 Viet. c. 47,
§§ 60 and 74,
and 20 & 21
Viet. c. 78,
§ 12.]

In the case of a company engaged in (*r*) working any mine within and subject to the jurisdiction of the Stannaries,—the court of the vice-warden of the Stannaries, unless the vice-warden certifies that in his opinion the company would be more advantageously wound up in the High Court of Chancery, in which case “the court” shall mean the High Court of Chancery:

In the case of a company registered in England that is not engaged in working any such mine as aforesaid,—the High Court of Chancery:

In the case of a company registered in Ireland, the Court of Chancery in Ireland:

In all cases of companies registered in Scotland, the Court of Session in either division thereof: (*rr*)

Provided that where the Court of Chancery in England or Ireland makes an order for winding up a company under this act, it may, if it thinks fit, direct all subsequent proceedings for winding up the same to be had in the Court of Bankruptcy having jurisdiction in the place in which the registered office of the company is situate; and thereupon such last-mentioned Court of Bankruptcy shall, for the purposes of winding up the company, be deemed to be “the court” within the meaning of the act, and shall have for the purposes of such winding up all the powers of the High Court of Chancery, or the Court of Chancery in Ireland, as the case may require (*s*).

Application for winding up to be made by petition.

[20 Viet. c. 47,
§ 69.]

82. Any application to the Court for the winding up of a company under this act shall be by petition (*t*); it may be presented by the company, or by any one or more creditor or creditors, contributory or contributories of the company, or by all or any of the above parties, together or separately (*u*); and every order which may be made on any such petition shall operate in favour of all the creditors and all the contributories of the company in the same manner as if it had been made upon the joint petition of a creditor and a contributory (*v*).

Power of court.

83. Any judge of the High Court of Chancery may do in chambers any act which the Court is hereby authorised to do; and the vice-warden of the Stannaries may direct that a petition for winding up a company be heard by him at such time and at such place within the jurisdiction of the Stannaries, or within or near to the place where the registered office of the company is situated, as he may deem to be convenient to the parties concerned, or (with the consent of the parties concerned) at any place in England; and all orders made thereupon shall have the same force and effect as if they had been made by the vice-warden sitting at Truro or elsewhere within the jurisdiction of the Court, and all parties and persons summoned to attend at the hearing of any such petition shall be compellable to give their attendance before the vice-warden by like process and in like manner as at the hearing of any cause or matter at the usual sitting of the said Court; and the registrar of the Court may, subject to exception,

(*r*) See *Silver Valley Mines*, 18 Ch. D. 472, and 50 & 51 Viet. c. 53, § 28 (The Stannaries act, 1857).

(*rr*) See further as to Scotch windings up, 49 Viet. c. 23.

(*s*) As to remitting to the County Court, see 30 & 31 Viet. c. 131, § 41 *et seq.*

(*t*) As to the petition, see *ante*, p.

654, and Rules 1 to 5, and Forms 1 and 2, in the 3rd Schedule thereto. As to the order to wind up, see Rules 6 and 7, and Forms 3—5, in the 3rd Schedule thereto.

(*u*) See *ante*, p. 624, and 30 & 31 Viet. c. 131, § 40.

(*v*) *Ante*, pp. 663 and 664.

or appeal to the vice-warden as heretofore used, do and exercise such and the like acts and powers in the matter of winding up as he is now used to do and exercise in a suit on the equity side of the said Court (*cc*).

84. A winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up (*y*). Commencement of winding up by court.

85. The Court may, at any time after the presentation of a petition for winding up a company under this act, and before making an order for winding up the company, upon the application of the company, or of any creditor or contributory of the company, restrain further proceedings in any action, suit, or proceeding (*z*) against the company, upon such terms as the Court thinks fit (*a*); the Court may also at any time after the presentation of such petition, and before the first appointment of liquidators, appoint provisionally an official liquidator of the estate and effects of the company (*b*). [20 Vict. c. 47, § 64.]
Court may grant injunction.
[20 Vict. c. 47, § 84.]

86. Upon hearing the petition the Court may dismiss the same with or without costs, may adjourn the hearing conditionally or unconditionally, and may make any interim order, or any other order that it deems just (*c*). Hearing petition.
[20 Vict. c. 47, §§ 70—72.]

87. When an order has been made for winding up a company under this act, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose (*d*). Actions and suits to be stayed.
[22 Vict. c. 60, § 6.]

88. When an order has been made for winding up a company under this act, a copy of such order shall forthwith be forwarded by the company to the registrar of joint-stock companies, who shall make a minute thereof in his books relating to the company. Copy of order to be forwarded to registrar.
[20 Vict. c. 47, § 73.]

89. The Court may at any time after an order has been made for winding up a company, upon the application by motion of any creditor or contributory of the company, and upon proof to the satisfaction of the Court that all proceedings in relation to such winding up ought to be stayed, make an order staying the same, either altogether or for a limited time, on such terms and subject to such conditions as it deems fit (*e*). Power of court to stay proceedings.
[20 Vict. c. 47, § 85.]

90. When an order has been made for winding up a company limited by guarantee and having a capital divided into shares, any share capital that may not have been called up shall be deemed to be assets of the company, and to be a debt (in England and Ireland of the nature of a specialty) due to the company from each member to the extent of any sums that may be unpaid on any shares held by him and payable at such time as may be appointed by the Court (*f*). Effect of order on share capital of company limited by guarantee.

91. The Court may, as to all matters relating to the winding up, have regard to the wishes of the creditors or contributories, as proved to it by any sufficient evidence, and may, if it thinks it expedient, direct meetings of the creditors or contributories to be summoned, held, and conducted in such manner as the Court directs, for the purpose of ascertaining their Court may have regard to wishes of creditors or contributories.

(*cc*) Amended as to the Stannaries by 32 & 33 Vict. c. 19, § 38.

(*y*) See *ante*, p. 661, §§ 114, 153, 163, 164.

(*z*) *E.g.*, for penalties, *Briton Medical Ass. Ass.*, 32 Ch. D. 503.

(*a*) See *ante*, pp. 672 *et seq.*, and § 197; and as to unregistered companies, §§ 291 and 294.

(*b*) See, as to provisional liquidators, *ante*, p. 700, and Rules 15 and 59.

(*c*) See § 91, and *ante*, pp. 630 *et seq.*, and as to costs, p. 658.

(*d*) *Ante*, pp. 672 *et seq.* See, also, §§ 163, 193; and as to unregistered companies, § 202.

(*e*) See *ante*, p. 663.

(*f*) See, also, § 134.

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wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the Court : in the case of creditors, regard is to be had to the value of the debts due to each creditor, and in the case of contributories to the number of votes conferred on each contributory by the regulations of the company (*g*).

Official liquidators (h).

Appointment of official liquidator.

[20 Vict. c. 47, § 88.]

92. For the purpose of conducting the proceedings in winding up a company, and assisting the Court therein, there may be appointed a person or persons to be called an official liquidator or official liquidators ; and the Court having jurisdiction may appoint such person or persons, either provisionally or otherwise, as it thinks fit, to the office of official liquidator or official liquidators ; in all cases, if more persons than one are appointed to the office of official liquidator, the Court shall declare whether any act hereby required or authorised to be done by the official liquidator is to be done by all or any one or more of such persons. The Court may also determine whether any and what security is to be given by any official liquidator on his appointment ; if no official liquidator is appointed, or during any vacancy in such appointment, all the property of the company shall be deemed to be in the custody of the Court (*i*).

Resignations, removals, filling up of vacancies, and compensation.

[20 Vict. c. 47, § 92.]

93. Any official liquidator may resign or be removed by the Court on due cause shown : and any vacancy in the office of an official liquidator appointed by the Court shall be filled by the Court (*k*) : there shall be paid to the official liquidator such salary or remuneration, by way of percentage or otherwise, as the Court may direct (*l*) ; and if more liquidators than one are appointed such remuneration shall be distributed amongst them in such proportions as the Court directs.

Style and duties of official liquidator.

[20 Vict. c. 47, § 93.]

94. The official liquidator or liquidators shall be described by the style of the official liquidator or official liquidators of the particular company in respect of which he is or they are appointed, and not by his or their individual name or names (*m*) : he or they shall take into his or their custody, or under his or their control, all the property, effects, and things in actions to which the company is or appears to be entitled, and shall perform such duties in reference to the winding up of the company as may be imposed by the Court (*n*).

Powers of official liquidator.

[20 Vict. c. 47, § 90.]

95. The official liquidator shall have power, with the sanction of the Court (*o*), to do the following things (*p*) :

- (1.) To bring or defend any action, suit, or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company (*q*) :
- (2.) To carry on the business of the company, so far as may be necessary for the beneficial winding up of the same :
- (3.) To sell the real and personal and heritable and movable property, effects, and things in action (*r*) of the company by

(*g*) See, also, § 149 and Rules 45—47.

(*h*) See *ante*, pp. 701 *et seq.*

(*i*) See, also, Rules 8—19.

(*k*) See Rule 16.

(*l*) See Rule 18.

(*m*) See *ante*, pp. 706 *et seq.*

(*n*) See § 203 as to unregistered companies.

(*o*) See Rules 48—50.

(*p*) See *ante*, pp. 707 *et seq.*

(*q*) See *ante*, p. 707 and § 203 as to unregistered companies.

(*r*) Including claims against the directors for misfeasance, *Park Gate Waggon Co.*, 17 Ch. D. 234.

public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels (s):

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- (4.) To do all acts and to execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal:
- (5.) To prove, rank, claim, and draw a dividend, in the matter of the bankruptcy or insolvency or sequestration of any contributory, for any balance against the estate of such contributory, and to take and receive dividends in respect of such balance, in the matter of bankruptcy or insolvency, or sequestration, as a separate debt due from such bankrupt or insolvent, and rateably with the other separate creditors:
- (6.) To draw, accept, make, and endorse any bill of exchange or promissory note in the name and on behalf of the company, also to raise upon the security of the assets of the company from time to time any requisite sum or sums of money; and the drawing, accepting, making, or endorsing of every such bill of exchange or promissory note as aforesaid on behalf of the company shall have the same effect with respect to the liability of such company as if such bill or note had been drawn, accepted, made, or endorsed by or on behalf of such company in the course of carrying on the business thereof:
- (7.) To take out, if necessary in his official name, letters of administration to any deceased contributory, and to do in his official name any other act that may be necessary for obtaining payment of any monies due from a contributory or from his estate and which act cannot be conveniently done in the name of the company; and in all cases where he takes out letters of administration, or otherwise uses his official name for obtaining payment of any monies due from a contributory, such monies shall, for the purpose of enabling him to take out such letters or recover such monies, be deemed to be due to the official liquidator himself:
- (8.) To do and execute all such other things as may be necessary for winding up the affairs of the company and distributing its assets (t).

96. The Court may provide by any order that the official liquidator may exercise any of the above powers without the sanction or intervention of the Court, and where an official liquidator is provisionally appointed may limit and restrict his powers by the order appointing him.

97. The official liquidator may, with the sanction of the Court, appoint a solicitor or law agent to assist him in the performance of his duties (u).

Ordinary powers of Court (x).

98. As soon as may be after making an order for winding up the company, the Court shall settle a list of contributories (y), with power to

(s) See, as to sales, Rule 32, and *ante*, pp. 711, 712.

(t) See, further, §§ 159—162.

(u) See Rule 68, *ante*, p. 703.

(x) See *ante*, pp. 684 *et seq.*

(y) See Rules 29—31, and the Forms 24 to 32 in the 3rd Sched. to the rules; and see *ante*, pp. 745 *et seq.*

Discretion of official liquidator.

[22 Vict. c. 60, § 9.]

Appointment of solicitor to official liquidator.

[20 Vict. c. 47, § 91.]

Collection and application of assets.

[20 Vict. c. 47, § 75.]

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Provision as to
representative
contributories.

rectify the register of members in all cases where such rectification is required in pursuance of this act (c), and shall cause the assets of the company to be collected and applied in discharge of its liabilities.

99. In settling the list of contributories the Court shall distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or being liable to the debts of others; it shall not be necessary, where the personal representative of any deceased contributory is placed on the list, to add the heirs or devisees of such contributory; nevertheless such heirs or devisees may be added as and when the Court thinks fit (d).

Power of court to
require delivery
of property
to official
liquidator.
[11 & 12 Vict.
c. 45, § 66.]

100. The Court may, at any time after making an order for winding up a company, require any contributory for the time being settled on the list of contributories, trustee, receiver, banker, or agent, or officer of the company, to pay, deliver, convey, surrender, or transfer forthwith, or within such time as the Court directs, to or into the hands of the official liquidator (b), any sum or balance, books, papers, estate or effects which happen to be in his hands for the time being, and to which the company is *prima facie* entitled (c).

Power of court
to order payment
of debts by con-
tributory.
[11 & 12 Vict.
c. 45, § 66; 21
& 22 Vict. c. 60,
§ 17.]

101. The Court may, at any time after making an order for winding up the company, make an order on any contributory for the time being settled on the list of contributories, directing payment to be made, in manner in the said order mentioned, of any monies due from him or from the estate of the person whom he represents to the company, exclusive of any monies which he or the estate of the person whom he represents may be liable to contribute by virtue of any call made or to be made by the Court in pursuance of this part of this act (d); and it may, in making such order, when the company is not limited, allow to such contributory by way of set-off any monies due to him or the estate which he represents from the company on any independent dealing or contract with the company, but not any monies due to him as a member of the company in respect of any dividend or profit (e):

Provided that when all the creditors of any company, whether limited or unlimited, are paid in full, any monies due on any account whatever to any contributory from the company may be allowed to him by way of set-off against any subsequent call or calls (f).

Power of court
to make calls.
[20 Vict. c. 47,
§ 82.]

102. The Court may, at any time after making an order for winding up a company, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of contributories, to the extent of their liability, for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves; and it may, in making a call, take into consideration the probability that some

(c) See § 35, and *ante*, p. 121 *et seq.*

(a) See § 76, and rules 29—31; and see *ante*, p. 813.

(b) See § 103 and §§ 115, 165.

(c) See Form 13 in the 3rd Sched. to the rules. See, also, § 165, and *ante*, pp. 695 *et seq.*

(d) See, also, § 165, and Rule 35, and Form 39 in the 3rd. Sched. to the rules.

(e) See as to directors with unlimited liability, 30 & 31 Vict. c. 131, § 6.

(f) See, further, as to set-off, § 38, cl. 7, and 30 & 31 Vict. c. 131, § 6, and *ante*, pp. 741 *et seq.*

of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same (*g*). APPENDIX V.

103. The Court may order any contributory, purchaser, or other person from whom money is due to the company to pay the same into the Bank of England or any branch thereof to the account of the official liquidator instead of to the official liquidator; and such order may be enforced in the same manner as if it had directed payment to the official liquidator (*h*). Power of court to order payment into bank.
[20 Vict. c. 47, § 83.]

104. All monies, bills, notes, and other securities paid and delivered into the Bank of England or any branch thereof in the event of a company being wound up by the Court, shall be subject to such order and regulation for the keeping of the account of such monies and other effects, and for the payment and delivery in or investment and payment and delivery out of the same, as the Court may direct (*i*). Regulation of account with court.

105. If any person made a contributory as personal representative of a deceased contributory makes default in paying any sum ordered to be paid by him, proceedings may be taken for administering the personal and real estates of such deceased contributory, or either of such estates, and of compelling payment thereof of the monies due (*k*). Proceedings in case of representative contributory not paying monies ordered.

106. Any order made by the Court in pursuance of this act upon any contributory shall, subject to the provisions herein contained for appealing against such order (§ 124), be conclusive evidence that the monies, if any, thereby appearing to be due or ordered to be paid are due; and all other pertinent matters stated in such order are to be taken to be truly stated as against all persons, and in all proceedings whatsoever, with the exception of proceedings taken against the real estate of any deceased contributory, in which case such order shall only be *prima facie* evidence for the purpose of charging his real estate, unless his heirs or devisees were on the list of contributories at the time of the order being made. Order conclusive evidence.
[11 & 12 Vict. c. 45, § 89.]

107. The Court may fix a certain day or certain days on or within which creditors of the company are to prove their debts or claims, or to be excluded from the benefit of any distribution made before such debts are proved (*l*). Court may fix a time for creditors to prove.
[20 Vict. c. 47, § 84.]

108. If in the course of proving the debts and claims of creditors in the Court of the vice-warden of the Stannaries any debt or claim is disputed by the official liquidator or by any creditor or contributory, or appears to the Court to be open to question, the Court shall have power, subject to appeal as hereinafter provided, to adjudicate upon it; and for that purpose the said Court shall have and exercise all needful powers of inquiry touching the same by affidavit or by oral examination of witnesses or of parties, whether voluntarily offering themselves for examination or summoned to attend by compulsory process of the Court, or to produce documents before the Court; and the Court shall also have power, incidentally, to decide on the validity and extent of any lien or charge claimed by any creditor on any property of the company in respect of such debt, and to make declarations of right, binding on all persons interested; and for the more satisfactory determination of any question of fact, or mixed question of law and fact arising on such inquiry, the vice-warden shall have power, if he thinks fit, to direct and settle any action or issue to be tried either on Proceedings in the court of the vice-warden of the Stannaries on proof of debts.

(*g*) See, further, as to calls, Rules 33, 35, and *ante*, pp. 846 *et seq.*

(*h*) See Rules 11, 32, and 36—41, and *ante*, p. 693.

(*i*) See Rules 11, 32, and 36—44.

(*k*) See § 76.

(*l*) See Rules 20—23, and *ante*, pp. 713 *et seq.*

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the common law side of his Court, or by a common or special jury, before the justices of assize in and for the counties of Cornwall or Devon, or at any sitting of one of the superior courts in London or Middlesex, which action or issue shall accordingly be tried in due course of law, and without other or further consent of parties; and the finding of the jury in such action or issues shall be conclusive of the facts found, unless the judge who tried it makes known to the vice-warden that he was not satisfied with the finding, or unless it appears to the vice-warden that, in consequence of miscarriage, accident, or the subsequent discovery of fresh material evidence, such finding ought not to be conclusive.

Court to adjust rights of contributories.

[20 Vict. c. 47, § 86.]

Court to order costs.

[20 Vict. c. 47, § 87.]

Dissolution of company.

[20 Vict. c. 47, § 93.]

Registrar to make minute of dissolution of company.

[20 Vict. c. 47, § 94.]

Penalty on not reporting dissolution of company.

[21 Vict. c. 14, § 20.]

Petition to be *lis pendens*.

[11 & 12 Vict. c. 45, § 125.]

Power of court to summon before it persons suspected of having property of company, &c.

[20 Vict. c. 47, § 77.]

109. The Court shall adjust the rights of the contributories amongst themselves, and distribute any surplus that may remain amongst the parties entitled thereto (*m*).

110. The Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the estate of the company of the costs, charges, and expenses incurred in winding up any company in such order of priority as the Court thinks just (*n*).

111. When the affairs of the company have been completely wound up, the Court shall make an order that the company be dissolved from the date of such order, and the company shall be dissolved accordingly (*o*).

112. Any order so made shall be reported by the official liquidator to the registrar, who shall make a minute accordingly in his books of the dissolution of such company.

113. If the official liquidator makes default in reporting to the registrar, in the case of a company being wound up by the Court, the order that the company be dissolved, he shall be liable to a penalty not exceeding five pounds for every day during which he is so in default.

[114. Any petition for winding up a company by the Court under this act shall constitute a *lis pendens* within the terms of the act passed in the session holden in the second and third years of the reign of her present Majesty, chapter eleven, and intituled, "An act for the better protection of purchasers against judgments, crown debts, *lis pendens*, and fiats in bankruptcy," provided the same is duly registered in manner required by such act concerning suits in equity (*p*).]

Extraordinary powers of Court (q).

115. The Court may, after it has made an order for winding up the company, summon (*r*) before it any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the Court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company; and the Court may require

(*m*) See, also, § 165, and *ante*, pp. 852, 867. Compare § 133 (10), though the words are different the meaning is the same. See *Bridgewater Navigation Co.*, 39 Ch. D. p. 21.

(*n*) See, as to costs of winding up, *ante*, pp. 859 *et seq.*

(*o*) See Rules 65—67, and *ante*, p.

870.

(*p*) This section is repealed by 30 & 31 Vict. c. 47.

(*q*) See, also, §§ 117, 127, 165—168, and *ante*, pp. 689 *et seq.*

(*r*) See Form 54 in the 3rd Schedule to the rules. See also § 165, and *ante*, pp. 689 *et seq.*

any such officer or person to produce any books, papers, deeds, writings, or other documents in his custody or power relating to the company; and if any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, having no lawful impediment (made known to the Court at the time of its sitting, and allowed by it), the Court may cause such person to be apprehended, and brought before the Court for examination; nevertheless in cases where any person claims any lien on papers, deeds, or writings or documents produced by him, such production shall be without prejudice to such lien, and the Court shall have jurisdiction in the winding up to determine all questions relating to such lien.

116. If, after an order for winding up in the Court of the vice-warden of the Stannaries, it appears that any person claims property in, or any lien, legal or equitable, upon any of the machinery, materials, ores, or effects on the mine or on premises occupied by the company in connection with the mine, or to which the company was, at the time of the order, *prima facie* entitled, it shall be lawful for the vice-warden or the registrar to adjudicate upon such claim on interpleader in the manner provided by section eleven of the act passed in the eighteenth year of the reign of her present Majesty, chapter thirty-two; and any action or issue directed upon such interpleader may, if the vice-warden think fit, be tried in his court, or at the assizes or the sittings in London or Middlesex, before a judge of one of the superior courts, in the manner and on the terms and conditions hereinbefore provided in the case of disputed debts and claims of creditors.

Special provisions as to court of vice-warden of the Stannaries.

117. The Court may examine upon oath, either by word of mouth or upon written interrogatories, any person appearing or brought before them in manner aforesaid concerning the affairs, dealings, estate, or effects of the company, and may reduce into writing the answers of every such person, and require him to subscribe the same (s).

Examination of parties by court. [20 Vict. c. 47, § 78.]

118. The Court may, at any time before or after it has made an order for winding up a company, upon proof being given that there is probable cause for believing that any contributory (t) to such company is about to quit the United Kingdom, or otherwise abscond, or to remove or conceal any of his goods or chattels, for the purpose of evading payment of calls, or for avoiding examination in respect of the affairs of the company, cause such contributory to be arrested, and his books, papers, monies, securities for monies, goods, and chattels to be seized, and him and them to be safely kept until such time as the Court may order (u).

Power to arrest contributory about to abscond, or to remove or conceal any of his property. [21 Vict. c. 14, § 11.]

119. Any powers by this act conferred on the Court shall be deemed to be in addition to and not in restriction of any other powers subsisting either at law or in equity, of instituting proceedings against any contributory, or the estate of any contributory, or against any debtor of the company for the recovery of any call or other sums due from such contributory, or debtor, or his estate; and such proceedings may be instituted accordingly.

Powers of court cumulative.

Enforcement of and appeal from orders.

120. All orders made by the Court of Chancery in England or Ireland under this act may be enforced in the same manner in which orders of

Power to enforce orders. [20 Vict. c. 47, § 60.]

(s) See *ante*, pp. 689 *et seq.*

(u) See *ante*, p. 692.

(t) Or alleged contributory. See § 74.

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such Court of Chancery made in any suit pending therein may be enforced ; and for the purposes of this part of this act the Court of the vice-warden of the Stannaries shall, in addition to its ordinary powers, have the same power of enforcing any orders made by it as the Court of Chancery in England has in relation to matters within the jurisdiction of such Court ; and for the last-mentioned purposes the jurisdiction of the vice-warden of the Stannaries shall be deemed to be co-extensive in local limits with the jurisdiction of the Court of Chancery in England (x).

Power to order contributories in Scotland to pay calls.

[22 Vict. c. 60,
§ 5.]

121. Where an order, interlocutor, or decree has been made in Scotland for winding up a company by the Court, it shall be competent to the Court in Scotland during session, and to the lord ordinary on the bills during vacation, on production by the liquidators of a list certified by them of the names of the contributories liable in payment of any calls which they may wish to enforce, and of the amount due by each contributory respectively and of the date when the same became due, to pronounce forthwith a decree against such contributories for payment of the sums so certified to be due by each of them respectively, with interest from the said date till payment, at the rate of five pounds per centum per annum, in the same way and to the same effect as if they had severally consented to registration for execution, on a charge of six days, of a legal obligation to pay such calls and interest ; and such decree may be extracted immediately, and no suspension thereof shall be competent, except on caution or consignment, unless with special leave of the Court or lord ordinary.

Order made in England to be enforced in Scotland and Ireland (y).

[22 Vict. c. 60,
§ 12.]

122. Any order made by the Court in England for or in the course of the winding up of a company under this act shall be enforced in Scotland and Ireland in the Courts that would respectively have had jurisdiction in respect of such company if the registered office of the company had been situate in Scotland or Ireland, and in the same manner in all respects as if such order had been made by the Courts that are hereby required to enforce the same ; and in like manner orders, interlocutors, and decrees, made by the Court in Scotland (z) for or in the course of the winding up of a company, shall be enforced in England and Ireland, and orders made by the Court in Ireland for or in the course of winding up a company shall be enforced in England and Scotland by the Courts which would respectively have had jurisdiction in the matter of such company if the registered office of the company were situate in the division of the United Kingdom where the order is required to be enforced, and in the same manner in all respects as if such order had been made by the Court required to enforce the same in the case of a company within its own jurisdiction.

Mode of dealing with orders to be enforced by other courts.

[22 Vict. c. 60,
§ 13.]

123. Where any order, interlocutor, or decree made by one Court is required to be enforced by another Court, as hereinbefore provided, an office copy of the order, interlocutor, or decree so made shall be produced to the proper officer of the Court required to enforce the same, and the production of such office copy shall be sufficient evidence of such order, interlocutor, or decree having been made ; and thereupon such last-mentioned Court shall take such steps in the matter as may be requisite for enforcing such order, interlocutor, or decree in the same manner as if it were the order, interlocutor, or decree of the Court enforcing the same.

(x) See *ante*, p. 697.

(z) See *City of Glasgow Bank*, 14 Ch.

(y) See *International Pulp and Paper Co.*, 3 Ch. D. 594.

D. 628.

124. Rehearings of (*a*) and appeals from any order or decision made or given in the matter of the winding up of a company by any Court having jurisdiction under this act, may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction; subject to this restriction, that no such rehearing or appeal shall be heard unless notice of the same is given within three weeks after any order complained of has been made in manner in which notices of appeal are ordinarily given according to the practice of the Court appealed from, unless such time is extended by the Court of Appeal (*b*): provided that it shall be lawful for the lord warden of the Stannaries, by a special or general order, to remit at once any appeal allowed and regularly lodged with him against any order or decision of the vice-warden made in the matter of a winding up to the Court of Appeal in Chancery; which Court shall thereupon hear and determine such appeal, and have power to require all such certificates of the vice-warden, records of proceedings below, documents, and papers as the lord warden would or might have required upon the hearing of such appeal, and to exercise all other the jurisdiction and powers of the lord warden specified in the act of Parliament passed in the eighteenth year of the reign of her present Majesty, chapter thirty-two; and any order so made by the Court of Appeal in Chancery shall be final, without any further appeal.

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Appeals from orders.

[11 & 12 Vict. c. 45, §§ 101—102, 12 & 13 Vict. c. 108, § 33.]

125. In all proceedings under this part of this act, all Courts, judges, and persons judicially acting, and all other officers, judicial or ministerial, of any Court, or employed in enforcing the process of any Court, shall take judicial notice of the signature of any officer of the Courts of Chancery or Bankruptcy in England or in Ireland, or of the Court of Session in Scotland, or of the registrar of the Court of the vice-warden of the Stannaries, and also of the official seal or stamp of the several offices of the Courts of Chancery or Bankruptcy in England or Ireland, or of the Court of Session in Scotland, or of the Court of the vice-warden of the Stannaries, when such seal or stamp is appended to or impressed on any document made, issued, or signed under the provisions of this part of the act, or any official copy thereof.

Judicial notice to be taken of signature of officers, &c.

[11 & 12 Vict. c. 45, § 111.]

126. [The commissioners of the Court of Bankruptcy (*c*) and] the judges of the county courts in England who sit at places more than twenty miles from the General Post Office, and the commissioners of bankrupt and the assistant barristers and recorders in Ireland, and the sheriffs of counties in Scotland, shall be commissioners for the purpose of taking evidence under this act in cases where any company is wound up in any part of the United Kingdom; and it shall be lawful for the Court to refer the whole or any part of the examination of any witnesses under this act to any person hereby appointed commissioner, although such commissioner is out of the jurisdiction of the Court that made the order or decree for winding up the company; and every such commissioner shall, in addition to any power of summoning and examining witnesses, and requiring the production or delivery of documents, and certifying or punishing defaults by witnesses, which he might lawfully exercise as a [commissioner of the Court of Bankruptcy] (*c*), judge of a county court, commissioner of bank-

Special commissioners for taking evidence.

[20 Vict. c. 47, § 101.]

(*a*) As to rehearings, see *ante*, p. 715, and 748.
699.

(*c*) These words repealed by 38 & 39

(*b*) See *ante*, pp. 662, 697 *et seq.*, Vict. c. 66.

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Court may order the examination of persons in Scotland.

[12 & 13 Vict. c. 103, § 21.]

rupt, assistant barrister, or recorder, or as a sheriff of a county, have in the matter so referred to him all the same powers of summoning and examining witnesses, and requiring the production or delivery of documents, and punishing defaults by witnesses, and allowing costs and charges and expenses to witnesses, as the Court which made the order for winding up the company has; and the examination so taken shall be returned or reported to such last-mentioned Court in such manner as it directs.

127. The Court may direct the examination in Scotland of any person for the time being in Scotland, whether a contributory of the company or not, in regard to the estate, dealings, or affairs of any company in the course of being wound up, or in regard to the estate, dealings, or affairs of any person being a contributory of the company, so far as the company may be interested therein by reason of his being such contributory; and the order or commission to take such examination shall be directed to the sheriff of the county in which the person to be examined is residing or happens to be for the time; and the sheriff shall summon such person to appear before him at a time and place to be specified in the summons for examination upon oath as a witness or as a haver, and to produce any books, papers, deeds, or documents called for which may be in his possession or power; and the sheriff may take such examination either orally or upon written interrogatories and shall report the same in writing in the usual form to the Court and shall transmit with such report the books, papers, deeds, or documents produced, if the originals thereof are required and specified by the order, or otherwise such copies thereof or extracts therefrom, authenticated by the sheriff, as may be necessary; and in case any person so summoned fails to appear at the time and place specified, or appearing refuses to be examined, or to make the production required, the sheriff shall proceed against such person as a witness or haver duly cited, and failing to appear or refusing to give evidence or make production may be proceeded against by the law of Scotland: and the sheriff shall be entitled to such and the like fees, and the witness shall be entitled to such and the like allowances as sheriffs when acting as commissioners under appointment from the Court of Session, and as witnesses and havers are entitled to in the like cases according to the law and practice of Scotland; if any objection is stated to the sheriff by the witness, either on the ground of his incompetency as a witness, or as to the production required to be made, or on any other ground whatever, the sheriff may, if he thinks fit, report such objection to the Court, and suspend the examination of such witness until such objection has been disposed of by the Court.

Affidavits may be sworn, &c., before any competent court or person.

[12 & 13 Vict. c. 103, § 24.]

128. Any affidavit, affirmation, or declaration required to be sworn or made, under the provisions or for the purposes of this part of this act, may be lawfully sworn or made in Great Britain or Ireland, or in any colony, island, plantation, or place under the dominion of her Majesty in foreign parts, before any court, judge, or person lawfully authorised to take and receive affidavits, affirmations, or declarations, or before any of her Majesty's consuls or vice-consuls, in any foreign parts out of her Majesty's dominions; and all courts, judges, justices, commissioners, and persons acting judicially shall take judicial notice of the seal or stamp or signature (as the case may be) of any such court, judge, person, consul, or vice-consul attached, appended, or subscribed to any such affidavit, affirmation, or declaration, or to any other document to be used for the purposes of this part of this act.

Voluntary winding up of company (d).

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129. A company under this act may be wound up voluntarily,

(1.) Whenever the period, if any, fixed for the duration of the company by the articles of association expires, or whenever the event, if any occurs, upon the occurrence of which it is provided by the articles of association that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily :

(2.) Whenever the company has passed a special resolution requiring the company to be wound up voluntarily (*e*) :

(3.) Whenever the company has passed an extraordinary resolution to the effect that it has been proved to their satisfaction that the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same (*f*) :

For the purposes of this act, any resolution shall be deemed to be extraordinary which is passed in such manner as would, if it had been confirmed by a subsequent meeting, have constituted a special resolution, as hereinbefore defined (*g*).

130. A voluntary winding up shall be deemed to commence at the time of the passing of the resolution authorising such winding up (*h*).

131. Whenever a company is wound up voluntarily, the company shall, from the date of the commencement of such winding up, cease to carry on its business, except in so far as may be required for the beneficial winding up thereof, and all transfers of shares, except transfers made to or with the sanction of the liquidators, or alteration in the status of the members of the company taking place after the commencement of such winding up, shall be void (*i*), but its corporate state and all its corporate powers shall, notwithstanding it is otherwise provided by its regulations, continue until the affairs of the company are wound up (*k*).

132. Notice of any special resolution or extraordinary resolution passed for winding up a company voluntarily shall be given by advertisement as respects companies registered in England in the "London Gazette," as respects companies registered in Scotland in the "Edinburgh Gazette," and as respects companies registered in Ireland in the "Dublin Gazette."

133. The following consequences shall ensue upon the voluntary winding up of a company :

(1.) The property of the company shall be applied in satisfaction of its liabilities *pari passu* (*l*), and, subject thereto, shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members, according to their rights and interests in the company :

(2.) Liquidators shall be appointed for the purpose of winding up the affairs of the company and distributing the property :

(3.) The company in general meeting shall appoint such persons or person as it thinks fit to be liquidators or a liquidator, and may fix the remuneration to be paid to them or him (*m*) :

Circumstances under which company may be wound up voluntarily.

[20 Vict. c. 47, § 102.]

Commencement of voluntary winding up.

[20 Vict. c. 47, § 64.]

Effect of voluntary winding up on status of company.

[20 Vict. c. 47, § 104.]

Notice of resolution to wind up voluntarily.

[20 Vict. c. 47, § 103.]

Consequences of voluntary winding up

[20 Vict. c. 47, § 101.]

(d) See *ante*, pp. 874 *et seq.*

(e) See §§ 51, 53, and 132.

(f) See *ante*, p. 877, and as to advertisement of the resolution, § 132.

(g) See § 51.

(h) See *ante*, pp. 664, 877.

(i) See § 153, and *ante*, pp. 667, 673.

(k) See §§ 142, 143, and *ante*, p. 885.

(l) See § 153, and *ante*, p. 884.

(m) See §§ 135 and 140, 141, and *ante*, pp. 878, *et seq.*

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- (4.) If one person only is appointed, all the provisions herein contained in reference to several liquidators shall apply to him :
- (5.) Upon the appointment of liquidators, all the power of the directors shall cease, except in so far as the company in general meeting or the liquidators may sanction the continuance of such powers :
- (6.) When several liquidators are appointed, every power hereby given may be exercised by such one or more of them, as may be determined at the time of their appointment, or in default of such determination by any number not less than two :
- (7.) The liquidators may, without the sanction of the Court, exercise all powers by this act given to the official liquidator (*n*) :
- (8.) The liquidators may exercise the powers hereinbefore given to the Court of settling the list of contributories of the company ; and any list so settled shall be *prima facie* evidence of the liability of the persons named therein to be contributories (*o*) :
- (9.) The liquidators may at any time after the passing of the resolution for winding up the company, and before they have ascertained the sufficiency of the assets of the company, call on all or any of the contributories for the time being settled on the list of contributories to the extent of their liability to pay all or any sums they deem necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves ; and the liquidators may in making a call take into consideration the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same (*p*) :
- (10.) The liquidators shall pay the debts of the company, and adjust the right of the contributories amongst themselves (*q*).

Effect of winding up on share capital of company limited by guarantee.

134. Where a company limited by guarantee, and having a capital divided into shares, is being wound up voluntarily, any share capital that may not have been called up shall be deemed to be assets of the company, and to be a specialty debt due from each member to the company to the extent of any sums that may be unpaid on any shares held by him, and payable at such time as may be appointed by the liquidators (*r*).

Power of company to delegate authority to appoint liquidators, &c.

135. A company about to be wound up voluntarily, or in the course of being wound up voluntarily, may, by an extraordinary resolution (*s*), delegate to its creditors, or to any committee of its creditors, the power of appointing liquidators or any of them, and supplying any vacancies in the appointment of liquidators, or may by a like resolution enter into any arrangement with respect to the powers to be exercised by the liquidators, and the manner in which they are to be exercised ; and any act done by the creditors in pursuance of such delegated powers shall have the same effect as if it had been done by the company.

Arrangement when binding company and on creditors.

136. Any arrangement entered into between a company about to be wound up voluntarily, or in the course of being wound up voluntarily,

(*n*) See §§ 95, 138, 139, 159, 160, and *ante*, pp. 708 *et seq.*

(*o*) See §§ 98, 99, and *ante*, p. 745.

(*p*) See, also, § 102, and *ante*, p. 884.

(*q*) Compare § 109, where the words

are different but the meaning the same. See *Bridgewater Navigation Co.*, 39 Ch.

D. p. 21.

(*r*) See, also, § 90.

(*s*) § 129.

and its creditors, shall be binding on the company if sanctioned by an extraordinary resolution (s), and on the creditors if acceded to by three-fourths in number and value of the creditors, subject to such right of appeal as is hereinafter mentioned.

137. Any creditor or contributory of a company that has in manner aforesaid entered into any arrangement with its creditors may, within three weeks from the date of the completion of such arrangement, appeal to the Court against such arrangement, and the Court may thereupon, as it thinks just, amend, vary, or confirm the same (t).

138. Where a company is being wound up voluntarily, the liquidators or any contributory of the company may apply to the Court (u) in England, Ireland, or Scotland, or to the Lord Ordinary on the bills in Scotland in time of vacation, to determine any question arising in the matter of such winding up, or to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court; and the Court or Lord Ordinary in the case aforesaid, if satisfied that the determination of such question, or the required exercise of power, will be just and beneficial (x) may accede, wholly or partially, to such application, on such terms and subject to such conditions as the Court thinks fit, or it may make such other order, interlocutor, or decree on such application as the Court thinks just.

139. Where a company is being wound up voluntarily the liquidators may, from time to time, during the continuance of such winding up, summon general meetings of the company for the purpose of obtaining the sanction of the company by special resolution or extraordinary resolution, or for any other purposes they think fit; and in the event of the winding up continuing for more than one year, the liquidators shall summon a general meeting of the company at the end of the first year, and of each succeeding year from the commencement of the winding up, or as soon thereafter as may be convenient, and shall lay before such meeting an account showing their acts and dealings, and the manner in which the winding up has been conducted during the preceding year.

140. If any vacancy occurs in the office of liquidators appointed by the company, by death, resignation, or otherwise, the company in general meeting may, subject to any arrangement they may have entered into with their creditors, fill up such vacancy; and a general meeting for the purpose of filling up such vacancy may be convened by the continuing liquidators, if any, or by any contributory of the company, and shall be deemed to have been duly held if held in manner prescribed by the regulations of the company, or in such other manner as may, on application by the continuing liquidator, if any, or by any contributory of the company, be determined by the Court.

141. If from any cause whatever there is no liquidator acting in the case of a voluntary winding up, the Court may, on the application of a contributory, appoint a liquidator or liquidators; the Court may also, on due cause shown, remove any liquidator, and appoint another liquidator to act in the matter of a voluntary winding up (y).

(s) § 129.

(t) See Rule 51.

(u) See Rule 51. See *ante*, p. 615, and as to staying actions, &c., pp. 673 *et seq.*, and p. 883.

(x) See *Gold Co.*, 12 Ch. D. 77, and *Heiron's case*, 15 Ch. D. 139.

(y) See Rule 51, and § 150, and *ante*, pp. 703, 878.

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Power of creditor or contributory to appeal.

Power for liquidators or contributories in voluntary winding up to apply to court.

[22 Vict. c. 60, § 14.]

Power of liquidators to call general meetings.

[21 Vict. c. 14, § 18.]

Power to fill up vacancy in liquidators.

[22 Vict. c. 60, § 15.]

Power of court to appoint liquidators.

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Liquidators on conclusion of winding up to make an account and lay it before general meeting.

[20 Vict. c. 47, § 104.]

Liquidators to report meeting to registrar.

[20 Vict. c. 47, § 104.]

Costs of voluntary liquidation.

[20 Vict. c. 47, § 104.]

Creditor may insist on winding up by Court.

[20 Vict. c. 47, § 105.]

Power of court to adopt proceedings of voluntary winding up.

[21 Vict. c. 14, § 19.]

Power of court to direct voluntary winding up to continue subject to supervision of Court.

[21 Vict. c. 14, § 19.]

Effect of petition for continuance of winding up subject to supervision.

[22 Vict. c. 60, § 2.]

142. As soon as the affairs of the company are fully wound up, the liquidators shall make up an account showing the manner in which such winding up has been conducted, and the property of the company disposed of; and thereupon they shall call a general meeting of the company for the purpose of having the account laid before them and hearing any explanation that may be given by the liquidators; the meeting shall be called by advertisement, specifying the time, place, and object of such meeting; and such advertisement shall be published one month at least previously to the meeting, as respects companies registered in England in the "London Gazette," and as respects companies registered in Scotland in the "Edinburgh Gazette," and as respects companies registered in Ireland in the "Dublin Gazette."

143. The liquidators shall make a return to the registrar of such meeting having been held, and of the date at which the same was held; and on the expiration of three months from the date of the registration of such return the company shall be deemed to be dissolved: if the liquidators make default in making such return to the registrar they shall incur a penalty not exceeding five pounds for every day during which such default continues.

144. All costs, charges, and expenses properly incurred in the voluntary winding up of a company, including the remuneration of the liquidators, shall be payable out of the assets of the company in priority to all other claims.

145. The voluntary winding up of a company shall not be a bar to the right of any creditor of such company to have the same wound up by the Court, if the Court is of opinion that the rights of such creditor will be prejudiced by a voluntary winding up (z).

146. Where a company is in course of being wound up voluntarily, and proceedings are taken for the purpose of having the same wound up by the Court, the Court may, if it thinks fit, notwithstanding that it makes an order directing the company to be wound up by the Court, provide in such order or in any other order for the adoption of all or any of the proceedings taken in the course of the voluntary winding up (a).

Winding up subject to the supervision of the Court (b).

147. When a resolution has been passed by a company to wind up voluntarily, the Court may make an order directing that the voluntary winding up should continue, but subject to such supervision of the Court, and with such liberty for creditors, contributories, or others, to apply to the Court, and generally upon such terms and subject to such conditions as the Court thinks just (c).

148. A petition, praying wholly or in part that a voluntary winding up should continue, but subject to the supervision of the Court, and which winding up is hereinafter referred to as a winding up subject to the supervision of the Court, shall, for the purpose of giving jurisdiction to the

(z) *Ante*, p. 636. As to how far a compulsory order supersedes a voluntary winding up, see *Thomas v. Patent Lionette Co.*, 17 Ch. D. 250.

(a) See *Taurine Co.*, 25 Ch. D. 118, p. 139.

(b) See *ante*, p. 886.

(c) For form of order, see form No. 4, in the 3rd Sched. to the Rules. As to who may petition, and as to "or others" see *Pen y Van Colliery Co.*, 6 Ch. D. 477.

Court over suits and actions, be deemed to be a petition for winding up the company by the Court (*d*). APPENDIX V.

149. The Court may, in determining whether a company is to be wound up altogether by the Court, or subject to the supervision of the Court in the appointment of liquidator or liquidators, and in all other matters relating to the winding up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence, and may direct meetings of the creditors or contributories to be summoned, held, and regulated in such manner as the Court directs for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the Court : in the case of creditors regard shall be had to the value of the debts due to each creditor, and in the case of contributories to the number of votes conferred on each contributory by the regulations of the company (*e*).

150. Where any order is made by the Court for a winding up subject to the supervision of the Court, the Court may, in such order or in any subsequent order, appoint any additional liquidator or liquidators ; and any liquidators so appointed by the Court shall have the same powers, be subject to the same obligations, and in all respects stand in the same position as if they had been appointed by the company ; the Court may from time to time remove any liquidators so appointed by the Court, and fill up any vacancy occasioned by such removal, or by death or resignation (*f*).

151. Where an order is made for winding up, subject to the supervision of the Court, the liquidators appointed to conduct such winding up may, subject to any restrictions imposed by the Court, exercise all their powers, without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily ; but, save as aforesaid, any order made by the Court for a winding up, subject to the supervision of the Court, shall for all purposes, including the staying of actions, suits, and other proceedings, be deemed to be an order of the Court for winding up the company by the Court, and shall confer full authority on the Court to make calls, or to enforce calls made by the liquidators, and to exercise all other powers which it might have exercised if an order had been made for winding up the company altogether by the Court ; and in the construction of the provisions whereby the Court is empowered to direct any act or thing to be done to or in favour of the official liquidators, the expression official liquidators shall be deemed to mean the liquidators conducting the winding up subject to the supervision of the Court (*g*).

152. Where an order has been made for the winding up of a company subject to the supervision of the Court, and such order is afterwards superseded (*h*) by an order directing the company to be wound up compulsorily,

(*d*) See § 85 ; and as to the petition, see Rules 1—5, and see *ante*, pp. 654 *et seq.*, and p. 673.

(*e*) See, also, § 91, and Rules 45—47.

(*f*) See, also, § 141.

(*g*) See, as to this section, *ante*, p. 588 ; as to the commencement of the winding up, pp. 664 and 889 ; as to stay-

ing actions, &c., p. 674 ; as to dealings with property, p. 666 ; as to transfers of shares, pp. 831 *et seq.* ; as to compromises, &c., §§ 159 and 160.

(*h*) As to how far a compulsory order supersedes a voluntary winding up, see *Thomas v. Patent Lionite Co.*, 17 Ch. D. 250.

Court may have regard to wishes of creditors.

[22 Vict. c. 60, §§ 2 & 3.]

Power to court to appoint additional liquidators in winding up subject to supervision.

[22 Vict. c. 60, § 3.]

Effect of order of court for winding up subject to supervision.

[22 Vict. c. 60, § 4.]

Appointment in certain cases of voluntary liquidators to be official liquidators.

[22 Vict. c. 60, § 8.]

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the Court may in such last-mentioned order, or in any subsequent order, appoint the voluntary liquidators or any of them, either provisionally or permanently, and either with or without the addition of any other persons, to be official liquidators.

Supplemental provisions.

Dispositions of property, &c., after the commencement of the winding up to be void.

[20 Vict. c. 47, § 73.]

The books of the company to be evidence.

[20 Vict. c. 47, § 81.]

Disposal of books, accounts, and documents of the company.

153. Where any company is being wound up by the Court or subject to the supervision of the Court, all dispositions of the property, effects, and things in action of the company, and every transfer of shares, or alteration in the status of the members of the company made between the commencement of the winding up (*i*) and the order for winding up, shall, unless the Court otherwise orders, be void (*k*).

154. Where any company is being wound up, all books, accounts, and documents of the company and of the liquidators shall, as between the contributories of the company (*l*), be *prima facie* evidence of the truth of all matters purporting to be therein recorded (*m*).

155. Where any company has been wound up under this act and is about to be dissolved, the books, accounts, and documents of the company and of the liquidators may be disposed of in the following way; that is to say, where the company has been wound up by or subject to the supervision of the Court, in such way as the Court directs, and where the company has been wound up voluntarily, in such way as the company by an extraordinary resolution directs; but after the lapse of five years from the date of such dissolution, no responsibility shall rest on the company, or the liquidators, or any one to whom the custody of such books, accounts, and documents has been committed, by reason that the same, or any of them, cannot be made forthcoming to any party or parties claiming to be interested therein (*n*).

Inspection of books.

[22 Vict. c. 60, § 7.]

156. Where an order has been made for winding up a company by the Court, or subject to the supervision of the Court, the Court may make such order for the inspection by the creditors and contributories of the company of its books and papers as the Court thinks just: and any books and papers in the possession of the company may be inspected by creditors or contributories, in conformity with the order of the Court, but not further or otherwise (*o*).

Power of assignee to sue and be sued.

157. Any person to whom any thing in action belonging to the company is assigned, in pursuance of this act, may bring or defend any action or suit relating to such thing in action in his own name.

Debts and claims of all descriptions to be proved.

158. In the event of any company being wound up under this act, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as is possible, of the value of all such debts or claims, as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value (*p*).

(*i*) See § 84.

(*k*) See, also, §§ 131, 163, 164, and *ante*, pp. 666 *et seq.*

(*l*) And alleged contributories, see 74.

(*m*) See *ante*, p. 705.

(*n*) As to right of litigants to compel the production of these books by the liquidator, see *London and Yorkshire Bank v. Cooper*, 15 Q. B. D. 473.

(*o*) See Rule 58, and *ante*, p. 704.

(*p*) See Rules 20—28, and *ante*, pp.

159. The liquidators may, with the sanction of the Court (*q*), where the company is being wound up by the Court or subject to the supervision of the Court, and with the sanction of an extraordinary resolution (*r*) of the company, where the company is being wound up altogether voluntarily, pay any classes of creditors in full, or make such compromise or other arrangement as the liquidators may deem expedient with creditors or persons claiming to be creditors, or persons having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable (*s*).

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Power to make compromises, &c., with creditors.

[22 Vict. c. 60, § 10.]

160. The liquidators may, with the sanction of the Court (*t*) where the company is being wound up by the Court or subject to the supervision of the Court, and with the sanction of an extraordinary resolution (*u*) of the company where the company is being wound up altogether voluntarily, compromise all calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and all claims, whether present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and any contributory or alleged contributory, or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets of the company or the winding up of the company, upon the receipt of such sums, payable at such times, and generally upon such terms as may be agreed upon, with power for the liquidators to take any security for the discharge of such debts or liabilities, and to give complete discharges in respect of all or any such calls, debts, or liabilities (*x*).

Power to make compromises contributories and debtors.

[22 Vict. c. 60, § 19.]

161. Where any company is proposed to be or is in the course of being wound up altogether voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company, the liquidators of the first-mentioned company may, with the sanction of a special resolution (*y*) of the company by whom they were appointed, conferring either a general authority on the liquidators, or an authority in respect of any particular arrangement, receive in compensation or part compensation for such transfer or sale, shares, policies, or other like interests in such other company, for the purpose of distribution amongst the members of the company being wound up, or may enter into any other arrangement whereby the members of the company being wound up may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the purchasing company; and any sale made or arrangement entered into by the liquidators in pursuance of this section shall be binding on the members of the company being wound up; subject to this proviso, that if any member of the company being wound up, who has not voted in favour of the special resolution passed by the company of which he is a member at either of the meetings held for passing the same, expresses his dissent from any such special resolution in writing addressed to the liquidators or one of them, and left at the registered office of the company not

Power for liquidators to accept shares, &c., as a consideration for sale of property to another company.

[21 Vict. c. 14, § 17.]

716 *et seq.*; and as to annuities and policies, 35 & 36 Vict. c. 41, *ante*, p. 732.

(*q*) See rules 49, 60—62.

(*r*) See § 129.

(*s*) See *ante*, pp. 709, 711.

(*t*) See Rules 50, 60—62.

(*u*) See § 129.

(*x*) See §§ 136, 137; 33 & 34 Vict. c. 104, § 2, *ante*, pp. 709 *et seq.*

(*y*) See § 51.

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later than seven days after the date of the meeting at which such special resolution was passed (z), such dissentient member may require the liquidators to do one of the following things as the liquidators may prefer; that is to say, either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determined in manner hereinafter mentioned, such purchase-money to be paid before the company is dissolved, and to be raised by the liquidators in such manner as may be determined by special resolution; no special resolution shall be deemed invalid for the purposes of this section by reason that it is passed antecedently to or concurrently with any resolution for winding up the company, or for appointing liquidators; but if an order be made within a year for winding up the company by or subject to the supervision of the Court, such resolution shall not be of any validity unless it is sanctioned by the Court (a).

Mode of determining price.

162. The price to be paid for the purchase of the interest of any dissentient member may be determined by agreement; but if the parties dispute about the same, such dispute shall be settled by arbitration, and for the purposes of such arbitration the provisions of "The companies clauses consolidation act, 1845," with respect to the settlement of disputes by arbitration (b), shall be incorporated with this act; and in the construction of such provisions this act shall be deemed to be the special act, and the "company" shall mean the company that is being wound up, and any appointment by the said incorporated provisions directed to be made under the hand of the secretary, or any two of the directors, may be made under the hand of the liquidator, if only one, or any two or more of the liquidators if more than one.

Certain attachments, &c., to be void.

[20 Vict. c. 47. § 80.]

Fraudulent preference.

[20 Vict. c. 47. § 76.]

163. Where any company is being wound up by the Court or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents (c).

164. Any such conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property as would, if made or done by or against any individual trader, be deemed in the event of his bankruptcy to have been made or done by way of undue or fraudulent preference of the creditors of such trader, shall, if made or done by or against any company, be deemed, in the event of such company being wound up under this act, to have been made or done by way of undue or fraudulent preference of the creditors of such company, and shall be invalid accordingly (d); and for the purposes of this section the presentation of a petition for winding up a company shall in the case of a company being wound up by the Court or subject to the supervision of the Court, and a resolution for winding up the company shall in the case of a voluntary winding up, be deemed to correspond with the act of bankruptcy in the case of an individual trader: and any conveyance or assignment made by any company formed under this act of all its estate and effects to trustees for the benefit of all its creditors shall be void to all intents.

Power of court to adjudicate

165. Where, in the course of the winding up of any company under

(z) *Union Bank of Kingston-upon-Hull*, 13 Ch. D. 808.

(a) See, as to transfers of business under §§ 161 and 162, *ante*, pp. 711, 882, and 894.

(b) 8 & 9 Viet. c. 16, §§ 123—134.

(c) See, also, §§ 84, 85, 87, 197, 198, 201, 202, and see *ante*, pp. 671 *et seq.*

(d) See *ante*, p. 668.

this act, it appears that any past or present director, manager, official, or other liquidator, or any officer of such company, has misapplied or retained in his own hands or become liable or accountable for any monies of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of any liquidator, or of any creditor or contributory of the company, notwithstanding that the offence is one for which the offender is criminally responsible, examine into the conduct of such director, manager, or other officer, and compel him to repay any monies so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the Court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust, as the Court thinks just (*e*).

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against delinquent directors and officers.

166. If any director, officer, or contributory of any company wound up under this act destroys, mutilates, alters, or falsifies any books, papers, writings, or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account, or other document belonging to the company with intent to defraud or deceive any person, every person so offending shall be deemed to be guilty of a misdemeanor, and upon being convicted shall be liable to imprisonment for any term not exceeding two years, with or without hard labour (*f*).

Penalty on falsification of books.

[20 Vict. c. 47, § 79.]

167. Where any order is made for winding up a company by the Court or subject to the supervision of the Court, if it appear in the course of such winding up that any past or present director, manager, officer, or member of such company has been guilty of any offence in relation to the company for which he is criminally responsible (*g*), the Court may, on the application of any person interested in such winding up (*h*), or of its own motion, direct the official liquidators, or the liquidators (as the case may be), to institute and conduct a prosecution or prosecutions for such offence, and may order the costs and expenses to be paid out of the assets of the company.

Prosecution of delinquent directors, etc., in the case of winding up by court. [22 Vict. c. 60, § 20.]

168. Where a company is being wound up altogether voluntarily, if it appear to the liquidators conducting such winding up that any past or present director, manager, officer, or member of such company has been guilty of any offence in relation to the company for which he is criminally responsible, it shall be lawful for the liquidators, with the previous sanction of the Court (*i*), to prosecute such offender; and all expenses properly incurred by them in such prosecution shall be payable out of the assets of the company in priority to all other liabilities.

Prosecution of delinquent directors, &c., in case of voluntary winding up. [22 Vict. c. 60, § 21.]

169. If any person, upon any examination upon oath or affirmation authorised under this act, or in any affidavit, deposition, or solemn affirmation in or about the winding up of any company under this act, or otherwise in or about any matter arising under this act, wilfully and corruptly give false evidence, he shall, upon conviction, be liable to the penalties of wilful perjury.

Penalty on perjury.

[11 & 12 Vict. c. 45, § 113.]

(*e*) See *ante*, pp. 693 *et seq.**seq.*, *ante*, pp. 446, 697.(*f*) See, also, 24 & 25 Vict. c. 96,(*h*) See Rule 51.§ 83, *ante*, pp. 446 *et seq.*(*i*) See Rule 51, and *ante*, p. 881.(*g*) See 24 & 25 Vict. c. 96, §§ 82, *et*

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Power of courts to make rules.

Power of Lord Chancellor of Great Britain to make rules.

[20 Vict. c. 47, § 95, and 22 Vict. c. 60, § 11.]

Power of Court of Session in Scotland to make rules.

[20 Vict. c. 47, § 97.]

Power to make rules in Stannaries Court.

[20 Vict. c. 47, § 98.]

Power of Lord Chancellor of Ireland to make rules.

[20 Vict. c. 47, § 96.]

[170 authorised the Lord Chancellor to make rules concerning the mode of proceeding to be had for winding up a company in the Court of Chancery, and enacted that until such rules were made the general practice of the Court of Chancery, including the practice hitherto in use in winding up companies, should, so far as the same was applicable and not inconsistent with this act, apply to all proceedings for winding up a company (*k*).]

171. In Scotland, the Court of Session may make such rules concerning the mode of winding up as may be necessary by act of sederunt; but, until such rules are made, the general practice of the Court of Session in suits pending in such Court shall, so far as the same is applicable and not inconsistent with this act, apply to all proceedings for winding up a company, and official liquidators shall in all respects be considered as possessing the same powers as any trustee on a bankrupt estate.

172. The vice-warden of the Stannaries may, from time to time, with the consent provided for by section twenty-three of the act of eighteenth of Victoria, chapter thirty-two, make rules for carrying into effect the powers conferred by this act upon the Court of the vice-warden; but, subject to such rules, the general practice of the said Court, and of the registrar's office in the said Court, including the present practice of the said Court in winding up companies, may be applied to all proceedings under this act. The said vice-warden may likewise, with the same consent, make from time to time rules for specifying the fees to be taken in his said Court in proceedings under this act; and any rules so made shall be of the same force as if they had been enacted in the body of this act; and the fees paid in respect of proceedings taken under this act, including fees taken under "The joint stock companies act, 1856," in the matter of winding up companies, shall be applied exclusively towards payment of such additional officers, or such increase of the salaries of existing officers, or pensions to retired officers, or such other needful expenses of the Court, as the lord warden of the Stannaries shall, from time to time, on the application of the vice-warden or otherwise, think fit to direct, sanction, or assign, and meanwhile shall be kept as a separate fund, apart from the ordinary fees of the Court arising from other business, to await such direction and order of the lord warden herein, and to accumulate by investment in government securities until the whole shall have been so appropriated (*l*).

173. In Ireland the Lord Chancellor of Ireland may, as respects the winding up of companies in Ireland, with the advice and consent of the Master of the Rolls in Ireland, exercise the same power of making rules as is by this act hereinbefore given to the Lord Chancellor of Great Britain; but, until such rules are made, the general practice of the Court of Chancery in Ireland, including the practice hitherto in use in Ireland in

(*k*) See 30 & 31 Vict. c. 131, § 20, and *ante*, p. 685. Under the above section rules have been promulgated. See *infra*, Appendix No. vi.; and as to the general practice of the Court of Chancery, see Rules 74 and 75. The section has been repealed by 44 & 45

Vict. c. 59; but the rules in the Appendix are still in force.

(*l*) Rules have been issued under this section, but they are not printed in the present work. They are published by Stevens and Sons. And see 30 & 31 Vict. c. 131, § 20.

winding up companies, shall, so far as the same is applicable and not inconsistent with this act, apply to all proceedings for winding up a company.

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PART V.

REGISTRATION OFFICE.

174. The registration of companies under this act shall be conducted as follows (that is to say) :—

Constitution of
registration
office.

- (1.) The Board of Trade may, from time to time, appoint such registrars, assistant registrars, clerks, and servants as they may think necessary for the registration of companies under this act, and remove them at pleasure : [20 Vict. c. 47, § 106.]
- (2.) The Board of Trade may make such regulations as they think fit with respect to the duties to be performed by any such registrars, assistant registrars, clerks, and servants as aforesaid :
- (3.) The Board of Trade may, from time to time, determine the places at which offices for the registration of companies are to be established, so that there be at all times maintained in each of the three parts of the United Kingdom at least one such office (*m*), and that no company shall be registered except at an office within that part of the United Kingdom in which, by the memorandum of association, the registered office of the company is declared to be established, and the board may require that the registrar's office of the court of the vice-warden of the Stannaries shall be one of the offices for the registration of companies formed for working mines within the jurisdiction of the Court :
- (4.) The Board of Trade may, from time to time, direct a seal or seals to be prepared for the authentication of any documents required for or connected with the registration of companies :
- (5.) Every person may inspect the documents kept by the registrar of joint stock companies ; and there shall be paid for such inspection such fees as may be appointed by the Board of Trade, not exceeding one shilling for each inspection ; and any person may require a certificate of the incorporation of any company, or a copy or extract of any other document or any part of any other document, to be certified by the registrar : and there shall be paid for such certificate of incorporation, certified copy, or extract such fees as the Board of Trade may appoint, not exceeding five shillings for the certificate of incorporation, and not exceeding sixpence for each folio of such copy or extract, or, in Scotland, for each sheet of two hundred words :
- (6.) The existing registrar, assistant registrars, clerks, and other officers and servants in the office for the registration of joint stock companies shall, during the pleasure of the Board of Trade, hold the offices and receive the salaries hitherto held and received

(*m*) The Board of Trade has, by an order dated the 14th Feb. 1863, directed companies for working mines within the Stannaries to be registered in the Court of the vice-warden.

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- by them, but they shall in the execution of their duties conform to any regulations that may be issued by the Board of Trade :
- (7.) There shall be paid to any registrar, assistant registrar, clerk, or servant that may hereafter be employed in the registration of joint-stock companies, such salary as the Board of Trade may, with the sanction of the commissioners of the Treasury, direct :
- (8.) Whenever any act is herein directed to be done to or by the registrar of joint-stock companies, such act shall, until the Board of Trade otherwise directs, be done in England to or by the existing registrar of joint-stock companies, or in his absence to or by such person as the Board of Trade may for the time being authorise, in Scotland to or by the existing registrar of joint-stock companies in Scotland, and in Ireland to or by the existing assistant registrar of joint-stock companies for Ireland, or by such person as the Board of Trade may for the time being authorise in Scotland or Ireland in the absence of the registrar ; but in the event of the Board of Trade altering the constitution of the existing registry office, such act shall be done to or by such officer or officers and at such place or places with reference to the local situation of the registered offices of the companies to be registered as the Board of Trade may appoint.

PART VI.

APPLICATION OF ACT TO COMPANIES REGISTERED UNDER THE JOINT-STOCK COMPANIES ACT.

Definition of
Joint-stock com-
panies acts.

175. The expression "Joint-stock companies acts" as used in this act shall mean "The joint-stock companies act, 1856," "The joint-stock companies act, 1856, 1857," "The joint-stock banking companies act, 1857," and "The act to enable joint-stock banking companies to be formed on the principle of limited liability," or any one or more of such acts, as the case may require ; but shall not include the act passed in the eighth year of the reign of Her present Majesty, chapter one hundred and ten, and intituled "An act for the registration, incorporation, and regulation of joint-stock companies."

Application of
act to companies
formed under
joint-stock com-
panies acts.

176. Subject as hereinafter mentioned, this act, with the exception of table A. in the first schedule, shall apply to companies formed and registered under the said Joint-stock companies acts, or any of them, in the same manner in the case of a limited company as if such company had been formed and registered under this act as a company limited by shares, and in the case of a company other than a limited company as if such company had been formed and registered as an unlimited company under this act, with this qualification, that wherever reference is made expressly or impliedly to the date of registration, such date shall be deemed to refer to the date at which such companies were respectively registered under the said Joint-stock companies acts, or any of them, and the power of altering regulations by special resolution given by this act (*n*) shall, in the case of any company formed and registered under the said Joint-stock companies acts, or any of them, extend to altering any provisions contained in

(*n*) See §§ 50 and 196, *ante*, p. 119.

the table marked B. annexed to "The Joint-stock companies act, 1856," and shall also in the case of an unlimited company formed and registered as last aforesaid extend to altering any regulations relating to the amount of capital or its distribution into shares, notwithstanding such regulations are contained in the memorandum of association (o).

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177. This act shall apply to companies registered but not formed under the said Joint-stock companies acts or any of them in the same manner as it is hereinafter declared (p) to apply to companies registered but not formed under this act, with this qualification, that wherever reference is made expressly or impliedly to the date of registration, such date shall be deemed to refer to the date at which such companies were respectively registered under the said Joint-stock companies acts, or any of them (q).

Application of act to companies registered under Joint-stock companies acts.

178. Any company registered under the said Joint-stock companies acts, or any of them, may cause its shares to be transferred in manner hitherto in use, or in such other manner as the company may direct.

Mode of transferring shares.

PART VII.

COMPANIES AUTHORISED TO REGISTER UNDER THIS ACT.

179. The following regulations shall be observed with respect to the registration of companies under this part of this act; (that is to say,)

Regulations as to registration of existing companies.

- (1.) No company having the liability of its members limited by act of Parliament or letters patent, and not being a joint-stock company as hereinafter defined (r), shall register under this act in pursuance of this part thereof:
- (2.) No company having the liability of its members limited by act of Parliament, or by letters patent, shall register under this act in pursuance of this part thereof as an unlimited company, or as a company limited by guarantee:
- (3.) No company that is not a joint-stock company, as hereinafter defined (r), shall in pursuance of this part of this act register under this act as a company limited by shares:
- (4.) No company shall register under this act in pursuance of this part thereof, unless an assent to its so registering is given by a majority of such of its members as may be present, personally or by proxy, in cases where proxies are allowed by the regulations of the company, at some general meeting summoned for the purpose:
- (5.) Where a company not having the liability of its members limited by act of Parliament or letters patent, is about to register as a limited company, the majority required to assent as aforesaid shall consist of not less than three-fourths of the members present, personally or by proxy, at such last-mentioned general meeting:
- (6.) Where a company is about to register as a company limited by guarantee, the assent to its being so registered shall be accompanied by a resolution declaring that each member undertakes to contribute to the assets of the company, in the event of the

(o) See *ante*, p. 115.

(q) See *ante*, p. 115.

(p) See Part VII.

(r) § 181. See *ante*, pp. 115, 116.

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same being wound up, during the time that he is a member or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceased to be a member, and of the costs, charges, and expenses of winding up the company, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding a specified amount :

In computing any majority under this section, when a poll is demanded, regard shall be had to the number of votes to which each member is entitled according to the regulations of the company of which he is a member.

Companies capable of being registered.
[21 Vict. c. 14, § 29.]

180. With the above exceptions, and subject to the foregoing regulations (s), every company existing at the time of the commencement of this act, including any company registered under the said Joint-stock companies acts (t), consisting of seven or more members, and any company hereafter formed in pursuance of any act of Parliament other than this act, or of letters patent, or being a company engaged in working mines within and subject to the jurisdiction of the Stannaries, or being otherwise duly constituted by law, and consisting of seven or more members, may at any time hereafter register itself under this act as an unlimited company, or a company limited by shares, or a company limited by guarantee ; and no such registration shall be invalid by reason that it has taken place with a view to the company being wound up.

Definition of joint-stock company.

181. For the purposes of this part of this act, so far as the same relates to the description of companies empowered to register as companies limited by shares, a joint-stock company shall be deemed to be a company having a permanent paid-up or nominal capital of fixed amount, divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of shares in such capital, or the holders of such stock, and no other persons ; and such company when registered with limited liability under this act shall be deemed to be a company limited by shares (u).

Proviso as to banking company.
[22 Vict. c. 91, § 1.]

[182. No banking company claiming to issue notes in the United Kingdom shall be entitled to limited liability in respect of such issue, but shall continue subject to unlimited liability in respect thereof ; and, if necessary, the assets shall be marshalled for the benefit of the general creditors, and the members shall be liable for the whole amount of the issue, in addition to the sum for which they would be liable as members of a limited company (x).]

Requisitions for registration by companies.

183. Previously to the registration, in pursuance of this part of this act of any joint-stock company (y), there shall be delivered to the registrar the following documents (that is to say) :—

- (1.) A list showing the names, addresses, and occupations of all persons who on a day named in such list, and not being more than six clear days before the day of registration, were members of such company, with the addition of the shares held by such

(s) See, also, §§ 182—184, and 188.

(t) The act applies to them, even though they do not register. See §§ 176, 177, and *ante*, pp. 113, 116, and 617.

(u) See *ante*, p. 116.

(x) This section was repealed by 42 & 43 Vict. c. 76, § 6. See, also, § 188, and for the corresponding section now in force, 42 & 43 Vict. c. 76, § 6.

(y) § 181.

persons respectively, distinguishing, in cases where such shares are numbered, each share by its number :

- (2.) A copy of any act of Parliament, royal charter, letters patent, deed of settlement, contract of co-partnery, cost-book regulations, or other instrument constituting or regulating the company (z) :
- (3.) If any such joint-stock company is intended to be registered as a limited company, the above list and copy shall be accompanied by a statement specifying the following particulars ; that is to say,

The nominal capital of the company and the number of shares into which it is divided ;

The number of shares taken and the amount paid on each share ;

The name of the company, with the addition of the word " limited " as the last word thereof (a) ;

With the addition, in the case of a company intended to be registered as a company limited by guarantee, of the resolution declaring the amount of the guarantee.

184. Previously to the registration in pursuance of this part of this act of any company not being a joint-stock company (b), there shall be delivered to the registrar a list showing the names, addresses, and occupations of the directors or other managers (if any) of the company, also a copy of any act of Parliament, letters patent, deed of settlement, contract of co-partnery, cost-book regulations, or other instrument constituting or regulating the company, with the addition, in the case of a company intended to be registered as a company limited by guarantee, of the resolution declaring the amount of guarantee.

Requisitions for registration by existing company not being a joint-stock company.

185. Where a joint-stock company (c) authorised to register under this act, has had the whole or any portion of its capital converted into stock, such company shall, as to the capital so converted, instead of delivering to the registrar a statement of shares, deliver to the registrar a statement of the amount of stock belonging to the company, and the names of the persons who were holders of such stock, on some day to be named in the statement, not more than six clear days before the day of registration.

Power for company to register amount of stock instead of shares. [21 Vict. c. 14, § 30.]

186. The lists of members and directors, and any other particulars relating to the company hereby required to be delivered to the registrar, shall be verified by a declaration of the directors of the company delivering the same, or any two of them, or of any two other principal officers of the company, made in pursuance of the act passed in the sixth year of the reign of his late Majesty King William the Fourth chapter sixty-two.

Authentication of statements.

187. The registrar may require such evidence as he thinks necessary for the purpose of satisfying himself whether an existing company is or not a joint-stock company as hereinbefore defined (d).

Registrar may require evidence as to nature of company.

188. Every banking company existing at the date of the passing of this act which registers itself as a limited company shall, at least thirty days previous to obtaining a certificate of registration with limited liability, give notice that it is intended so to register the same to every person

On registration of banking company with limited liability, notice to be

(z) See § 209, as to insurance companies already registered under 7 & 8 Vict. c. 110.

(b) § 181.

(c) § 181.

(d) § 181.

(a) See § 190.

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given to customers.
[22 Vict. c. 91, § 3.]

and partnership firm who have a banking account with the company; and such notice shall be given either by delivering the same to such person or firm, or leaving the same or putting the same into the post addressed to him or them at such address as shall have been last communicated or otherwise become known as his or their address to or by the company: and, in case the company omits to give any such notice as is hereinbefore required to be given, then as between the company and the person or persons only who are for the time being interested in the account in respect of which such notice ought to have been given, and so far as respects such account and all variations thereof down to the time at which such notice shall be given, but not further or otherwise, the certificate of registration with limited liability shall have no operation (*e*).

Exemption of certain companies from payment of fees.
[21 Vict. c. 14, § 32.]

189. No fees shall be charged in respect of the registration in pursuance of this part of this act of any company in cases where such company is not registered as a limited company, or where previously to its being registered as a limited company the liability of the shareholders was limited by some other act of Parliament or by letters patent.

Power to company to change name.
[20 Vict. c. 47, § 114.]

190. Any company authorised by this part of this act to register with limited liability shall, for the purpose of obtaining registration with limited liability, change its name, by adding thereto the word "limited."

Certificate of registration and incorporation of companies.
[20 Vict. c. 47, § 113.]

191. Upon compliance with the requisitions in this part of this act contained with respect to registration, and upon payment of such fees, if any, as are payable under the tables marked B. and C. in the first schedule hereto, the registrar shall certify under his hand that the company so applying for registration is incorporated as a company under this act, and, in the case of a limited company, that it is limited; and thereupon such company shall be incorporated, and shall have perpetual succession and a common seal, with power to hold lands; and any banking company in Scotland so incorporated shall be deemed and taken to be a bank incorporated, constituted, or established by or under act of Parliament (*f*).

Certificate to be evidence of compliance with act.
[20 Vict. c. 47, § 115.]

192. A certificate of incorporation given at any time to any company registered in pursuance of this part of this act shall be conclusive evidence that all the requisitions herein contained in respect of registration under this act have been complied with, and that the company is authorised to be registered under this act as a limited or unlimited company (*g*), as the case may be; and the date of incorporation mentioned in such certificate shall be deemed to be the date at which the company is incorporated under this act (*h*).

Vesting of property in company.

193. All such property, real and personal, including all interests and rights in, to, and out of property, real and personal, and including obligations, and things in action, as may belong to or be vested in the company at the date of its registration under this act, shall on registration pass to and vest in the company as incorporated under this act for all the estate and interest of the company therein (*i*).

Registration not to affect obligations incurred previously thereto.
[20 Vict. c. 47, § 116, and 21 Vict. c. 49, § 8.]

194. The registration in pursuance of this part of this act of any company shall not affect or prejudice the liability of such company to have enforced against it, or its right to enforce, any debt or obligation incurred,

(*e*) § 182. See, also, 42 & 43 Vict. c. 76, § 6. Ir. 94, and *ante*, p. 112, note (*l*).

(*f*) See § 18, *ante*, p. 111.

(*h*) Compare § 188; and see as to the certificate, *ante*, p. 111.

(*g*) These words are not in § 18. See *Ennis v. West Clare Rail. Co.*, 3 L. R.

(*i*) See *ante*, p. 263, note (*c*).

or any contract entered into, by, to, with, or on behalf of such company previously to such registration (*k*). APPENDIX V.

195. All such actions, suits, and other legal proceedings as may at the time of the registration of any company registered in pursuance of this part of this act have been commenced by or against such company, or the public officer or any member thereof, may be continued in the same manner as if such registration had not taken place; nevertheless execution shall not issue against the effects of any individual member of such company upon any judgment, decree, or order obtained in any action, suit, or proceeding so commenced as aforesaid; but in the event of the property and effects of the company being insufficient to satisfy such judgment, decree, or order, an order may be obtained for winding up the company (*l*). Continuation of existing actions and suits.
[20 Vict. c. 47, § 116, and 21
Vi-t. c. 49, § 10.]

196. When a company is registered under this act in pursuance of this part thereof, all provisions contained in any act of Parliament, deed of settlement, contract of co-partnery, cost-book regulations, letters patent, or other instrument constituting or regulating the company, including, in the case of a company registered as a company limited by guarantee, the resolution declaring the amount of the guarantee, shall be deemed to be conditions and regulations of the company, in the same manner and with the same incidents as if they were contained in a registered memorandum of association and articles of association; and all the provisions of this act shall apply to such company and the members, contributories, and creditors thereof, in the same manner in all respects as if it had been formed under this act, subject to the provisions following; (that is to say), Effect of registration.
[21 Vict. c. 14, § 33.]

- (1.) That table A. in the first schedule to this act shall not, unless adopted by special resolution, apply to any company registered under this act in pursuance of this part thereof:
- (2.) That the provisions of this act relating to the numbering of shares (*m*) shall not apply to any joint-stock company whose shares are not numbered:
- (3.) That no company shall have power to alter any provision contained in any act of Parliament relating to the company:
- (4.) That no company shall have power, without the sanction of the Board of Trade, to alter any provision contained in any letters patent relating to the company:
- (5.) That in the event of the company being wound up, every person shall be a contributory, in respect of the debts and liabilities of the company contracted prior to registration, who is liable, at law or in equity, to pay or contribute to the payment of any debt or liability of the company contracted prior to registration, or to pay or contribute to the payment of any sum, for the adjustment of the rights of the members amongst themselves in respect of any such debt or liability; or to pay or contribute to the payment of the costs, charges, and expenses of winding up the company, so far as relates to such debts or liabilities as aforesaid; and every such contributory shall be liable to contribute to the assets of the company, in the course of the winding up, all sums due from him in respect of any such liability as aforesaid; and in the event of the death, bankruptcy, or insol-

(*k*) See *ante*, p. 127.

(*m*) § 22.

(*l*) See *ante*, pp. 262, 263.

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veney of any such contributory as last aforesaid, or marriage of any such contributory being a female, the provisions hereinbefore contained with respect to the representatives, heirs, and devisees of deceased contributories, and with reference to the assignees of bankrupt or insolvent contributories, and to the husbands of married contributories, shall apply (*n*) :

- (6.) That nothing herein contained shall authorise any company to alter any such provisions contained in any deed of settlement, contract of co-partnery, cost-book regulations, letters patent, or other instrument constituting or regulating the company, as would, if such company had been originally formed under this act, have been contained in the memorandum of association, and are not authorised to be altered by this act :

But nothing herein contained shall derogate from any power of altering its constitution or regulations which may be vested in any company registering under this act in pursuance of this part thereof by virtue of any act of Parliament, deed of settlement, contract of co-partnery, letters patent, or other instrument constituting or regulating the company (*o*).

Power of court
to restrain fur-
ther proceedings.
[20 Vict. c. 47,
§ 84.]

197. The Court may, at any time after the presentation of a petition for winding up a company registered in pursuance of this part of this act, and before making an order for winding up the company, upon the application by motion of any creditor of the company, restrain further proceedings in any action, suit, or legal proceeding against any contributory of the company as well as against the company as hereinbefore provided, upon such terms as the Court thinks fit (*p*).

Order for wind-
ing up company.
[20 Vict. c. 47,
§ 73.]

198. Where an order has been made for winding up a company registered in pursuance of this part of the act, in addition to the provisions hereinbefore contained (*q*); it is hereby further provided that no suit, action, or other legal proceeding shall be commenced or proceeded with against any contributory of the company in respect of any debt of the company except with the leave of the Court, and subject to such terms as the Court may impose (*r*).

PART VIII.

APPLICATION OF ACT TO UNREGISTERED COMPANIES.

Winding up of
unregistered
companies.

11 & 12 Vict.
c. 45, §§ 1—3.]

199. Subject as hereinafter mentioned, any partnership, association, or company, except railway companies incorporated by act of Parliament (*s*), consisting of more than seven members, and not registered under this act, and hereinafter included under the term unregistered company (*t*), may be

(*n*) See §§ 74—78, 105, 106, 200, and *ante*, pp. 751 *et seq.*; pp. 846 *et seq.*, and 859; and as to Industrial and Provident Societies, *ante*, p. 916.

(*o*) As to the power of a company registered under this act to alter its memorandum of association, see § 12; and as to its power to alter its articles of associ-

ation, see §§ 50 and 176.

(*p*) See §§ 85, 195, 196, and also § 201, *ante*, pp. 672 *et seq.*, and 819.

(*q*) See §§ 87 and 196.

(*r*) See §§ 195 and 202; and see *ante*, pp. 682, 683.

(*s*) See *ante*, p. 617.

(*t*) This definition includes companies

wound up under this act; and all the provisions of this act with respect to winding up shall apply to such company, with the following exceptions and additions (*u*). APPENDIX V.

- (1.) An unregistered company shall, for the purpose of determining the Court having jurisdiction in the matter of the winding-up, be deemed to be registered in that part of the United Kingdom where its principal place of business is situate; or, if it has a principal place of business situate in more than one part of the United Kingdom, then in each part of the United Kingdom where it has a principal place of business; moreover the principal place of business of an unregistered company, or (where it has a principal place of business situate in more than one part of the United Kingdom) such one of its principal places of business as is situate in that part of the United Kingdom in which proceedings are being instituted, shall for all the purposes of the winding up of such company be deemed to be the registered office of the company:
- (2.) No unregistered company shall be wound up under this act voluntarily or subject to the supervision of the Court (*x*):
- (3.) The circumstances under which an unregistered company may be wound up are as follows (*y*): (that is to say,)
 - (*a*.) Whenever the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;
 - (*b*.) Whenever the company is unable to pay its debts;
 - (*c*.) Whenever the Court is of opinion that it is just and equitable that the company should be wound up:
- (4.) An unregistered company shall, for the purposes of this act, be deemed to be unable to pay its debts (*z*), [20 Vict. c. 47,
§ 68, and 11 &
12 Vict. c. 45,
§ 5.]
 - (*a*.) Whenever a creditor to whom the company is indebted, at law or in equity, by assignment or otherwise, in a sum exceeding fifty pounds then due, has served on the company, by leaving the same at the principal place of business of the company, or by delivering to the secretary or some director or principal officer of the company, or by otherwise serving the same in such manner as the Court may approve or direct, a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor:
 - (*b*.) Whenever any action, suit, or other proceeding has been instituted against any member of the company for any debt or demand due, or claimed to be due, from the company, or from him in his character of member of the company, and notice in writing of the institution of

registered under the acts of 1856—1858; but see as to such companies, *supra*, §§ 176, 177, and *ante*, p. 617.

(*u*) See *ante*, p. 617.

(*x*) See, as to Industrial and Provident

Societies, *ante*, pp. 916 *et seq.*

(*y*) See *ante*, pp. 628 *et seq.*

(*z*) See, as to registered companies, §§ 79, 80, and *ante*, p. 628.

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such action, suit, or other legal proceeding having been served upon the company by leaving the same at the principal place of business of the company, or by delivering it to the secretary, or some director, manager, or principal officer of the company, or by otherwise serving the same in such manner as the Court may approve or direct, the company has not within ten days after service of such notice paid, secured, or compounded for such debt or demand, or procured such action, suit, or other legal proceeding to be stayed, or indemnified the defendant to his reasonable satisfaction against such action, suit, or other legal proceeding, and against all costs, damages, and expenses to be incurred by him by reason of the same :

- (c.) Whenever, in England or Ireland, execution or other process issued on a judgment, decree, or order obtained in any court in favour of any creditor in any proceeding at law or in equity, instituted by such creditor against the company, or any member thereof as such, or against any person authorised to be sued as nominal defendant on behalf of the company, is returned unsatisfied :
- (d.) Whenever, in the case of an unregistered company engaged in working mines within and subject to the jurisdiction of the Stannaries, a customary decree or order absolute for the sale of the machinery, materials, and effects of such mine has been made in a creditor's suit in the court of the vice-warden :
- (e.) Whenever, in Scotland, the *inducior* of a charge for payment on an extract decree, or an extract registered bond or an extract registered protest, have expired without payment being made :
- (f.) Whenever it is otherwise proved to the satisfaction of the Court that the company is unable to pay its debts.

Who to be deemed contributories in the event of company being wound up.
[11 & 12 Vict. c. 45, § 2.]

200. In the event of an unregistered company being wound up every person shall be deemed to be a contributory who is liable, at law or in equity, to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members amongst themselves, or to pay or contribute to the payment of the costs, charges, and expenses of winding up the company ; and every such contributory shall be liable to contribute to the assets of the company in the course of the winding up all sums due from him in respect of any such liability as aforesaid ; but in the event of the death, bankruptcy, or insolvency of any contributory, or marriage of any female contributory, the provisions hereinbefore contained with respect to the personal representatives, heirs, and devisees of a deceased contributory, and to the assignees of a bankrupt or insolvent contributory, and to the husband of married contributories, shall apply (a).

Power of court to restrain

201. The Court may, at any time after the presentation of a petition for winding up an unregistered company, and before making an order for winding up the company, upon the application of any creditor of the com-

(a) See §§ 74—78, and 105, 106, 357 ; and as to Industrial and Provident § 196, cl. 5, and *ante*, pp. 752, 819, Societies, *ante*, p. 916.

pany, restrain further proceedings in any action, suit, or proceeding against any contributory of the company, or against the company as hereinbefore provided (*b*), upon such terms as the Court thinks fit.

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further proceedings.

202. Where an order has been made for winding up an unregistered company, in addition to the provisions hereinbefore contained in the case of companies formed under this act (*c*), it is hereby further provided that no suit, action, or other legal proceeding shall be commenced or proceeded with against any contributory of the company in respect of any debt of the company, except with the leave of the Court, and subject to such terms as the Court may impose.

[20 Vict. c. 47, § 84.]

Effect of order for winding up company.

[20 Vict. c. 47, § 73.]

203. If any unregistered company has no power to sue and be sued in a common name, or if for any reason it appears expedient, the Court may by the order made for winding up such company, or by any subsequent order, direct that all such property, real, and personal, including all interest, claims, and rights into and out of property, real and personal, and including things in action, as may belong to or be vested in the company, or to or in any person or persons on trust for or on behalf of the company, or any part of such property, is to vest in the official liquidator or official liquidators (*d*) by his or their official name or names; and thereupon the same or such part thereof as may be specified in the order shall vest accordingly; and the official liquidator or official liquidators may, in his or their official name or names, or in such name or names and after giving such indemnity as the Court directs, bring or defend any actions, suits, or other legal proceeding relating to any property vested in him or them, or any actions, suits, or other legal proceedings necessary to be brought or defended for the purpose, of effectually winding up the company and recovering the property thereof (*e*).

Property may be vested in official liquidators, &c.

[11 & 12 Vict. c. 45, § 29.]

204. The provisions made by this part of the act with respect to unregistered companies shall be deemed to be made in addition to and not in restriction of any provisions hereinbefore contained with respect to winding up companies by the Court; and the Court or official liquidator may, in addition to anything contained in this part of the act, exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies formed under this act; but an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this act, and then only to the extent provided by this part of this act (*f*).

Provisions in this part of act cumulative.

(*b*) See, also, §§ 85, 197, 199, 204; Q. B. D. 683.
and *ante*, p. 682.

(*c*) See §§ 87, 199, 204; and *ante*, p. 682.

(*d*) This does not render the liquidators personally liable, *Graham v. Edge*, 20

(*e*) See *ante*, pp. 705 *et seq.*, &c.

(*f*) As to the scope of this section, see *Rudow v. Great Britain Mutual Life Ass. Society*, 17 Ch. D. 600.

APPENDIX V.

PART IX.

REPEAL OF ACTS, AND TEMPORARY PROVISIONS.

- Repeal of acts. 205. After the commencement of this act there shall be repealed the several acts specified in the first part of the third schedule hereto, with this qualification, that so much of the said acts as is set forth in the second part of the said third schedule shall be hereby re-enacted and continue in force as if unrepealed (*g*).
- Saving clause as to repeal. 206. No repeal hereby enacted shall affect (*h*),
- (1.) Anything duly done under any acts hereby repealed :
 - (2.) The incorporation of any company registered under any act hereby repealed :
 - (3.) Any right or privilege acquired or liability incurred under any act hereby repealed :
 - [(4.) Any penalty, forfeiture, or other punishment incurred in respect of any offence against any act hereby repealed : (*i*)]
 - (5.) Table B. in the schedule annexed to the Joint-stock companies act, 1856, or any part thereof, so far as the same applies to any company existing at the time of the commencement of this act (*k*).
- Saving of existing proceedings for winding up. [207. Related to the winding up of companies under an order made or a resolution passed before the act came into operation (*l*).]
- Saving of conveyances, &c. 208. Where previously to the commencement of this act any conveyance, mortgage, or other deed has been made in pursuance of any act hereby repealed, such deed shall be of the same force as if this act had not passed, and for the purposes of such deed such repealed act shall be deemed to remain in full force.
- Compulsory registration of certain companies. 209. Every insurance company completely (*m*) registered under the act passed in the eighth year of the reign of her present Majesty, chapter one hundred and ten, intituled "An act for the registration, incorporation, and regulation of joint-stock companies," shall on or before the second day of November, one thousand eight hundred and sixty-two, and every other company required by any act hereby repealed to register under the said joint-stock companies acts, or one of such acts, and which has not so registered, shall, on or before the expiration of the thirty-first day from the commencement of this act, register itself as a company under this act, in manner and subject to the regulations hereinbefore contained (*n*), with this exception, that no company completely registered under the said act of the eighth year of the reign of her present Majesty shall be required to deliver to the registrar a copy of its deed of settlement ; and for the
- (*g*) See §§ 170—173.
- (*h*) See *ante*, p. 129.
- (*i*) Sub-section 4 is repealed by 38 & 39 Vict. c. 66.
- (*k*) See § 176.
- (*l*) See *West Silver Bank Mining Co.*, 32 Beav. 226 ; *Fire Annihilator Co.*, *ib.* 563. This section is repealed by 38 & 39 Vict. c. 66.
- (*m*) *I.e.*, under § 7, *et seq.* ; not provisionally registered under § 4, nor simply registered under § 58. See *ante*, p. 114.
- (*n*) See § 203. § 180 enables these companies to register with limited liability. See *ante*, pp. 114, 127. § 38 applies to companies registered under this section ; *Ramsay's case*, 3 Ch. D. 388.

purpose of enabling such insurance companies as are mentioned in this section to register under this act, this act shall be deemed to come into operation immediately on the passing thereof; nevertheless the registration of such companies shall not have any effect until the time of the commencement of this act. No fees shall be charged in respect of the registration of any company required to register by this section.

APPENDIX V.

210. If any company required by the last section to register under this act makes default in complying with the provisions thereof, then, from and after the day upon which such company is required to register under this act, until the day on which such company is registered under this act (which it is empowered to do at any time), the following consequences shall ensue; (that is to say,) Penalty on company not registering. [21 Vict. c. 14, § 28.]

- (1.) The company shall be incapable of suing either at law or in equity, but shall not be incapable of being made a defendant to a suit either at law or in equity (o) :
- (2.) No dividend shall be payable to any shareholder in such company :
- (3.) Each director or manager of the company shall, for each day during which the company so being in default carries on business incur a penalty not exceeding five pounds, and such penalty may be recovered by any person, whether a shareholder or not in the company, and be applied by him to his own use :

Nevertheless, such default shall not render the company so being in default illegal, nor subject it to any penalty or disability, other than as specified in this section; and registration under this act shall cancel any penalty or forfeiture, and put an end to any disability which any company may have incurred under any act hereby repealed by reason of its not having registered under the Joint-stock companies acts, 1856, 1857, or one of them.

[211 and 212. Conferred power on the Board of Trade to change the registered office of any company from any one part of the United Kingdom of Great Britain and Ireland, to any other part thereof, upon application made within one year from the passing of the act (p).] Temporary power for companies to change registered office.

(o) See *ante*, p. 127.

(p) §§ 211 and 212 are repealed by 38 & 39 Vict. c. 66.

APPENDIX V.

FIRST SCHEDULE.

TABLE A. (see §§ 14, 15) (*q*).REGULATIONS FOR MANAGEMENT OF A COMPANY LIMITED BY SHARES (*r*).*Shares (s).*First Schedule.
Table A.

- (1.) If several persons are registered as joint holders of any share, any one of such persons may give effectual receipts for any dividend payable in respect of such share.
- (2.) Every member shall, on payment of one shilling, or such less sum as the company in general meeting may prescribe, be entitled to a certificate, under the common seal of the company, specifying the share or shares held by him, and the amount paid up thereon (*t*).
- (3.) If such certificate is worn out or lost, it may be renewed, on payment of one shilling, or such less sum as the company in general meeting may prescribe.

Calls on Shares (u).

- (4.) The directors may from time to time make such calls upon the members in respect of all monies unpaid on their shares as they think fit, provided that twenty-one days' notice at least is given of each call (*x*); and each member shall be liable to pay the amount of calls so made to the persons and at the times and places appointed by the directors (*y*).
- (5.) A call shall be deemed to have been made at the time when the resolution of the directors authorising such call was passed.
- (6.) If the call payable in respect of any share is not paid before or on the day appointed for payment thereof, the holder for the time being of such share shall be liable to pay interest for the same at the rate of five pounds per cent. per annum from the day appointed for the payment thereof to the time of the actual payment.

(*q*) This table corresponds to table B. in the act of 1856. The two are substantially alike in most respects. The regulations in the above table apply to companies formed under this act, and limited by shares, unless specially excluded. (See § 15.) But they do not, unless specially adopted, apply to companies existing before the passing of the act, and registered under it: § 196: see also § 176.

The Board of Trade has power to alter these regulations (see § 71); and every company to which they apply can alter

them by a special resolution. See § 50.

(*r*) As to the construction of companies' regulations, see *ante*, pp. 172 *et seq.*

(*s*) Shares are personal estate, and must be numbered. See § 22 of the act. See *ante*, p. 451.

(*t*) See § 31 of the act.

(*u*) See, on this subject, *ante*, pp. 407, *et seq.*

(*x*) See, as to giving notices, Nos. 95—97; and see *ante*, pp. 407, *et seq.*

(*y*) § 16 makes calls specialty debts.

- (7.) The directors may, if they think fit, receive from any member willing to advance the same all or any part of the monies due upon the shares held by him beyond the sums actually called for; and upon the monies so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the company may pay interest at such rate as the member paying such sum in advance and the directors agree upon (z).

APPENDIX V.

Table A.

Transfers of shares (a).

- (8.) The instrument of transfer of any share in the company shall be executed both by the transferor and transferee; and the transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register book in respect thereof.
- (9.) Shares in the company shall be transferred in the following form:—I A. B. of _____, in consideration of the sum of _____ pounds paid to me by C. D. of _____, do hereby transfer to the said C. D. the share [or shares], numbered _____, standing in my name in the books of the _____ company, to hold unto the said C. D., his executors, administrators, and assigns, subject to the several conditions on which I held the same at the time of the execution hereof; and I, the said C. D., do hereby agree to take the said share [or shares] subject to the same conditions. As witness our hands, the _____ day of _____.
- (10.) The company may decline to register any transfer of shares made by a member who is indebted to them (b).
- (11.) The transfer books shall be closed during the fourteen days immediately preceding the ordinary general meeting in each year.

Transmission of shares.

- (12.) The executors or administrators of a deceased member shall be the only persons recognised by the company as having any title to his share.
- (13.) Any person becoming entitled to a share in consequence of the death, bankruptcy, or insolvency of any member, or in consequence of the marriage of any female member, may be registered as a member upon such evidence being produced as may from time to time be required by the company.
- (14.) Any person who has become entitled to a share in consequence of the death, bankruptcy, or insolvency of any member, or in consequence of the marriage of any female member, may, instead of

(z) Interest is payable though no profits have been earned, *Dale v. Martin*, 11 L. R., Ir. 371, affirming 9 ib. 498. shares, see *ante*, pp. 464 *et seq.*, and as to sales, see pp. 487 *et seq.*

(a) See § 22. As to the transfer of (b) See *ante*, pp. 465, 468, 470 and pp. 533 *et seq.*

APPENDIX V.

Table A.

being registered himself, elect to have some person to be named by him registered as a transferee of such share (e).

- (15.) The person so becoming entitled shall testify such election by executing to his nominee an instrument of transfer of such share.
- (16.) The instrument of transfer shall be presented to the company, accompanied with such evidence as the directors may require to prove the title of the transferor; and thereupon the company shall register the transferee as a member.

Forfeiture of shares (d).

- (17.) If any member fails to pay any call on the day appointed for payment thereof, the directors may, at any time thereafter, during such time as the call remains unpaid, serve a notice on him (e), requiring him to pay such call, together with interest and any expenses that may have accrued by reason of such non-payment.
- (18.) The notice shall name a further day, on or before which such call, and all interest and expenses that have accrued by reason of such non-payment, are to be paid. It shall also name the place where payment is to be made (the place so named being either the registered office of the company or some other place at which calls of the company are usually made payable). The notice shall also state that, in the event of non-payment at or before the time and at the place appointed, the shares in respect of which such call was made will be liable to be forfeited.
- (19.) If the requisitions of any such notice as aforesaid are not complied with, any share in respect of which such notice has been given may, at any time thereafter, before payment of all calls, interest, and expenses due in respect thereof has been made, be forfeited by a resolution of the directors to that effect.
- (20.) Any share so forfeited shall be deemed to be the property of the company, and may be disposed of in such manner as the company in general meeting thinks fit (f).
- (21.) Any member whose shares have been forfeited shall notwithstanding be liable to pay to the company all calls owing upon such shares at the time of the forfeiture (g).
- (22.) A statutory declaration in writing, that the call in respect of a share was made and notice thereof given, and that default in payment of the call was made, and that the forfeiture of the share was made by a resolution of the directors to that effect, shall be sufficient evidence of the facts therein stated, as against all persons entitled to such share; and such declaration and the receipt of the company for the price of such share shall constitute a good title to such share; and a certificate of proprietorship

(e) See, also, as to executors and administrators, § 24 of the act, *ante*, pp. 536 *et seq.*, and as to trustees in bankruptcy, pp. 551 *et seq.*

(d) See on this subject, *ante*, pp. 530 *et seq.*, and pp. 842 *et seq.*

(e) The service may be personal, or by post. See Nos. 95—97.

(f) The disposal of forfeited shares is special business. See Nos. 35, 36.

(g) See *ante*, p. 425.

shall be delivered to a purchaser, and thereupon he shall be deemed the holder of such share discharged from all calls due prior to such purchase ; and he shall not be bound to see to the application of the purchase money, nor shall his title to such share be affected by any irregularity in the proceedings in reference to such sale.

APPENDIX V.

Table A.

Conversion of shares into stock.

- (23.) The directors may, with the sanction of the company previously given in general meeting, convert any paid-up shares into stock (*h*).
- (24.) When any shares have been converted into stock, the several holders of such stock may thenceforth transfer their respective interests therein, or any part of such interests, in the same manner and subject to the same regulations as and subject to which any shares in the capital of the company may be transferred, or as near thereto as circumstances admit (*i*).
- (25.) The several holders of stock shall be entitled to participate in the dividends and profits of the company according to the amount of their respective interests in such stock ; and such interest shall, in proportion to the amount thereof, confer on the holders thereof respectively the same privileges and advantages for the purpose of voting at meetings of the company, and for other purposes, as would have been conferred by shares of equal amount in the capital of the company ; but so that none of such privileges or advantages, except the participation in the dividends and profits of the company, shall be conferred by any such aliquot part of consolidated stock as would not, if existing in shares, have conferred such privileges or advantages (*k*).

Increase in capital (l).

- (26.) The directors may, with the sanction of a special resolution of the company previously given in general meeting, increase its capital by the issue of new shares ; such aggregate increase to be of such amount, and to be divided into shares of such respective amounts, as the company in general meeting directs, or, if no direction is given, as the directors think expedient.
- (27.) Subject to any direction to the contrary that may be given by the meeting that sanctions the increase of capital, all new shares shall be offered to the members in proportion to the existing shares held by them ; and such offer shall be made by notice specifying the number of shares to which the member is entitled, and limiting a time within which the offer, if not accepted, will be deemed to be declined ; and after the expiration of such time, or on the receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the

(*h*) See the act, §§ 12, 28, 34, and 405.
ante, p. 405.

(*l*) See § 12 of the act, and *ante*, pp.
 397 &c., 401.

(*i*) See the act, § 29.

(*k*) See § 29 of the act, and *ante*, p.

APPENDIX V.

Table A.

directors may dispose of the same in such manner as they think most beneficial to the company.

- (28.) Any capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions with reference to the payment of calls, and the forfeiture of shares on non-payment of calls, or otherwise, as if it had been part of the original capital.

General meetings (m).

- (29.) The first general meeting shall be held at such time, not being more than six months after the registration of the company, and at such place, as the directors may determine (n).
- (30.) Subsequent general meetings shall be held at such time and place as may be prescribed by the company in general meeting; and if no other time or place is prescribed, a general meeting shall be held on the first Monday in February in every year, at such place as may be determined by the directors.
- (31.) The above-mentioned general meetings shall be called ordinary meetings: all other general meetings shall be called extraordinary (o).
- (32.) The directors may, whenever they think fit, and they shall upon a requisition made in writing by not less than one-fifth in number of the members of the company, convene an extraordinary general meeting.
- (33.) Any requisition made by the members shall express the object of the meeting proposed to be called, and shall be left at the registered office of the company.
- (34.) Upon the receipt of such requisition the directors shall forthwith proceed to convene an extraordinary general meeting. If they do not proceed to convene the same within twenty-one days from the date of the requisition, the requisitionists, or any other members amounting to the required number, may themselves convene an extraordinary general meeting (p).

Proceedings at general meetings (q).

- (35.) Seven days' notice at the least (r), specifying the place, the day, and the hour of meeting, and in case of special business (s) the general nature of such business, shall be given to the members in manner hereinafter mentioned (t), or in such other manner, if any, as may be prescribed by the company in general meeting; but the non-receipt of such notice by any member shall not invalidate the proceedings at any general meeting (u).
- (36.) All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of sanctioning a dividend and the

(m) See § 49 of the act, and as to meetings and the proceedings at them, *ante*, pp. 304 *et seq.*, 340.

(n) See The Companies act, 1867, § 39.

(o) See *ante*, p. 307.

(p) See § 52 of the act.

(q) See *ante*, pp. 304 *et seq.*, 340.

(r) See § 52 of the act, and *ante*, pp. 305, 306.

(s) See No. 36.

(t) See Nos. 95, 97.

(u) See *ante*, p. 304.

consideration of the accounts, balance-sheets, and the ordinary report of the directors.

APPENDIX V.

Table A.

- (37.) No business shall be transacted at any general meeting, except the declaration of a dividend, unless a quorum of members is present at the time when the meeting proceeds to business, and such quorum shall be ascertained as follows; that is to say, if the persons who have taken shares in the company (*x*) at the time of the meeting do not exceed ten in number, the quorum shall be five; if they exceed ten there shall be added to the above quorum one for every five additional members up to fifty, and one for every ten additional members after fifty, with this limitation, that no quorum shall in any case exceed twenty (*y*).
- (38.) If within one hour from the time appointed for the meeting a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved: in any other case, it shall stand adjourned to the same day in the next week, at the same time and place; and if at such adjourned meeting a quorum is not present, it shall be adjourned *sine die*.
- (39.) The chairman (if any) of the board of directors shall preside as chairman at every general meeting of the company (*z*).
- (40.) If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting, the members present shall choose some one of their number to be chairman (*a*).
- (41.) The chairman may, with the consent of the meeting, adjourn any meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place (*b*).
- (42.) At any general meeting, unless a poll is demanded by at least five members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company (*c*), shall be sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution.
- (43.) If a poll is demanded by five or more members it shall be taken in such manner as the chairman directs, and the result of such poll shall be deemed to be the resolution of the company in general meeting. In the case of an equality of votes at any general meeting the chairman shall be entitled to a second or casting vote.

Votes of members (d).

- (44.) Every member shall have one vote for every share up to ten: he shall have an additional vote for every five shares beyond the first ten shares up to one hundred, and an additional vote for every ten shares beyond the first hundred shares (*e*).

(*x*) This expression should apparently be, "if the members of the company."

(*y*) See, as to quorums, *ante*, pp. 155, 299.

(*z*) See § 52 of the act.

(*a*) See § 52 of the act.

(*b*) See *ante*, p. 341.

(*c*) See, as to this, § 67 of the act.

(*d*) See *ante*, pp. 309 *et seq.*

(*e*) See § 52 of the act.

APPENDIX V.

Table A.

- (45.) If any member is a lunatic or idiot, he may vote by his committee, curator bonis, or other legal curator.
- (46.) If one or more persons are jointly entitled to a share or shares, the member whose name stands first on the register of members as one of the holders of such share or shares, and no other, shall be entitled to vote in respect of the same.
- (47.) No member shall be entitled to vote at any general meeting unless all calls due from him have been paid, and no member shall be entitled to vote in respect of any share that he has acquired by transfer at any meeting held after the expiration of three months from the registration of the company, unless he has been possessed of the share in respect of which he claims to vote for at least three months previously to the time of holding the meeting at which he proposes to vote.
- (48.) Votes may be given either personally or by proxy (*f*).
- (49.) The instrument appointing a proxy shall be in writing, under the hand of the appointor, or if such appointor is a corporation, under their common seal, and shall be attested by one or more witness or witnesses: no person shall be appointed a proxy who is not a member of the company.
- (50.) The instrument appointing a proxy shall be deposited at the registered office of the company not less than seventy-two hours before the time for holding the meeting at which the person named in such instrument proposes to vote; but no instrument appointing a proxy shall be valid after the expiration of twelve months from the date of its execution.
- (51.) Any instrument appointing a proxy shall be in the following form (*g*):—

Company limited.

I of in the county of being a member of
the Company limited, and entitled to vote *or*
 votes, hereby appoint of as my
proxy, to vote for me and on my behalf at the [ordinary *or*
extraordinary, *as the case may be*] general meeting of the com-
pany to be held on the day of , and at any
adjournment thereof [*or* at any meeting of the company that
may be held in the year].

As witness my hand, this day of .

Signed by the said in the presence of .

Directors (h).

- (52.) The number of the directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association.
- (53.) Until directors are appointed, the subscribers of the memorandum of association shall be deemed to be directors (*i*).
- (54.) The future remuneration of the directors, and their remuneration for services performed previously to the first general meeting, shall be determined by the company in general meeting.

(*f*) See *ante*, p. 309.(*h*) See *ante*, pp. 298, 336.(*g*) This must be stamped. See *ante*,(*i*) See *ante*, p. 336.

Powers of directors (k).

APPENDIX V.

Table A.

- (55.) The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not by the foregoing act, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulations of these articles, to the provisions of the foregoing act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made (*l*).
- (56.) The continuing directors may act notwithstanding any vacancy in their body.

Disqualification of directors (m).

- (57.) The office of director shall be vacated—
 If he holds any other office or place of profit under the company;
 If he becomes bankrupt or insolvent;
 If he is concerned in or participates in the profits of any contract with the company;
 But the above rules shall be subject to the following exceptions: That no director shall vacate his office by reason of his being a member of any company which has entered into contracts with or done any work for the company of which he is director; nevertheless he shall not vote in respect of such contract or work; and if he does so vote his vote shall not be counted.

Rotation of directors (ante, p. 337).

- (58.) At the first ordinary meeting after the registration of the company the whole of the directors shall retire from office; and at the first ordinary meeting in every subsequent year one-third of the directors for the time being, or if their number is not a multiple of three, then the number nearest to one-third, shall retire from office.
- (59.) The one-third or other nearest number to retire during the first and second years ensuing the first ordinary meeting of the company shall, unless the directors agree among themselves, be determined by ballot: in every subsequent year the one-third or other nearest number who have been longest in office shall retire.
- (60.) A retiring director shall be re-eligible.
- (61.) The company at the general meeting at which any directors retire in manner aforesaid shall fill up the vacated offices by electing a like number of persons.

(*k*) See *ante*, pp. 155 *et seq.*, 298 *et seq.*, pp. 377 *et seq.*, and p. 596, &c.

(*l*) See *infra*, No. 71.

(*m*) See *ante*, pp. 300, 337.

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- (62.) If at any meeting at which an election of directors ought to take place the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week, at the same time and place; and if at such adjourned meeting the places of the vacating directors are not filled up, the vacating directors, or such of them as have not had their places filled up, shall continue in office until the ordinary meeting in the next year, and so on from time to time until their places are filled up.
- (63.) The company may from time to time, in general meeting, increase or reduce the number of directors, and may also determine in what rotation such increased or reduced number is to go out of office.
- (64.) Any casual vacancy (*n*) occurring in the board of directors may be filled up by the directors, but any person so chosen shall retain his office so long only as the vacating director would have retained the same if no vacancy had occurred.
- (65.) The company, in general meeting, may, by a special resolution (*o*), remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead; the person so appointed shall hold office during such time only as the director in whose place he is appointed would have held the same if he had not been removed (*p*).

Proceedings of directors (q).

- (66.) The directors may meet together for the despatch of business, adjourn, and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business: questions arising at any meeting shall be decided by a majority of votes: in case of equality of votes the chairman shall have a second or casting vote: a director may at any time summon a meeting of the directors.
- (67.) The directors may elect a chairman at their meetings, and determine the period for which he is to hold office; but if no such chairman is elected, or if at any meeting the chairman is not present at the time appointed for holding the same, the directors present shall choose some one of their number to be chairman of such meeting.
- (68.) The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit: any committee so formed shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on them by the directors (*r*).
- (69.) A committee may elect a chairman of their meetings: if no such chairman is elected, or if he is not present at the time

(*n*) As to the meaning of the word "casual," see *York Tramways Co. v. Willows*, 8 Q. B. D. p. 694; *Munster v. Cammell Co.*, 21 Ch. D. p. 187.

(*o*) See the act, § 51.

(*p*) *Ante*, pp. 302, 337.

(*q*) See *ante*, pp. 298 *et seq.*, and as to boards and quorums, *ante*, pp. 155, 299, 328-9.

(*r*) See *ante*, p. 338, and the references in the last note.

appointed for holding the same, the members present shall choose one of their number to be chairman of such meeting.

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Table A.

- (70.) A committee may meet and adjourn as they think proper : questions arising at any meeting shall be determined by a majority of votes of the members present ; and in case of an equality of votes the chairman shall have a second or casting vote.
- (71.) All acts done by any meeting of the directors or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director (*s*).

Dividends (t).

- (72.) The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares.
- (73.) No dividend shall be payable except out of the profits arising from the business of the company.
- (74.) The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserved fund to meet contingencies, or for equalising dividends, or for repairing or maintaining the works connected with the business of the company, or any part thereof ; and the directors may invest the sum so set apart as a reserved fund upon such securities as they may select.
- (75.) The directors may deduct from the dividends payable to any member all such sums of money as may be due from him to the company on account of calls or otherwise.
- (76.) Notice of any dividend that may have been declared shall be given to each member in manner hereinafter mentioned (*u*) ; and all dividends unclaimed for three years after having been declared may be forfeited by the directors for the benefit of the company.
- (77.) No dividend shall bear interest as against the company.

Accounts (x).

- (78.) The directors shall cause true accounts to be kept,—
- Of the stock in trade of the company ;
 - Of the sums of money received and expended by the company, and the matter in respect of which such receipt and expenditure takes place ; and
 - Of the credits and liabilities of the company :
- The books of account shall be kept at the registered office of

(*s*) See § 67 of the act, and *ante*, p. 300.

(*t*) See *ante*, pp. 429 *et seq.*

(*u*) See Nos. 95—97.

(*x*) See *ante*, pp. 439 *et seq.*, and as to accounts of banking companies, see 42 & 43 Vict. c. 76, § 7.

APPENDIX V.

Table A.

the company, and, subject to any reasonable restrictions as to the time and manner of inspecting the same that may be imposed by the company in general meeting, shall be open to the inspection of the members during the hours of business (*y*).

- (79.) Once at the least in every year the directors shall lay before the company in general meeting a statement of the income and expenditure for the past year, made up to a date not more than three months before such meeting.
- (80.) The statement so made shall show, arranged under the most convenient heads, the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure, distinguishing the expense of the establishment, salaries, and other like matters; every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting; and in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year, the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.
- (81.) A balance-sheet shall be made out in every year, and laid before the company in general meeting; and such balance-sheet shall contain a summary of the property and liabilities of the company arranged under the heads appearing in the form annexed to this table, or as near thereto as circumstances admit (*z*).
- (82.) A printed copy of such balance-sheet shall, seven days previously to such meeting, be served on every member in the manner in which notices are hereinafter directed to be served (*a*).

Audit (b).

- (83.) Once at the least in every year the accounts of the company shall be examined, and the correctness of the balance-sheet ascertained, by one or more auditor or auditors.
- (84.) The first auditors shall be appointed by the directors: subsequent auditors shall be appointed by the company in general meeting.
- (85.) If one auditor only is appointed, all the provisions herein contained relating to auditors shall apply to him.
- (86.) The auditors may be members of the company; but no person is eligible as an auditor who is interested otherwise than as a member in any transaction of the company; and no director or other officer of the company is eligible during his continuance in office.
- (87.) The election of auditors shall be made by the company at their ordinary meeting in each year.

(*y*) See *ante*, pp. 439 *et seq.*

(*a*) See No. 95.

(*z*) See form at end of this table,

(*b*) See *ante*, pp. 443, 4.

infra, p. 1000.

- (88.) The remuneration of the first auditors shall be fixed by the directors; that of subsequent auditors shall be fixed by the company in general meeting. APPENDIX V.
Table A.
- (89.) Any auditor shall be re-eligible on his quitting office.
- (90.) If any casual vacancy occurs in the office of any auditor appointed by the company, the directors shall forthwith call an extraordinary general meeting for the purpose of supplying the same.
- (91.) If no election of auditors is made in manner aforesaid, the Board of Trade may, on the application of not less than five members of the company, appoint an auditor for the current year, and fix the remuneration to be paid to him by the company for his services.
- (92.) Every auditor shall be supplied with a copy of the balance-sheet, and it shall be his duty to examine the same, with the accounts and vouchers relating thereto.
- (93.) Every auditor shall have a list delivered to him of all books kept by the company, and shall at all reasonable times have access to the books and accounts of the company: he may, at the expense of the company, employ accountants or other persons to assist him in investigating such accounts, and he may in relation to such accounts examine the directors or any other officer of the company.
- (94.) The auditors shall make a report to the members upon the balance-sheet and accounts; and in every such report they shall state whether, in their opinion, the balance-sheet is a full and fair balance-sheet, containing the particulars required by these regulations, and properly drawn up so as to exhibit a true and correct view of the state of the company's affairs, and, in case they have called for explanations or information from the directors, whether such explanations or information have been given by the directors, and whether they have been satisfactory; and such report shall be read, together with the report of the directors, at the ordinary meeting.

Notices (c).

- (95.) A notice may be served by the company upon any member either personally, or by sending it through the post in a pre-paid letter addressed to such member at his registered place of abode.
- (96.) All notices directed to be given to the members shall, with respect to any share to which persons are jointly entitled, be given to whichever of such persons is named first in the register of members; and notice so given shall be sufficient notice to all the holders of such share.
- (97.) Any notice, if served by post, shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post; and in proving such service it shall be sufficient to prove that the letter containing the notices was properly addressed and put into the post-office.

(c) These clauses only apply to notices business, see *London and Staffordshire Fire Ins. Co.*, 24 Ch. D. 149.
in the ordinary course of a company's

Dr. BALANCE SHEET (d) of the Co., made up to Cr. 18 .

CAPITAL AND LIABILITIES.				PROPERTY AND ASSETS.			
		£	s. d.	£	s. d.	£	s. d.
I. CAPITAL . . .	1 Showing : The Number of Shares . . .			III. PROPERTY held by the Company . . .	7 Showing : Immovable Property, distinguishing— (a.) Freehold Land . . . (b.) " Buildings . . . (c.) Leasehold . . . (d.) Stock in Trade . . . (e.) Plant . . . The Cost to be stated with Deductions for Deterioration in Value as charged to the Reserve Fund or Profit and Loss		
	2 The Amount paid per Share . . .						
	3 If any Arrears of Calls, the Nature of the Arrear, and the Names of the Defaulters . . .						
	4 The Particulars of any forfeited Shares . . .						
II. DEBTS AND LIABILITIES of the Company . . .	5 Showing : The Amount of Loans on Mortgages or Debenture Bonds . . .			IV. DEBTS owing to the Company . . .	9 Showing : Debts considered good for which the Company hold Bills or other Securities . . . 10 Debts considered good for which the Company hold no Security . . . 11 Debts considered doubtful and bad . . . Any Debt due from a Director or other Officer of the Company to be separately stated . . .		
	6 The Amount of Debts owing by the Company, distinguishing— (a.) Debts for which Acceptances have been given . . . (b.) Debts to Tradesmen for Supplies of Stock in Trade or other Articles . . . (c.) Debts for Law Expenses . . . (d.) Debts for Interest on Debentures or other Loans . . . (e.) Unclaimed Dividends . . . (f.) Debts not enumerated above . . .						
VI. RESERVE FUND . . .	Showing : The Amount set aside from Profits to meet Contingencies . . .			V. CASH AND INVESTMENTS . . .	12 Showing : The Nature of Investment and Rate of Interest . . . 13 The Amount of Cash, where lodged, and if bearing Interest . . .		
VII. PROFIT AND LOSS . . .	Showing : The disposable Balance for Payment of Dividend, &c. . .						
CONTINGENT LIABILITIES . . .	Claims against the Company not acknowledged as Debts . . .						
	Monies for which the Company is contingently liable . . .						

d) See clauses 81 and 82 of the foregoing Table A. As to balance-sheets of banking companies registered after the passing of the Companies act, 1879, see 42 & 43 Viet, c. 6, § 8.

TABLE B. (See § 17.)

APPENDIX V.

Table B.

TABLE OF FEES TO BE PAID TO THE REGISTRAR OF JOINT-STOCK COMPANIES BY A COMPANY HAVING A CAPITAL DIVIDED INTO SHARES.

	£	s.	d.
For registration of a company whose nominal capital does not exceed 2,000 <i>l.</i> , a fee of	2	0	0
For registration of a company whose nominal capital exceeds 2,000 <i>l.</i> , the above fee of 2 <i>l.</i> , with the following additional fees, regulated according to the amount of nominal capital; (that is to say,)	£	s.	d.
For every 1,000 <i>l.</i> of nominal capital, or part of 1,000 <i>l.</i> , after the first 2,000 <i>l.</i> , up to 5,000 <i>l.</i>	1	0	0
For every 1,000 <i>l.</i> of nominal capital, or part of 1,000 <i>l.</i> , after the first 5,000 <i>l.</i> , up to 100,000 <i>l.</i>	0	5	0
For every 1,000 <i>l.</i> of nominal capital, or part of 1,000 <i>l.</i> , after the first 100,000 <i>l.</i>	0	1	0
For registration of any increase of capital made after the first registration of the company, the same fees per 1,000 <i>l.</i> , or part of 1,000 <i>l.</i> , as would have been payable if such increased capital had formed part of the original capital at the time of registration.			
Provided that no company shall be liable to pay in respect of nominal capital on registration, or afterwards, any greater amount of fees than 50 <i>l.</i> , taking into account in the case of fees payable on an increase of capital after registration the fees paid on registration.			
For registration of any existing company, except such companies as are by this act exempted from payment of fees in respect of registration under this act (e), the same fee as is charged for registering a new company.			
For registering any document hereby required or authorised to be registered, other than the memorandum of association	0	5	0
For making a record of any fact hereby authorised or required to be recorded by the registrar of companies, a fee of	0	5	0

TABLE C. (See § 17.)

TABLE OF FEES TO BE PAID TO THE REGISTRAR OF JOINT-STOCK COMPANIES BY A COMPANY NOT HAVING A CAPITAL DIVIDED INTO SHARES.

Table C.

	£	s.	d.
For registration of a company whose number of members as stated in the articles of association does not exceed 20	2	0	0
For registration of a company whose number of members, as stated in the articles of association, exceeds 20, but does not exceed 100	5	0	0

(e) See §§ 189 and 209. 51 Vict. c. 8, § 11, requires a statement of the amount of nominal capital to be sent to the registrar, and imposes a stamp duty of 2*s.* per 100*l.* of capital.

APPENDIX V.	For registration of a company whose number of members, as stated in the articles of association, exceeds 100, but is not stated to be unlimited, the above fee of 5 <i>l.</i> , with an additional 5 <i>s.</i> for every 50 members or less number than 50 members after the first 100.	£	s.	d.
Table C.	For registration of a company in which the number of members is stated in the articles of association to be unlimited, a fee of	20	0	0
	For registration of any increase on the number of members made after the registration of the company in respect of every 50 members, or less than 50 members, of such increase	0	5	0
	Provided that no one company shall be liable to pay on the whole a greater fee than 20 <i>l.</i> in respect of its number of members, taking into account the fee paid on the first registration of the company.			
	For registration of any existing company, except such companies as are by this act exempted from payment of fees in respect of registration under this act (<i>f</i>), the same fee as is charged for registering a new company.			
	For registering any document hereby required or authorised to be registered, other than the memorandum of association	0	5	0
	For making a record of any fact hereby authorised or required to be recorded by the registrar of companies, a fee of	0	5	0

FORM D.

Form D. FORM OF STATEMENT REFERRED TO IN PART III. OF THE ACT.
(See § 44.)

* The capital of the company is , divided into shares of each.

The number of shares issued is

Calls to the amount of pounds per share have been made, under which the sum of pounds has been received.

The liabilities of the company on the first day of January (*or* July) were,—

Debts owing to sundry persons by the company :

On judgment, £

On specialty, £

On notes or bills, £

On simple contracts, £

On estimated liabilities, £

The assets of the company on that day were,—

Government securities [*stating them*], £

Bills of exchange and promissory notes, £

Cash at the bankers, £

Other securities, £

(*f*) See § 189.

* If the company has no capital divided into shares, the portion of the statement relating to capital and shares must be omitted.

APPENDIX V.

Form A.

SECOND SCHEDULE (g).

FORM A. (See § 8.)

MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BY SHARES.

1st. The name of the company is "The Eastern Steam Packet Company, Limited."

2nd. The registered office of the company will be situate in England.

3rd. The objects for which the company is established are, "the conveyance of passengers and goods in ships or boats between such places as the company may from time to time determine, and the doing all such other things as are incidental or conducive to the attainment of the above object."

4th. The liability of the members is limited.

5th. The capital of the company is two hundred thousand pounds, divided into one thousand shares of two hundred pounds each.

WE, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association; and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses, and Descriptions of Subscribers.			Number of Shares taken by each Subscriber.
"1. John Jones of	in the county of	Merchant	200
"2. John Smith of	in the county of	. . .	25
"3. Thomas Green of	in the county of	. . .	30
"4. John Thompson of	in the county of	. . .	40
"5. Caleb White of	in the county of	. . .	15
"6. Andrew Brown of	in the county of	. . .	5
"7. Cæsar White of	in the county of	. . .	10
Total shares taken			325

Dated the 22nd day of November 1861.

Witness to the above signatures,

A. B., No. 13, Hute Street, Clerkenwell, Middlesex.

FORM B. (See §§ 9, 14.)

MEMORANDUM AND ARTICLES OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE, AND NOT HAVING A CAPITAL DIVIDED INTO SHARES.

Form B.

Memorandum of association.

1st. The name of the company is "The Mutual London Marine Association, Limited."

(g) The forms in this schedule are given as examples, to be followed as closely as possible. (See § 71.) The cases to which they apply will be found in the sections referred to at the head of each form.

APPENDIX V.

Form B.

2nd. The registered office of the company will be situate in England.

3rd. The objects for which the company is established are, "the mutual insurance of ships belonging to members of the company, and the doing all such other things as are incidental or conducive to the attainment of the above objects."

4th. Every member of the company undertakes to contribute to the assets of the company, in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and the costs, charges, and expenses of winding up the same, and for the adjustment of the rights of the contributors amongst themselves, such amount as may be required not exceeding ten pounds.

WE, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association.

Names, Addresses, and Descriptions of Subscribers.

" 1. John Jones of	in the county of	Merchant.
" 2. John Smith of	in the county of	
" 3. Thomas Green of	in the county of	
" 4. John Thompson of	in the county of	
" 5. Caleb White of	in the county of	
" 6. Andrew Brown of	in the county of	
" 7. Cæsar White of	in the county of	

Dated the 22nd day of November 1861,

Witness to the above signatures,

A. B., No. 13, Hute Street, Clerkenwell, Middlesex.

ARTICLES OF ASSOCIATION TO ACCOMPANY PRECEDING MEMORANDUM OF ASSOCIATION. (See § 14.)

- (1.) The company, for the purpose of registration, is declared to consist of five hundred members.
- (2.) The directors hereinafter mentioned may, whenever the business of the association requires it, register an increase of members.

Definition of members.

- (3.) Every person shall be deemed to have agreed to become a member of the company who insures any ship or share in a ship in pursuance of the regulations hereinafter contained.

General meetings.

- (4.) The first general meeting shall be held at such time, not being more than three months after the incorporation of the company, and at such place, as the directors may determine.
- (5.) Subsequent general meetings shall be held at such time and place as may be prescribed by the company in general meeting; and if no other time or place is prescribed, a general meeting

shall be held on the first Monday in February in every year, at such place as may be determined by the directors.

APPENDIX V.

Form B.

- (6.) The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.
- (7.) The directors may, whenever they think fit, and they shall, upon a requisition made in writing by any five or more members, convene an extraordinary general meeting.
- (8.) Any requisition made by the members shall express the object of the meeting proposed to be called, and shall be left at the registered office of the company.
- (9.) Upon the receipt of such requisition the directors shall forthwith proceed to convene a general meeting; if they do not proceed to convene the same within twenty-one days from the date of the requisition, the requisitionists, or any other five members, may themselves convene a meeting.

Proceedings at general meetings.

- (10.) Seven days' notice at the least, specifying the place, the day, and the hour of meeting, and in case of special business the general nature of such business, shall be given to the members in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the company in general meeting; but the non-receipt of such notice by any member shall not invalidate the proceedings at any general meeting.
- (11.) All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of the consideration of the accounts, balance-sheets, and the ordinary report of the directors.
- (12.) No business shall be transacted at any meeting except the declaration of a dividend, unless a quorum of members is present at the commencement of such business; and such quorum shall be ascertained as follows; that is to say, if the members of the company at the time of the meeting do not exceed ten in number, the quorum shall be five; if they exceed ten, there shall be added to the above quorum one for every five additional members up to fifty, and one for every ten additional members after fifty, with this limitation, that no quorum shall in any case exceed thirty.
- (13.) If within one hour from the time appointed for the meeting a quorum of members is not present, the meeting, if convened upon the requisition of the members, shall be dissolved: in any other case it shall stand adjourned to the same day in the following week at the same time and place; and if at such adjourned meeting a quorum of members is not present, it shall be adjourned *sine die*.
- (14.) The chairman (if any) of the directors shall preside as chairman at every general meeting of the company.
- (15.) If there is no such chairman, or if at any meeting he is not present at the time of holding the same, the members present shall choose some one of their number to be chairman of such meeting.

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Form B.

- (16.) The chairman may, with the consent of the meeting, adjourn any meeting from time to time and from place to place; but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.
- (17.) At any general meeting, unless a poll is demanded by at least five members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company, shall be sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution.
- (18.) If a poll is demanded in manner aforesaid, the same shall be taken in such manner as the chairman directs, and the result of such poll shall be deemed to be the resolution of the company in general meeting.

Votes of members.

- (19.) Every member shall have one vote and no more.
- (20.) If any member is a lunatic or idiot, he may vote by his committee, curator bonis, or other legal curator.
- (21.) No member shall be entitled to vote at any meeting unless all monies due from him to the company have been paid.
- (22.) Votes may be given either personally or by proxies: a proxy shall be appointed in writing under the hand of the appointor, or, if such appointor is a corporation, under its common seal.
- (23.) No person shall be appointed a proxy who is not a member; and the instrument appointing him shall be deposited at the registered office of the company not less than forty-eight hours before the time of holding the meeting at which he proposes to vote.
- (24.) Any instrument appointing a proxy shall be in the following form:—

Company Limited.

I of in the county of being a member of
the company limited, hereby appoint of
as my proxy, to vote for me and on my behalf at the [ordinary
or extraordinary, *as the case may be*] general meeting of the
company to be held on the day of , and at any
adjournment thereof to be held on the day of
next [*or*, at any meeting of the company that may be held in
the year].

As witness my hand, this day of .

Signed by the said in the presence of .

Directors.

- (25.) The number of the directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association.
- (26.) Until directors are appointed, the subscribers of the memorandum of association shall for all the purposes of this act be deemed to be directors.

Powers of directors.

APPENDIX V.

FORM B.

- (27.) The business of the company shall be managed by the directors, who may exercise all such powers of the company as are not hereby required to be exercised by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

Election of directors.

- (28.) The directors shall be elected annually by the company in general meeting.

Business of company.

[Here insert rules as to mode in which business of insurance is to be conducted.]

Accounts.

- (29.) The accounts of the company shall be audited by a committee of five members, to be called the audit committee.
- (30.) The first audit committee shall be nominated by the directors out of the body of members.
- (31.) Subsequent audit committees shall be nominated by the members at the ordinary general meeting in each year.
- (32.) The audit committee shall be supplied with a copy of the balance-sheet, and it shall be their duty to examine the same with the accounts and vouchers relating thereto.
- (33.) The audit committee shall have a list delivered to them of all books kept by the company, and they shall at all reasonable times have access to the books and accounts of the company; they may, at the expense of the company, employ accountants or other persons to assist them in investigating such accounts, and they may in relation to such accounts examine the directors or any other officer of the company.
- (34.) The audit committee shall make a report to the members upon the balance-sheet and accounts; and in every such report they shall state whether in their opinion the balance-sheet is a full and fair balance-sheet, containing the particulars required by these regulations of the company, and properly drawn up so as to exhibit a true and correct view of the state of the company's affairs, and, in case they have called for explanation or information from the directors, whether such explanations or information have been given by the directors, and whether they have been satisfactory; and such report shall be read, together with the report of the directors, at the ordinary meeting.

Notices.

- (35.) A notice may be served by the company upon any member either personally, or by sending it through the post in a prepaid letter addressed to such member at his registered place of abode.
- (36.) Any notice, if served by post, shall be deemed to have been

APPENDIX V.

Form B.

served at the time when the letter containing the same would be delivered in the ordinary course of the post ; and in proving such service it shall be sufficient to prove that the letter containing the notice was properly addressed, and put into the post office.

Winding up.

- (37). The company shall be wound up voluntarily whenever an extraordinary resolution, as defined by the Companies act, 1862, is passed, requiring the company to be wound up voluntarily.

Names, Addresses, and Descriptions of Subscribers.

" 1. John Jones of	in the county of	Merchant.
" 2. John Smith of	in the county of	
" 3. Thomas Green of	in the county of	
" 4. John Thompson of	in the county of	
" 5. Caleb White of	in the county of	
" 6. Andrew Brown of	in the county of	
" 7. Caesar White of	in the county of	

Dated the 22nd day of November 1861.

Witness to the above signatures,

A. B., No. 13, Hute Street, Clerkenwell, Middlesex.

FORM C. (See §§ 9 & 14.)

Form C.

MEMORANDUM AND ARTICLES OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE, AND HAVING A CAPITAL DIVIDED INTO SHARES.

Memorandum of association.

1st. The name of the company is, "The Highland Hotel Company, Limited."

2nd. The registered office of the company will be situate in Scotland.

3rd. The objects for which the company is established are "the facilitating travelling in the Highlands of Scotland, by providing hotels and conveyances by sea and by land for the accommodation of travellers, and the doing all such other things as are incidental or conducive to the attainment of the above object."

4th. Every member of the company undertakes to contribute to the assets of the company in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and the costs, charges, and expenses of winding up the same, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required not exceeding twenty pounds.

WE, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association.

Names, Addresses, and Descriptions of Subscribers.

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Form C.

" 1. John Jones of	in the county of	Merchant.
" 2. John Smith of	in the county of	
" 3. Thomas Green of	in the county of	
" 4. John Thompson of	in the county of	
" 5. Caleb White of	in the county of	
" 6. Andrew Brown of	in the county of	
" 7. Cæsar White of	in the county of	

Dated the 22nd day of November 1861.

Witness to the above signatures,

A. B., No. 13, Hute Street, Clerkenwell, Middlesex.

Articles of association to accompany preceding memorandum of association.

(See § 14.)

1. The capital of the company shall consist of five hundred thousand pounds, divided into five thousand shares of one hundred pounds each.

2. The directors may, with the sanction of the company in general meeting, reduce the amount of shares.

3. The directors may, with the sanction of the company in general meeting, cancel any shares belonging to the company.

4. All the articles of Table A. shall be deemed to be incorporated with these articles, and to apply to the company.

WE, the several persons whose names and addresses are subscribed, agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses, and Descriptions of Subscribers.			Number of Shares taken by each Subscriber.
" 1. John Jones of	in the county of	Merchant	200
" 2. John Smith of	in the county of	. .	25
" 3. Thomas Green of	in the county of	. .	30
" 4. John Thompson of	in the county of	. .	40
" 5. Caleb White of	in the county of	. .	15
" 6. Andrew Brown of	in the county of	. .	5
" 7. Cæsar White of	in the county of	. .	10
Total shares taken			325

Dated the 22nd day of November 1861.

Witness to the above signatures,

A. B., No. 13, Hute Street, Clerkenwell, Middlesex.

FORM D. (See §§ 10, 14.)

MEMORANDUM AND ARTICLES OF ASSOCIATION OF AN UNLIMITED COMPANY, HAVING A CAPITAL DIVIDED INTO SHARES.

Form D.

Memorandum of association.

1st. The name of the company is "The Patent Stereotype Company."

2nd. The registered office of the company will be situate in England.

L.C.

3 T

APPENDIX V.
Form D.

3rd. The objects for which the company is established are “ the working of a patent method of founding and casting stereotype plates, of which method John Smith, of London, is the sole patentee.”

WE, the several persons whose names are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association.

Names, Addresses, and Descriptions of Subscribers.

- | | | |
|-----------------------|------------------|-----------|
| “ 1. John Jones of | in the county of | Merchant. |
| “ 2. John Smith of | in the county of | |
| “ 3. Thomas Green of | in the county of | |
| “ 4. John Thompson of | in the county of | |
| “ 5. Caleb White of | in the county of | |
| “ 6. Andrew Brown of | in the county of | |
| “ 7. Abel Brown of | in the county of | |

Dated 22nd day of November 1861.
Witness to the above signatures,
A. B., No. 20, Bond Street, Middlesex.

Articles of association to accompany the preceding memorandum of association. (See § 14.)

Capital of the company.

The capital of the company is two thousand pounds, divided into twenty shares of one hundred pounds each.

Application of Table A.

All the articles of Table A. shall be deemed to be incorporated with these articles, and to apply to the company.

WE, the several persons whose names and addresses are subscribed, agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses, and Descriptions of Subscribers.				Number of Shares taken by Sub- scribers.
“ 1. John Jones of	in the county of	Merchant		1
“ 2. John Smith of	in the county of	. .		5
“ 3. Thomas Green of	in the county of	. .		2
“ 4. John Thompson of	in the county of	. .		2
“ 5. Caleb White of	in the county of	. .		3
“ 6. Andrew Brown of	in the county of	. .		4
“ 7. Abel Brown of	in the county of	. .		1
Total shares taken				18

Dated the 22nd day of November 1861.
Witness to the above signatures,
A. B., No. 20, Bond Street, Middlesex.

FORM E. as required by the Second Part of the Act (see § 26) (h).

SUMMARY of CAPITAL AND SHARES of the COMPANY, made up to the Day of .

Nominal Capital £ divided into Shares of £ each.
 Number of Shares taken up to the day of
 There has been called up on each Share £
 Total amount of Calls received £
 Total amount of Calls unpaid £

List of Persons holding Shares in the Company on the day of , and of Persons who have held Shares therein at any Time during the Year immediately preceding the said day of , showing their Names and Addresses, and an Account of the Shares so held.

Folio in Register Ledger containing Particulars.	NAMES, ADDRESSES, AND OCCUPATIONS.			ACCOUNT OF SHARES.			Remarks.
	Surname.	Christian Name.	Address.	Shares held by existing Members on the day of	Additional Shares held by existing Members during preceding Year.		Shares held by Persons no longer Members.
					Number.	Date of Transfer.	

(h. For additional particulars required when shares have been converted into stock, see § 29; when share warrants have been issued, see 30 & 31 Vict. c. 131 § 32; when a portion of the paid-up capital has been returned, see 43 Vict. c. 19, § 6.

APPENDIX V.

Form F.

FORM F. (See § 21.)

LICENCE TO HOLD LANDS.

The lords of the committee of privy council appointed for the consideration of matters relating to trade and foreign plantations hereby license the Association, Limited, to hold the lands hereunder described [*insert description of lands*]. The conditions of this licence are [*insert conditions, if any*].

THIRD SCHEDULE. (See § 205.)

FIRST PART.

	Date and Chapter of Act.	Title of Act.
Acts repealed.	21 & 22 Geo. 3, c. 46	An Act to promote Trade and Manufactures by regulating and encouraging partnerships.
	(Parliament of Ireland)	
	7 & 8 Vict. c. 110	An Act for the Registration, Incorporation, and Regulation of Joint-Stock Companies.
	7 & 8 Vict. c. 111	An Act for facilitating the winding up the Affairs of Joint-Stock Companies unable to meet their pecuniary Engagements.
	7 & 8 Vict. c. 113	An Act to Regulate Joint-Stock Banks in England.
	8 & 9 Vict. c. 98	An Act for facilitating the winding up the Affairs of Joint-Stock Companies in Ireland unable to meet their pecuniary Engagements.
	9 & 10 Vict. c. 28	An Act to facilitate the Dissolution of certain Railway Companies.
	9 & 10 Vict. c. 75	An Act to Regulate Joint-Stock Banks in Scotland and Ireland.
	10 & 11 Vict. c. 78	An Act to amend an Act for the Registration, Incorporation, and Regulation of Joint-Stock Companies.
	11 & 12 Vict. c. 45	An Act to amend the Acts for facilitating the winding up the Affairs of Joint Stock Companies unable to meet their pecuniary Engagements, and also to facilitate the Dissolution and winding up of Joint-Stock Companies and other Partnerships.
	12 & 13 Vict. c. 108	An Act to amend the Joint-Stock Companies Winding-up Act, 1848.
	19 & 20 Vict. c. 47	An Act for the Incorporation and Regulation of Joint-Stock Companies and other Associations.
	20 & 21 Vict. c. 14	An Act to amend the Joint-Stock Companies Act, 1856.
	20 & 21 Vict. c. 49	An Act to amend the Law relating to Banking Companies.
	20 & 21 Vict. c. 78	An Act to amend the Act Seven and Eight Victoria, Chapter One hundred and eleven, for facilitating the winding up the affairs of Joint-Stock Companies unable to meet their pecuniary Engagements, and also the Joint-Stock Companies Winding-up Acts, 1848 and 1849.
	20 & 21 Vict. c. 80	An Act to amend the Joint-Stock Companies Act, 1856.
	21 & 22 Vict. c. 60	An Act to amend the Joint Stock Companies Acts, 1856 and 1857, and the Joint-Stock Banking Companies Act, 1857.
	21 & 22 Vict. c. 91	An Act to enable Joint-Stock Banking Companies to be formed on the Principle of Limited Liability.

SECOND PART (*i*).

APPENDIX V.

7 & 8 VICT. c. 113, s. 47.

Every company of more than six persons established on the sixth day of May one thousand eight hundred and forty-four, for the purpose of carrying on the trade or business of bankers within the distance of sixty-five miles from London, and not within the provisions of the act passed

Existing companies to have the powers of suing and being sued.

(*i*) The explanation of the Second Part of the Third Schedule to the foregoing statute, is as follows :—

The 39 & 40 Geo. 3, c. 28, rendered all banking companies of more than six persons illegal, the Bank of England alone being excepted.

The 7 Geo. 4, c. 46, rendered banking companies of more than six persons legal, provided they did not carry on business within 65 miles of London. The same act also empowered the banking companies thus legalised to sue and be sued by public officers, upon certain conditions.

The 3 & 4 Will. 4, c. 98, enabled banking companies of more than six persons to carry on business within 65 miles of London, subject to certain restrictions; but neither this act nor any other, prior to the 7 & 8 Vict., extended to these companies the privilege of suing and being sued by public officers, and which privilege was enjoyed under 7 Geo. 4, c. 46, by banking companies carrying on business more than 65 miles from London.

The 7 & 8 Vict. c. 113, § 47, which is above preserved from repeal, conferred the privilege in question upon banking companies of more than six members carrying on business within 65 miles of London, and established before the 6th of May, 1844.

The same act (7 & 8 Vict. c. 113) prohibited the formation after the 6th of May, 1844, of banking companies of more than six persons, save under its provisions (§ 1). This act also authorised banking companies of more than six persons formed before the 6th of May, 1844, to obtain charters of incorporation, and so bring themselves within the provisions of the act (§ 45). Once

within its provisions by incorporation, the privilege of suing and being sued by

public officers would, of course, be unnecessary; and this accounts for the occurrence in the 47th section of 7 & 8 Vict. c. 113, of the words “and not within the provisions of this Act.”

With respect to the 20 & 21 Vict. c. 49, it must be borne in mind that when it passed, there were three kinds of banking partnerships and companies in existence, viz. :—1. Ordinary banking firms of not more than six members; 2. Banking companies of more than six members formed before the 6th of May, 1844, but not incorporated; and 3. Banking companies of more than six members, which, whether formed before or after the 6th of May, 1844, were incorporated under the provisions of 7 & 8 Vict. c. 113. It must also be borne in mind that prior to the passing of the 20 & 21 Vict. c. 49, the privileges of banking partnerships and companies to issue notes, &c., depended partly upon whether they consisted of more than six members or not, and partly upon the distance from London at which they carried on their business. (See *ante*, p. 136 n.) Such was the state of the law when the Joint-stock banking companies act, 1857, passed. That act (20 & 21 Vict. c. 49) did four things, viz. :—1. It imperatively required all banking companies formed under 7 & 8 Vict. c. 113, to register (§ 4). 2. It repealed that act, not only with respect to banking companies formed after the 17th of August, 1857, but also with respect to all companies formed before that time under 7 & 8 Vict. c. 113, as soon as they should have registered as required. (See § 12.) 3. It prohibited the formation of banking companies of more than ten members, save under its own provisions

Note on banking companies. [See also *ante*, pp. 136—138.]

APPENDIX V.

in the session holden in the seventh and eighth years of the reign of Her present Majesty, chapter one hundred and thirteen, shall have the same powers and privileges of suing and being sued in the name of any one of the public officers of such copartnership as the nominal plaintiff, petitioner, or defendant on behalf of such co-partnership, and all judgments, decrees, and orders made and obtained in any such suit may be enforced, in like manner as is provided with respect to such companies carrying on

Note on banking companies.

(§ 13). 4. It conferred upon banking companies of not more than ten members the privileges previously enjoyed by banking firms of not more than six members (§ 12). This last enactment it is which is preserved from repeal by the act of 1862.

The above observations will, it is hoped, enable the reader to understand without difficulty the object of saving from repeal the clauses in the second part of the 3rd schedule to the Companies act, 1862.

A few additional remarks, however, are necessary to explain the varieties of banking companies which may be met with after that act has come into operation.

Until 1857 banking companies could not be formed by registration, and until the following year they could not be formed with limited liability, except by virtue of some special act of Parliament or royal charter. In 1857, however, an act was passed, authorising banking companies of more than six members to register (20 & 21 Vict. c. 49); and in 1858 another act was passed, authorising them to register with limited liability (21 & 22 Vict. c. 91). Companies actually registered under these acts are made subject to the provisions of the act of 1862 (see §§ 176, 177), which also authorises the formation of new banking companies of more than six members, with limited or unlimited liability (§ 6). Adding registered banking companies therefore to those which existed before 1857, the result will be as follows:—

1. There may be ordinary banking partnerships of not more than ten members.

2. There may be companies of more than six members formed before the 6th May, 1844, and empowered to sue and be sued by public officers, but not

registered.

3. There may be registered companies of more than six members. Companies of this class may be limited or not, and may have been originally formed before or after May, 1844, and if after, then either under 7 & 8 Vict. c. 113, or under the Joint-stock companies acts of 1857—1858, or under the new act of 1862. As to the power of a bank registered as unlimited to re-register as limited, see 42 & 43 Vict. c. 76.

4. There may, perhaps, be yet another class, viz., companies formed before the 6th of May, 1844, and subsequently incorporated by royal charter under 7 & 8 Vict. c. 113, § 46, but not registered under any of the later acts. Such a company might possibly be considered as not having been formed under 7 & 8 Vict. c. 113, within the meaning of 20 & 21 Vict. c. 49, § 4; and, if so, registration under this last act would not be compulsory, and if not compulsory under that act, it is not compulsory under the act of 1862. (See § 209.) If, however, the incorporation of the company by charter be considered as the formation of the company within the meaning of 20 & 21 Vict. c. 49, § 4, then the registration of the company is imperative, and the class under consideration cannot legally exist. The latter view the writer conceives to be correct.

In addition to the above four classes there, of course, may be banking companies formed under special acts or charters of their own.

With reference to Irish banks, and as to how far the Irish act, 33 Geo. 2, c. 14, is repealed by the imperial act, 6 Geo. 4, c. 42, see *O'Flaherty v. McDowell*, 6 H. L. C. 142, and *Copland v. Davis*, L. R. 5 H. L. 358.

the said trade or business at any place in England exceeding the distance of sixty-five miles from London, under the provisions of an act passed in the seventh year of the reign of King George the fourth, chapter forty-six, intituled, "An act for the better regulating copartnerships of certain bankers in England, and for amending so much of an act of the thirty-ninth and fortieth years of the reign of His late Majesty King George the third, intituled 'An act for establishing an agreement with the governor and company of the Bank of England for advancing the sum of three millions towards the supply for the service of the year one thousand eight hundred,' as relates to the same"; provided, that such first-mentioned company shall make out and deliver from time to time to the commissioners of stamps and taxes the several accounts or returns required by the last-mentioned act; and all the provisions of the last-recited act as to such accounts or returns shall be taken to apply to the accounts or returns so made out and delivered by such first-mentioned companies as if they had been originally included in the provisions of the last-recited act.

20 & 21 Vict. c. 49, part of section 12.

Notwithstanding anything contained in any act passed in the session holden in the seventh and eighth years of the reign of Her present Majesty, chapter one hundred and thirteen, and intituled "An act to regulate Joint-Stock Banks in England," or in any other act, it shall be lawful for any number of persons, not exceeding ten, to carry on in partnership the business of banking, in the same manner and upon the same conditions in all respects as any company of not more than six persons could before the passing of this act have carried on such business.

Power to form banking partnerships of ten persons.

THE COMPANIES SEALS ACT, 1864.

27 VICT. CAP. 19.

An act to enable joint stock companies carrying on business in foreign countries to have official seals to be used in such countries (k).

[13th May, 1864.]

WHEREAS there have been and may be established in the United Kingdom companies whose business is to be carried on in countries not situate in the United Kingdom, and it is convenient and desirable that investments may be made, and mortgages, conveyances, and leases taken, and contracts and engagements entered into, on behalf of the Company, in such countries, in the name of the company: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This act may be cited for all purposes as "the Companies seals Short Title, 1864."

(k) See *ante*, p. 229.

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Power to
companies to
have an
official seal.

2. Any company, under "The Companies act, 1862," whose objects require or comprise the transaction of business, as hereinbefore mentioned, in foreign countries, may cause to be prepared an official seal for and to be used in any place, district, or territory situate out of the United Kingdom in which the business of the company shall be carried on, and every such official seal may and shall be a fac-simile of or as nearly as practicable a fac-simile of the common seal of the company, with the exception that on the face thereof shall be inscribed the name of each and every place, district, or territory in and for which it is to be used : provided that it shall be lawful for any such company as aforesaid from time to time to break up and renew any official seal or seals, and to vary the limits within which it is intended to be used.

Power to com-
panies to appoint
agents abroad to
affix seals.

3. Every company having or using any such official seal as is authorised by this act may from time to time, by any instrument or instruments in writing under the common seal of the company, empower any agent or agents specially appointed for the purpose, or any local agent, board, committee, manager, or commissioner appointed under the provisions of the articles of association of such company, in any place, district, or territory situate out of the United Kingdom where the business of the company shall for the time being be carried on, to affix such official seal to any deed, contract, or other instrument to which the company is or shall be made a party in such place, district, or territory, and no other order of the company or the board of directors thereof shall be necessary to authorize any such seal to be affixed to any deed, contract, or other instrument.

As to the
duration of
powers granted
under sect. 3 of
this act.

4. Every power granted under the last preceding section shall, as between the company, their successors and assigns, on the one hand, and the person or persons dealing with the agent or agents, board, committee, manager, or commissioner named in the instrument conferring the power, and all parties claiming through or under such person or persons, on the other hand, continue in force during the period, if any, mentioned in the instrument conferring the power, or if no power be there mentioned then until notice of the revocation or determination of the power shall have been given to such person or persons as aforesaid.

Person affixing
seal to document
to certify the
date when so
affixed.

5. Whenever any such official seal as aforesaid shall be affixed to any document, the person affixing the same shall, by writing under his hand and written on the document to which the seal may have been affixed, certify the date when and the place where the same was affixed ; and any document to which any such seal shall have been duly affixed within the district or territory or place the name whereof is inscribed on such seal shall bind the company in the same way and to the same extent and have the same force and effect as if it had been duly sealed with the common seal of the company.

Companies not
to exercise
powers of act
unless autho-
rized.

6. The powers given by this act shall be exercised by such companies only as are or shall be expressly authorised to exercise the same by their articles of association, or a special resolution passed according to the provisions of "The Companies act, 1862," and shall be exercised by such companies subject to any directions or restrictions in their articles of association or the special resolutions contained.

Section 55 of
25 & 26 Vict.
c. 89, not
repealed.

7. Nothing in this act contained shall operate to repeal the provisions of the fifty-fifth section of "The Companies act, 1862," but such section shall continue in force, and all acts done or to be done thereunder shall be as valid and effectual as if this act had not been passed.

“THE COMPANIES ACT, 1867.”

30 & 31 VICT. CAP. 131.

An Act to amend “The Companies act, 1862.”

[20th August, 1867.]

BE it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Preliminary.

1. This act may be cited for all purposes as “The Companies act, Short title. 1867.”

2. The Companies act, 1862, is hereinafter referred to as “the principal act ;” and the principal act and this act are hereinafter distinguished as and may be cited for all purposes as “The Companies Acts, 1862 and 1867 ;” and this act shall, so far as is consistent with the tenor thereof, be construed as one with the principal act ; and the expression “this act” in the principal act, and any expression referring to the principal act which occurs in any act or other document, shall be construed to mean the principal act as amended by this act.

Act to be construed as one with 25 & 26 Vict. c. 89.

3. This act shall come into force on the first day of September one thousand eight hundred and sixty-seven, which date is hereinafter referred to as the commencement of this act.

Commencement of act.

Unlimited liability of directors.

4. Where after the commencement of this act a company is formed as a limited company under the principal act, the liability of the directors or managers of such company, or the managing director, may, if so provided by the memorandum of association, be unlimited.

Company may have directors with unlimited liability.

5. The following modifications shall be made in the thirty-eighth section of the principal act with respect to the contributions to be required in the event of the winding up of a limited company under the principal act, from any director or manager whose liability is, in pursuance of this act, unlimited :

Liability of directors, past and present, where liability is unlimited.

- (1.) Subject to the provisions hereinafter contained, any such director or manager, whether past or present, shall, in addition to his liability (if any) to contribute as an ordinary member, be liable to contribute as if he were at the date of the commencement of such winding up a member of an unlimited company :
- (2.) No contribution required from any past director or manager who has ceased to hold such office for a period of one year or upwards prior to the commencement of the winding up shall exceed the amount (if any) which he is liable to contribute as an ordinary member of the company :
- (3.) No contribution required from any past director or manager in respect of any debt or liability of the company contracted after the time at which he ceased to hold such office shall exceed the

APPENDIX V.

amount (if any) which he is liable to contribute as an ordinary member of the company :

- (4.) Subject to the provisions contained in the regulations of the company, no contribution required from any director or manager shall exceed the amount (if any) which he is liable to contribute as an ordinary member, unless the Court deems it necessary to require such contribution in order to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of the winding up.

Director with unlimited liability may have set-off as under sect. 101, of 25 & 26 Vict. c. 89.

Notice to be given to director on his election that his liability will be unlimited.

Penalty for neglect to give notice. Liability not affected by neglect.

Existing limited companies may, by special resolutions, make liability of directors unlimited.

6. In the event of the winding up of any limited company, the Court, if it think fit, may make to any director or manager of such company whose liability is unlimited the same allowance by way of set-off as under the one hundred and first section of the principal act it may make to a contributory where the company is not limited.

7. In any limited company in which, in pursuance of this act, the liability of a director or manager is unlimited, the directors or managers of the company (if any), and the member who proposes any person for election or appointment to such office, shall add to such proposal a statement that the liability of the person holding such office will be unlimited ; and the promoters, directors, managers, and secretary (if any) of such company, or one of them, shall, before such person accepts such office or acts therein, give him notice in writing that his liability will be unlimited.

If any director, manager, or proposer make default in adding such statement, or if any promoter, director, manager, or secretary make default in giving such notice, he shall be liable to a penalty not exceeding one hundred pounds, and shall also be liable for any damage which the person so elected or appointed may sustain from such default ; but the liability of the person elected or appointed shall not be affected by such default.

8. Any limited company under the principal act, whether formed before or after the commencement of this act, may, by a special resolution, if authorised so to do by its regulations, as originally framed or as altered by special resolution, from time to time modify the conditions contained in its memorandum of association so far as to render unlimited the liability of its directors or managers, or of the managing director ; and such special resolution shall be of the same validity as if it had been originally contained in the memorandum of association, and a copy thereof shall be embodied in or annexed to every copy of the memorandum of association which is issued after the passing of the resolution ; and any default in this respect shall be deemed to be a default in complying with the provisions of the fifty-fourth section of the principal act, and shall be punished accordingly (*l*).

Reduction of capital and shares (m).

Power to company to reduce capital, by special resolution and order of Court registered by registrar.

9. Any company limited by shares may, by special resolution, so far modify the conditions contained in its memorandum of association, if authorised so to do by its regulations, as originally framed or as altered by special resolution, as to reduce its capital ; but no such resolution for

(*l*) See, as to special resolutions, act of 1862, § 51, and as to altering the memorandum, *ib.* § 12.

(*m*) See Ord. of 1863, rules 2 *et seq.* ; and 40 & 41 Vict. c. 26, §§ 2 to 5, *infra* ; and 43 Vict. c. 19 ; and *ante*, p. 402.

reducing the capital of any company shall come into operation until an order of the Court is registered by the registrar of joint-stock companies, as is hereinafter mentioned. APPENDIX V.

10. The company shall after the date of the passing of any special resolution for reducing its capital add to its name, until such date as the Court may fix, the words "and reduced," as the last words in its name; and those words shall, until such date, be deemed to be part of the name of the company within the meaning of the principal act. Company to add "and reduced" to its name for a limited period.

11. A company which has passed a special resolution for reducing its capital may apply to the Court by petition for an order confirming the reduction; and on the hearing of the petition the Court, if satisfied that with respect to every creditor of the company who under the provisions of this act is entitled to object to the reduction, either his consent to the reduction has been obtained, or his debt or claim has been discharged or has determined, or has been secured as hereinafter provided, may make an order confirming the reduction on such terms and subject to such conditions as it deems fit. Company to apply to the Court for an order confirming reduction, which may be made as herein provided.

12. The expression "the Court" shall in this act mean the Court which has jurisdiction to make an order for winding up the petitioning company; and the eighty-first and eighty-third sections of the principal act shall be construed as if the term "winding up" in those sections included proceedings under this act; and the Court may in any proceedings under this act make such order as to costs as it deems fit. Definition of the Court.
[Costs.]

13. Where a company proposes to reduce its capital, every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the proposed reduction, and to be entered in the list of creditors who are so entitled to object. Creditors entitled to prove in winding up may object to reduction.

The Court shall settle a list of such creditors, and for that purpose shall ascertain as far as possible without requiring an application from any creditor the names of such creditors and the nature and amount of their debts or claims, and may publish notices fixing a certain day or days within which creditors of the company who are not entered on the list are to claim to be so entered or to be excluded from the right of objecting to the proposed reduction. List of objecting creditors to be settled by the Court.

14. Where a creditor whose name is entered on the list of creditors, and whose debt or claim is not discharged or determined, does not consent to the proposed reduction, the Court may (if it think fit) dispense with such consent on the company securing the payment of the debt or claim of such creditor by setting apart and appropriating, in such manner as the Court may direct, a sum of such amount as is hereinafter mentioned; (that is to say,) Court may dispense with consent of creditor on security being given for his debt.

- (1.) If the full amount of the debt or claim of the creditor is admitted by the company, or, though not admitted, is such as the company are willing to set apart and appropriate, then the full amount of the debt or claim shall be set apart and appropriated.
- (2.) If the full amount of the debt or claim of the creditor is not admitted by the company, and is not such as the company are willing to set apart and appropriate, or if the amount is contingent or not ascertained, then the Court may, if it think fit, inquire into and adjudicate upon the validity of such debt or claim, and the amount for which the company may be liable in respect thereof, in the same manner as if the company were

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being wound up by the Court, and the amount fixed by the Court on such inquiry and adjudication shall be set apart and appropriated.

Order confirm-
ing reduction
and minute
showing certain
particulars as to
capital as altered
to be registered.

15. The registrar of joint stock companies, upon the production to him of an order of the Court confirming the reduction of the capital of a company, and the delivery to him of a copy of the order, and of a minute (approved by the Court), showing with respect to the capital of the company, as altered by the order, the amount of such capital, the number of shares in which it is to be divided, and the amount of each share, shall register the order and minute, and on the registration the special resolution confirmed by the order so registered shall take effect.

Notice of such registration shall be published in such manner as the Court may direct.

The registrar shall certify under his hand the registration of the order and minute, and his certificate shall be conclusive evidence that all the requisitions of this act with respect to the reduction of capital have been complied with, and that the capital of the company is such as is stated in the minute.

Minute to form
part of memo-
randum of asso-
ciation and mem-
bers to be liable
only for dif-
ference between
amounts paid on
shares and
amounts of shares
as fixed by
minute.

16. The minute when registered shall be deemed to be substituted for the corresponding part of the memorandum of association of the company, and shall be of the same validity and subject to the same alterations as if it had been originally contained in the memorandum of association; and, subject as in this act mentioned, no member of the company, whether past or present, shall be liable in respect of any share to any call or contribution exceeding in amount the difference (if any) between the amount which has been paid on such share and the amount of the share as fixed by the minute.

Saving of rights
of creditors who
are ignorant of
proceedings.

17. If any creditor who is entitled in respect of any debt or claim to object to the reduction of the capital of a company under this act, is in consequence of his ignorance of the proceedings taken with a view to such reduction, or of their nature and effect with respect to his claim, not entered on the list of creditors, and after such reduction the company is unable, within the meaning of the eightieth section of the principal act, to pay to the creditor the amount of such debt or claim, every person who was a member of the company at the date of the registration of the order and minute relating to the reduction of the capital of the company shall be liable to contribute for the payment of such debt or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day prior to such registration; and on the company being wound up, the Court, on the application of such creditor, and on proof that he was ignorant of the proceedings taken with a view to the reduction, or of their nature and effect with respect to his claim, may, if it think fit, settle a list of such contributories accordingly, and make and enforce calls and orders on the contributories settled on such list in the same manner in all respects as if they were ordinary contributories in a winding up; but the provisions of this section shall not affect the rights of the contributories of the company among themselves.

Copy of regis-
tered minute to
be embodied in
every memoran-
dum of associa-
tion subsequently
issued.

18. A minute when registered shall be embodied in every copy of the memorandum of association issued after its registration; and if any company makes default in complying with the provisions of this section it shall incur a penalty not exceeding one pound for each copy in respect of which such default is made, and every director and manager of the company

who shall knowingly and wilfully authorise or permit such default shall incur the like penalty. APPENDIX V.

19. If any director, manager, or officer of the company wilfully conceals the name of any creditor of the company who is entitled to object to the proposed reduction, or wilfully misrepresents the nature or amount of the debt or claim of any creditor of the company, or if any director or manager of the company aids or abets in or is privy to any such concealment or misrepresentation as aforesaid, every such director, manager, or officer shall be guilty of a misdemeanor. Penalty for concealment of name of creditor or misrepresentation of his debt, &c.

20. The powers of making rules concerning winding up conferred by the one hundred and seventieth, one hundred and seventy-first, one hundred and seventy-second, and one hundred and seventy-third sections of the principal act shall respectively extend to making rules concerning matters in which jurisdiction is by this act given to the Court which has the power of making an order to wind up a company, and until such rules are made the practice of the Court in matters of the same nature shall, so far as the same is applicable, be followed. Power to make rules extended to making rules concerning matters in which jurisdiction is given by this act.

Subdivision of shares (o).

21. Any company limited by shares may by special resolution so far modify the conditions contained in its memorandum of association, if authorised so to do by its regulations as originally framed or as altered by special resolution, as by subdivision of its existing shares, or any of them, to divide its capital, or any part thereof, into shares of smaller amount than is fixed by its memorandum of association. Shares may be divided into shares of smaller amount.

Provided, that in the subdivision of the existing shares the proportion between the amount which is paid and the amount (if any) which is unpaid on each share of reduced amount shall be the same as it was in the case of the existing share or shares from which the share of reduced amount is derived. Proportion between amounts paid and unpaid on shares to be preserved.

22. The statement of the number and amount of the shares into which the capital of the company is divided contained in every copy of the memorandum of association issued after the passing of any such special resolution, shall be in accordance with such resolution; and any company which makes default in complying with the provisions of this section shall incur a penalty not exceeding one pound for each copy in respect of which such default is made; and every director and manager of the company who knowingly or wilfully authorises or permits such default shall incur the like penalty. Statement of number and amount of shares as altered to be embodied in every memorandum of association subsequently issued.

Associations not for profit.

23. Where any association is about to be formed under the principal act as a limited company, if it proves to the Board of Trade that it is formed for the purpose of promoting commerce, art, science, religion, charity, or any other useful object, and that it is the intention of such association to apply the profits, if any, or other income of the association in promoting its objects, and to prohibit the payment of any dividend to the members of the association, the Board of Trade may by licence, under the hand of one of the secretaries or assistant secretaries, direct such association to be registered with limited liability, without the addition of the word limited to its

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The licence by the Board of Trade may be granted upon such conditions and subject to such regulations as the board think fit to impose; and such conditions and regulations shall be binding on the association, and may, at the option of the said board, be inserted in the memorandum and articles of association, or in both or one of such documents.

Calls upon shares.

Company may have some shares fully paid and others not.

24. Nothing contained in the principal act (*p*) shall be deemed to prevent any company under that act, if authorised by its regulations as originally framed or as altered by special resolution, from doing any one or more of the following things; namely,—

- (1.) Making arrangements on the issue of shares for a difference between the holders of such shares in the amount of calls to be paid, and in the time of payment of such calls;
- (2.) Accepting from any member of the company who assents thereto the whole or a part of the amount remaining unpaid on any share or shares held by him, either in discharge of the amount of a call payable in respect of any other share or shares held by him or without any call having been made;
- (3.) Paying dividend in proportion to the amount paid up on each share in cases where a larger amount is paid up on some shares than on others (*q*).

Shares to be issued and held subject to payment of the whole amount in cash, unless it be otherwise determined by a contract registered at or before the issue.

25. Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the registrar of joint-stock companies at or before the issue of such shares (*r*).

Transfer of shares.

Transfer may be registered at request of transferor.

26. A company shall on the application of the transferor of any share or interest in the company enter in its register of members the name of the transferee of such share or interest, in the same manner and subject to the same conditions as if the application for such entry were made by the transferee (*s*).

(*p*) See *ante*, pp. 343 and 455.

(*q*) *Oakbank Oil Co. v. Crum*, 8 App. Ca. 65, and *ante*, p. 455.

(*r*) See *ante*, pp. 395 and 783, and further as to the meaning of issue, 1 Ex. D. 242; 9 Ch. 554. See, also, *British Farmers', &c., Co.*, 7 Ch. D. 533, as to companies being estopped by their certificates from denying that shares are paid up.

(*s*) See act of 1862, §§ 22 and 35, and as to the person to procure the registration of the transfer, see *ante*, p. 491, and for remedy if registrar refuses to register a transfer on the ground that it is improperly stamped, see *Queen v. Registrar of Joint-Stock Cos.*, 21 Q. B. D. 131.

Share warrants to bearer.

27. In the case of a company limited by shares the company, if authorised so to do by its regulations as originally framed or as altered by special resolution, and subject to the provisions of such regulations, may, with respect to any share which is fully paid up, or with respect to stock, issue under their common seal a warrant stating that the bearer of the warrant is entitled to the share or shares or stock therein specified, and may provide, by coupons or otherwise, for the payment of the future dividends on the share or shares or stock included in such warrant, hereinafter referred to as a share warrant.

Warrants for fully paid up shares or stock may be issued in name of bearer.

28. A share warrant shall entitle the bearer of such warrant to the shares or stock specified in it, and such shares or stock may be transferred by the delivery of the share warrant.

Effect of share warrants.

29. The bearer of a share warrant shall, subject to the regulations of the company, be entitled, on surrendering such warrant for cancellation, to have his name entered as a member in the register of members, and the company shall be responsible for any loss incurred by any person by reason of the company entering in its register of members the name of any bearer of a share warrant in respect of the shares or stock specified therein without the share warrant being surrendered and cancelled.

Transfer of shares by delivery.

Bearer of a share warrant may be entered in the register of members on delivering up the warrant for cancellation.

30. The bearer of a share warrant may, if the regulations of the company so provide, be deemed to be a member of the company within the meaning of the principal act, either to the full extent or for such purposes as may be prescribed by the regulations :

Regulations of the company may make the bearer of a

Provided, that the bearer of a share warrant shall not be qualified in respect of the shares or stock specified in such warrant for being a director or manager of the company in cases where such a qualification is prescribed by the regulations of the company.

share warrant a member, but not so as to qualify him as a director in respect of such shares.

31. On the issue of a share warrant in respect of any share or stock the company shall strike out of its register of members the name of the member then entered therein as holding such share or stock as if he had ceased to be a member, and shall enter in the register the following particulars :

Entries in register where share warrant issued.

(1.) The fact of the issue of the warrant :

(2.) A statement of the shares or stock included in the warrant, distinguishing each share by its number :

(3.) The date of the issue of the warrant :

And until the warrant is surrendered the above particulars shall be deemed to be the particulars which are required by the twenty-fifth section of the principal act to be entered in the register of members of a company ; and on the surrender of a warrant the date of such surrender shall be entered as if it were the date at which a person ceased to be a member.

32. After the issue by the company of a share warrant the annual summary required by the twenty-sixth section of the principal act shall contain the following particulars,—the total amount of shares or stock for which share warrants are outstanding at the date of the summary, and the total amount of share warrants which have been issued and surrendered respectively since the last summary was made, and the number of shares or amount of stock comprised in each warrant.

Particulars as to share warrants to be contained in annual summary.

33. There shall be charged on every share warrant a stamp duty of an amount equal to three times the amount of the *ad valorem* stamp duty which would be chargeable on a deed transferring the share or shares or

Stamps on share warrants.

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Penalties on persons committing forgery in relation to share warrants or coupons, or attempting to defraud by means of forged warrants, &c.

stock specified in the warrant, if the consideration for the transfer were the nominal value of such share or shares or stock (*t*).

34. Whosoever forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any share warrant or coupon, or any document purporting to be a share warrant or coupon, issued in pursuance of this act, or demands or endeavours to obtain or receive any share or interest of or in any company under the principal act, or to receive any dividend or money payable in respect thereof, by virtue of any such forged or altered share warrant, coupon, or document, purporting as aforesaid, knowing the same to be forged or altered, with intent in any of the cases aforesaid to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Penalties on persons falsely personating owners of shares or share warrants.

35. Whosoever falsely and deceitfully personates any owner of any share or interest of or in any company, or of any share warrant or coupon issued in pursuance of this act, and thereby obtains or endeavours to obtain any such share or interest, or share warrant or coupon, or receives or endeavours to receive any money due to any such owner, as if such offender were the true and lawful owner, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Penalties on persons engraving plates, &c.

36. Whosoever, without lawful authority or excuse, the proof whereof shall be on the party accused, engraves or makes upon any plate, wood, stone, or other material any share warrant or coupon purporting to be a share warrant or coupon issued or made by any particular company under and in pursuance of this act, or to be a blank share warrant or coupon issued or made as aforesaid, or to be a part of such a share warrant or coupon, or uses any such plate, wood, stone, or other material for the making or printing any such share warrant or coupon, or any such blank share warrant or coupon, or any part thereof respectively, or knowingly has in his custody or possession any such plate, wood, stone, or other material, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years and not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Contracts (u).

Contracts on behalf of companies, how to be made.

37. Contracts on behalf of any company under the principal act may be made as follows; (that is to say,)

- (1.) Any contract which if made between private persons would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company, and such contract may be in the same manner varied or discharged:

(*t*) A penalty of 50*l.* is imposed upon the company, and its managing director, secretary or principal officer, if this sec-

tion is not observed by 33 & 34 Vict. c. 97, § 127.

(*u*) *Ante*, pp. 220—229.

- (2.) Any contract which if made between private persons would be by law required to be in writing, and signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under the express or implied authority of the company, and such contract may in the same manner be varied or discharged :
- (3.) Any contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under the express or implied authority of the company, and such contract may in the same way be varied or discharged :

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And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be.

38. Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors or the company, or otherwise ; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract (*r*).

Prospectus, &c. to specify dates and names of parties to any contract made prior to issue of such prospectus, &c., and otherwise to be deemed fraudulent on part of persons issuing as against persons taking shares on faith thereof.

Meetings.

39. Every company formed under the principal act after the commencement of this act shall hold a general meeting within four months after its memorandum of association is registered ; and if such meeting is not held the company shall be liable to a penalty not exceeding five pounds a day for every day after the expiration of such four months until the meeting is held ; and every director or manager of the company, and every subscriber of the memorandum of association, who knowingly authorises or permits such default, shall be liable to the same penalty.

Company to hold meeting within four months after registration.

Winding up.

40. No contributory of a company under the principal act (*x*) shall be capable of presenting a petition for winding up such company unless the members of the company are reduced in number to less than seven, or unless the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held (*y*) by him, and registered in his name, for a period of at least six months during the eighteen months previously to the commencement of the winding up, or have devolved upon him through the death of a former holder :

Contributory when not qualified to present winding up petition.

Provided that where a share has during the whole or any part of the six months been held by or registered in the name of the wife of a contri-

(*r*) See *ante*, pp. 91, 92.

(*y*) See *Wala Wynaad, &c., Co*, 21

(*x*) See act of 1862, § 82.

Ch. D. 849.

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	butory either before or after her marriage, or by or in the name of any trustee or trustees for such wife or for the contributory, such share shall for the purposes of this section be deemed to have been held by and registered in the name of the contributory.
Winding up in England may be referred to county court.	41. Where the High Court of Chancery in England makes an order for winding up a company under the principal act, it may, if it thinks fit, direct all subsequent proceedings to be had in a county court held under an act of the session of the ninth and tenth years of the reign of her present Majesty, chapter ninety-five, and the acts amending the same (<i>z</i>); and thereupon such county court shall, for the purpose of winding up the company, be deemed to be "the Court" within the meaning of the principal act, and shall have, for the purposes of such winding up, all the jurisdiction and powers of the High Court of Chancery (<i>a</i>).
Transfer of winding up from one county court to another.	42. If during the progress of a winding up it is made to appear to the High Court of Chancery that the same could be more conveniently prosecuted in any other county court, it shall be competent for the High Court of Chancery to transfer the same to such other county court, and thereupon the winding up shall proceed in such other county court.
Parties aggrieved by decisions of county court judge in winding up may appeal.	43. If any party in a winding up under this act is dissatisfied with the determination or direction of a judge of a county court on any matter in such winding up, such party may appeal from the same to the Vice-Chancellor named for that purpose by the Lord Chancellor by general order: Provided that such party shall, within thirty days after such determination or direction, give notice of such appeal to the other party or his attorney, and also deposit with the registrar of the county court the sum of ten pounds as security for the costs of the appeal; and the said Court of Appeal may make such final or other decree or order as it thinks fit, and may also make such order with respect to the costs of the said appeal as such Court may think proper, and such orders shall be final (<i>b</i>).
Powers to frame rules and orders under sect. 32, of 19 & 20 Vict. c. 108.	44. The county court judges appointed or to be appointed by the Lord Chancellor from time to time to frame rules and orders for regulating the practice of the courts, and forms and proceedings therein, under the thirty-second section of an act passed in the nineteenth and twentieth years of the reign of her present Majesty, chapter one hundred and eight, shall frame the rules and orders for regulating the practice of the county courts under this act, and forms of proceedings therein, and from time to time may amend such rules, orders, and forms; and such rules, orders, and forms, or amended rules, orders, and forms, certified under the hands of such judges or of any three or more of them, shall be submitted to the Lord Chancellor, who may allow or disallow or alter the same, and so from time to time; and the rules, orders, and forms, or amended rules, orders, and forms, so allowed or altered, shall from a day to be named by the Lord Chancellor be in force in every county court (<i>c</i>).
Scale of costs to be framed by the judges.	45. The county court judges mentioned in the last section shall be empowered to frame a scale of costs and charges to be paid to counsel and attorneys with respect to all proceedings in a winding up under this act,

(*z*) The act now in force is 51 & 52 Vict. c. 43; the County Courts act, 1888.

(*a*) See act of 1862, § 81.

(*b*) The appeal is now to the Divisional Court, see Judicature act, 1873, 36 & 37 Vict. c. 66, § 45; see also 51 & 52 Vict.

c. 43, §§ 120-132.

(*c*) Under this section an order has been made, adopting the orders and forms of the Chancery Division so far as the same are applicable. See County Court Rules, 1886, Order XLII.

and from time to time to amend such scale; and such scale or amended scale, certified under the hands of such judges or any three or more of them, shall be submitted to the Lord Chancellor, who from time to time may allow or disallow or alter the same; and the scale or amended scale so allowed or altered shall, from a day to be named by the Lord Chancellor, be in force in every county court.

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46. The registrars and high bailiffs of the county courts shall be remunerated for the duties to be performed by them under this act, by receiving for their own use such fees as may be from time to time authorised to be taken by any orders to be made by the commissioners of the Treasury, with the consent of the Lord Chancellor; and the commissioners of the Treasury are hereby authorised and empowered, with such consent as aforesaid, from time to time to make such orders: Provided, that it shall be lawful for the said commissioners, with the like consent as aforesaid, by an order to direct that after the date named in the order any registrar or high bailiff shall, in lieu of receiving such fees, be paid such fixed or fluctuating allowance as may in each case be thought just; and after such date the said fees shall be accounted for and paid over by such registrar or high bailiff in such manner as may be directed in the order.

Remuneration of registrars and high bailiffs for duties under this act, by fees, or by allowances.

Saving.

47. Nothing in this act contained shall exempt any company from the second or third (*d*) provisions of the one hundred and ninety-sixth section of the principal act restraining the alteration of any provision in any act of Parliament or charter.

Companies not exempted from second or third provisions of 25 & 26 Vict. c. 89, sect. 196.

THE JOINT STOCK COMPANIES ARRANGEMENT ACT, 1870.

23 & 34 VICT. CAP. 104.

An Act to facilitate compromises and arrangements between creditors and shareholders of joint stock and other companies in liquidation (c).

[10th August, 1870.]

WHEREAS it is expedient to amend the law relating to the liquidation of joint stock and other companies:

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This act may be cited as "The Joint Stock Companies Arrangement Act, 1870." Short title.

2. Where any compromise or arrangement shall be proposed between a company which is, at the time of the passing of this act or afterwards, in the course of being wound up, either voluntarily or by or under the supervision of the Court, under the Companies acts, 1862 and 1867, or either of them, and the creditors of such company, or any class of such creditors, of them, and the creditors of such company, or any class of such creditors, to decide as to such compromise.

(*d*) *Quære*, third and fourth, see Buckley, ed. 5, p. 549. (*c*) See *ante*, pp. 710, 711.

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Interpretation.	3. The word "company" in this act shall mean any company liable to be wound up under "The Companies act, 1862."
Act and Companies act to be read together.	4. This act shall be read and construed as part of "The Companies act, 1862."

"THE COMPANIES ACT, 1877."

40 & 41 VICT. CAP. 26.

An Act to amend the Companies acts of 1862 and 1867.

[23rd July, 1877.]

[30 & 31 Vict. c. 131.]	WHEREAS doubts have been entertained whether the power given by the Companies act, 1867, to a company of reducing its capital extends to paid-up capital, and it is expedient to remove such doubts :
	Be it enacted, &c. :
Short title.	1. This act may be cited for all purposes as the Companies act, 1877.
Construction of act.	2. This act shall, so far as is consistent with the tenor thereof, be construed as one with the Companies acts, 1862 and 1867, and the said acts and this act may be referred to as "The Companies acts, 1862, 1867, and 1877."
[25 & 26 Vict. c. 89, and 30 and 31 Vict. c. 131.]	3. The word "capital" as used in the Companies act, 1867, shall include paid-up capital : and the power to reduce capital conferred by that act shall include a power to cancel any lost capital, or any capital unrepresented by available assets, or to pay off any capital which may be in excess of the wants of the company ; and paid-up capital may be reduced either with or without extinguishing or reducing the liability (if any) remaining on the shares of the company, and to the extent to which such liability is not extinguished or reduced it shall be deemed to be preserved, notwithstanding anything contained in the Companies act, 1867 (<i>f</i>).
Construction of "capital" and powers to reduce capital contained in 30 & 31 Vict. c. 131.	4. The provisions of the Companies act, 1867, as amended by this act, shall apply to any company reducing its capital in pursuance of this act and of the Companies act, 1867, as amended by this act :
Application of provisions of 30 & 31 Vict. c. 131.	Provided, that where the reduction of the capital of a company does not involve either the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital,— (1.) The creditors of the company shall not, unless the court other-

(*f*) See *ante*, pp. 402 *et seq.*, and 43 Vict. c. 19.

wise direct, be entitled to object or required to consent to the reduction; and

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- (2.) It shall not be necessary before the presentation of the petition for confirming the reduction to add, and the Court may, if it thinks it expedient so to do, dispense altogether with the addition of the words "and reduced," as mentioned in the Companies Act, 1867. [36 & 31 Vict. c. 131.]

In any case that the Court thinks fit so to do, it may require the company to publish in such manner as it thinks fit the reasons for the reduction of its capital or such other information in regard to the reduction of its capital as the Court may think expedient with a view to give proper information to the public in relation to the reduction of its capital by a company, and, if the Court thinks fit, the causes which led to such reduction.

The minute required to be registered in the case of reduction of capital shall show, in addition to the other particulars required by law, the amount (if any) at the date of the registration of the minute proposed to be deemed to have been paid up on each share (g).

5. Any company limited by shares may so far modify the conditions contained in its memorandum of association if authorised so to do by its regulations as originally framed or as altered by special resolution, as to reduce its capital by cancelling any shares which, at the date of the passing of such resolution, have not been taken or agreed to be taken by any person: and the provisions of "The Companies act, 1867," shall not apply to any reduction of capital made in pursuance of this section. Power to reduce capital by the cancellation of unissued shares.

6. And whereas it is expedient to make provision for the reception as legal evidence of certificates of incorporation other than the original certificates, and of certified copies of or extracts from any documents filed and registered under the Companies acts, 1862 to 1877: Be it enacted, that any certificate of the incorporation of any company given by the registrar or by any assistant registrar for the time being shall be received in evidence as if it were the original certificate; and any copy or extract from any of the documents or part of the documents kept and registered at any of the offices for the registration of joint-stock companies in England, Scotland, or Ireland, if duly certified to be a true copy under the hand of the registrar or one of the assistant registrars for the time being, and whom it shall not be necessary to prove to be the registrar or assistant registrar, shall, in all legal proceedings, civil or criminal, and in all cases whatsoever, be received in evidence as of equal validity with the original document. Reception of certified copies of documents as legal evidence. [25 & 26 Vict. c. 89, 30 & 31 Vict. 131, and 40 & 41 Vict. c. 26.]

(g) For the form of the minute, see p. 54, and *Britannia Mills Co., ib. p. West Cumberland, &c., Co., W. N. 1888, 103.*

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THE COMPANIES ACT, 1879.

42 & 43 VICT. CAP. 76.

An act to amend the law with respect to the liability of members of banking and other joint stock companies : and for other purposes.

[15th August, 1879.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows :

Short title.

Act not to apply to Bank of England.

Act to be construed with 25 & 26 Vict. c. 89, 30 & 31 Vict. c. 131, and 40 & 41 Vict. c. 26.

Registration anew of company.

25 & 26 Vict.

c. 89.

30 & 31 Vict.

c. 131.

40 & 41 Vict.

c. 26.

42 & 43 Vict.

c. 76.

25 & 26 Vict.

c. 89.

Reserve capital of company, how provided.

25 & 26 Vict.

c. 89.

30 & 31 Vict.

c. 131.

40 & 41 Vict.

c. 26.

42 & 43 Vict.

c. 76.

1. This act may be cited as the Companies act, 1879.

2. This act shall not apply to the Bank of England.

3. This act shall, so far as is consistent with the tenor thereof, be construed as one with the Companies acts, 1862, 1867, and 1877, and those acts together with this act may be referred to as the Companies acts, 1862 to 1879.

4. Subject as in this act mentioned, any company registered before or after the passing of this act as an unlimited company may register under the Companies acts, 1862 to 1879, as a limited company, or any company already registered as a limited company may re-register under the provisions of this act.

The registration of an unlimited company as a limited company in pursuance of this act shall not affect or prejudice any debts, liabilities, obligations, or contracts incurred or entered into by, to, with, or on behalf of such company prior to registration, and such debts, liabilities, contracts, and obligations may be enforced in manner provided by Part VII. of the Companies act, 1862, in the case of a company registering in pursuance of that part.

5. An unlimited company may, by the resolution passed by the members when assenting to registration as a limited company under the Companies acts, 1862 to 1879, and for the purpose of such registration or otherwise, increase the nominal amount of its capital by increasing the nominal amount of each of its shares.

Provided always, that no part of such increased capital shall be capable of being called up, except in the event of and for the purposes of the company being wound up.

And, in cases where no such increase of nominal capital may be resolved upon, an unlimited company may, by such resolution as aforesaid, provide that a portion of its uncalled capital shall not be capable of being called up, except in the event of and for the purposes of the company being wound up.

A limited company may by a special resolution declare that any portion of its capital which has not been already called up shall not be capable of being called up, except in the event of and for the purpose of the company being wound up ; and thereupon such portion of capital shall not be capable of being called up, except in the event of and for the purposes of the company being wound up (*h*).

6. Section one hundred and eighty-two of the Companies act, 1862, is hereby repealed, and in place thereof it is enacted as follows :—A bank of issue registered as a limited company, either before or after the passing of this act, shall not be entitled to limited liability in respect of its notes ; and the members thereof shall continue liable in respect of its notes in the same manner as if it had been registered as an unlimited company ; but in case the general assets of the company are, in the event of the company being wound up, insufficient to satisfy the claims of both the note-holders and the general creditors, then the members, after satisfying the remaining demands of the note-holders, shall be liable to contribute towards payment of the debts of the general creditors a sum equal to the amount received by the note-holders out of the general assets of the company.

APPENDIX V.
25 & 26 Vict.
c. 89, s. 182,
repealed, and
liability of
bank of issue
unlimited in
respect of notes.

For the purposes of this section the expression “the general assets of the company” means the funds available for payment of the general creditor as well as the note-holder.

It shall be lawful for any bank of issue registered as a limited company to make a statement on its notes to the effect that the limited liability does not extend to its notes, and that the members of the company continue liable in respect of its notes in the same manner as if it had been registered as an unlimited company.

7. (1.) Once at the least in every year the accounts of every banking company registered after the passing of this act as a limited company shall be examined by an auditor or auditors, who shall be elected annually by the company in general meeting.

Audit of accounts
of banking
companies.

(2.) A director or officer of the company shall not be capable of being elected auditor of such company.

(3.) An auditor on quitting office shall be re-eligible.

(4.) If any casual vacancy occurs in the office of any auditor the surviving auditor or auditors (if any) may act, but if there is no surviving auditor, the directors shall forthwith call an extraordinary general meeting for the purpose of supplying the vacancy or vacancies in the auditorship.

(5.) Every auditor shall have a list delivered to him of all books kept by the company, and shall at all reasonable times have access to the books and accounts of the company ; and any auditor may, in relation to such books and accounts, examine the directors or any other officer of the company : Provided that if a banking company has branch banks beyond the limits of Europe, it shall be sufficient if the auditor is allowed access to such copies of and extracts from the books and accounts of any such branch as may have been transmitted to the head office of the banking company in the United Kingdom.

(6.) The auditor or auditors shall make a report to the members on the accounts examined by him or them, and on every balance sheet laid before the company in general meeting during his or their tenure of office ; and in every such report shall state whether, in his or their opinion, the balance sheet referred to in the report is a full and fair balance sheet properly drawn up, so as to exhibit a true and correct view of the state of the company's affairs, as shown by the books of the company ; and such report shall be read before the company in general meeting.

(7.) The remuneration of the auditor or auditors shall be fixed by the general meeting appointing such auditor or auditors, and shall be paid by the company.

8. Every balance sheet submitted to the annual or other meeting of the members of every banking company registered after the passing of this act as a limited company shall be signed by the auditor or auditors, and

Signature of
balance sheet.

APPENDIX V.

Application of
25 & 26 Vict.
c. 89,
30 & 31 Vict.
c. 131, and
40 & 41 Vict.
c. 26.

25 & 26 Vict.
c. 89,
30 & 31 Vict.
c. 131,
40 & 41 Vict.
c. 26, and
42 & 43 Vict.
c. 76.

Privileges of
Act available
notwithstanding
constitution
of company.

by the secretary or manager (if any), and by the directors of the company, or three of such directors at the least.

9. On the registration, in pursuance of this act, of a company which has been already registered, the registrar shall make provision for closing the former registration of the company, and may dispense with the delivery to him of copies of any documents with copies of which he was furnished on the occasion of the original registration of the company; but, save as aforesaid, the registration of such a company shall take place in the same manner and have the same effect as if it were the first registration of that company under the Companies acts, 1862 to 1879, and as if the provisions of the acts under which the company was previously registered and regulated had been contained in different acts of Parliament from those under which the company is registered as a limited company.

10. A company authorised to register under this act may register thereunder and avail itself of the privileges conferred by this act, notwithstanding any provisions contained in any act of Parliament, royal charter, deed of settlement, contract of copartnership, cost book, regulations, letters patent, or other instrument constituting or regulating the company.

THE COMPANIES ACT, 1880.

43 VICT. CAP. 19.

An act to amend the Companies acts of 1862, 1867, 1877 and 1879.

[24th March, 1880.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

Construction
of acts.

25 & 26 Vict.
c. 89,
30 & 31 Vict.
c. 131,
40 & 41 Vict.
c. 26,
42 & 43 Vict.
c. 76.

Accumulated
profits may be
returned to
shareholders in
reduction of
paid-up capital.

1. This act may be cited for all purposes as the Companies act, 1880.

2. This act shall, so far as is consistent with the tenor thereof, be construed as one with the Companies acts, 1862, 1867, 1877, and 1879, and the said acts and this act may be referred to as the Companies acts, 1862 to 1880:

3. When any company has accumulated a sum of undivided profits, which with the consent of the shareholders may be distributed among the shareholders in the form of a dividend or bonus, it shall be lawful for the company, by special resolution, to return the same, or any part thereof, to the shareholders in reduction of the paid-up capital of the company, the unpaid capital being thereby increased by a similar amount. The powers vested in the directors of making calls upon the shareholders in respect of moneys unpaid upon their shares shall extend to the amount of the unpaid capital as augmented by such reduction (*f*).

(i) See *ante*, p. 404. It is not necessary for the articles to provide for a reduction of capital. Compare 30 & 31

Vict. c. 131, §§ 9 and 21, and 40 & 41
Vict. c. 26, § 3.

4. No such special resolution as aforesaid shall take effect until a memorandum, showing the particulars required by law in the case of a reduction of capital by order of the Court, shall have been produced to and registered by the Registrar of Joint Stock Companies.

5. Upon any reduction of paid-up capital made in pursuance of this act, it shall be lawful for any shareholder, or for any one or more of several joint shareholders, within one month after the passing of the special resolution for such reduction, to require the company to retain, and the company shall retain accordingly, the whole of the moneys actually paid upon the shares held by such person, either alone or jointly with any other person or persons, and which, in consequence of such reduction, would otherwise be returned to him or them, and thereupon the shares in respect of which the said moneys shall be so retained shall, in regard to the payment of dividends thereon, be deemed to be paid up to the same extent only as the shares on which payment as aforesaid has been accepted by the shareholders in reduction of their paid-up capital, and the company shall invest and keep invested the moneys so retained in such securities authorised for investment by trustees as the company shall determine, and upon the money so invested, or upon so much thereof as from time to time exceeds the amount of calls subsequently made upon the shares in respect of which such moneys shall have been retained, the company shall pay such interest as shall be received by them from time to time on such securities, and the amount so retained and invested shall be held to represent the future calls which may be made to replace the capital so reduced on those shares, whether the amount obtained on sale of the whole or such proportion thereof as represents the amount of any call when made, produces more or less than the amount of such call.

6. From and after such reduction of capital the company shall specify in the annual lists of members, to be made by them in pursuance of the twenty-sixth section of the Companies act, 1862, the amounts which any of the shareholders of the company shall have required the company to retain, and the company shall have retained accordingly, in pursuance of the fifth section of this act, and the company shall also specify in the statements of account laid before any general meeting of the company the amount of the undivided profits of the company which shall have been returned to the shareholders in reduction of the paid-up capital of the company under this act.

7.—(1.) Where the Registrar of Joint Stock Companies has reasonable cause to believe that a company, whether registered before or after the passing of this act, is not carrying on business or in operation, he shall send to the company by post a letter inquiring whether the company is carrying on business or in operation.

(2.) If the registrar does not within one month of sending the letter receive any answer thereto, he shall within fourteen days after the expiration of the month send to the company by post a registered letter referring to the first letter, and stating that no answer thereto has been received by the registrar, and that if an answer is not received to the second letter within one month from the date thereof, a notice will be published in the Gazette with a view to striking the name of the company off the register.

(3.) If the registrar either receives an answer from the company to the effect that it is not carrying on business or in operation, or does not within one month after sending the second letter receive any answer thereto,

APPENDIX V.

No resolution to take effect till particulars have been registered.

Power to any shareholder within one month after passing of resolution to require company to retain moneys paid upon shares held by such person.

Company to specify amounts which shareholders have required them to retain under s. 5; also to specify amounts of profits returned to shareholders. 25 & 26 Vict. c. 89.

Power of registrar to strike names of defunct companies off register.

APPENDIX V.

the registrar may publish in the Gazette and send to the company a notice that at the expiration of three months from the date of that notice the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved.

(4.) At the expiration of the time mentioned in the notice the registrar may, unless cause to the contrary is previously shown by such company, strike the name of such company off the register, and shall publish notice thereof in the Gazette and on the publication in the Gazette of such last-mentioned notice the company whose name is so struck off shall be dissolved: Provided that the liability (if any) of every director, managing officer, and member of the company shall continue and may be enforced as if the company had not been dissolved.

(5.) If any company or member thereof feels aggrieved by the name of such company having been struck off the register in pursuance of this section, the company or member may apply to the superior court in which the company is liable to be wound up; and such court, if satisfied that the company was at the time of the striking off carrying on business or in operation (*k*) and that it is just so to do, may order the name of the company to be restored to the register, and thereupon the company shall be deemed to have continued in existence as if the name thereof had never been struck off; and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had never been struck off.

(6.) A letter or notice authorised or required for the purposes of this section to be sent to a company may be sent by post addressed to the company at its registered office, or, if no office has been registered, addressed to the care of some director or officer of the company, or if there be no director or officer of the company whose name and address are known to the registrar, the letter or notice (in identical form) may be sent to each of the persons who subscribed the memorandum of association, addressed to him at the address mentioned in that memorandum.

(7.) In the execution of his duties under this section the registrar shall conform to any regulations which may be from time to time made by the Board of Trade.

(8.) In this section the Gazette means, as respects companies whose registered office is in England, the "London Gazette;" as respects companies whose registered office is in Scotland, the "Edinburgh Gazette;" and as respects companies whose registered office is in Ireland, the "Dublin Gazette."

(*k*) A company which is carrying on business merely for the purpose of a voluntary winding up is within these words, *Outlay Ass. Soc.*, 34 Ch. D. 479.

THE COMPANIES ACT, 1883.

46 & 47 VICT. CAP. 28 (l).

An act to amend the Companies acts, 1862 and 1867.

[20th August, 1883.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. This act may be cited for all purposes as the Companies act, 1883. Short title.
2. This act shall, so far as is consistent with the terms thereof, be construed as one with the Companies acts, 1862 and 1867. Construction of act.
3. This act shall come into force on the first day of September, one thousand eight hundred and eighty-three. Commencement of act.
4. In the distribution of the assets of any company being wound up under the Companies acts, 1862 and 1867, there shall be paid in priority to other debts,—
 - (a.) All wages or salary of any clerk or servant in respect of service rendered to the company during four months before the commencement of the winding up not exceeding fifty pounds ; and
 - (b.) All wages of any labourer or workman in respect of services rendered to the company during two months before the commencement of the winding up.Wages and salary to be preferential claims.
5. The foregoing debts shall rank equally among themselves, and shall be paid in full, unless the assets of the company are insufficient to meet them, in which case they shall abate in equal proportions between themselves. Such claims to rank equally.
6. Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, the liquidator or liquidators or official liquidator shall discharge the foregoing debts forthwith, so far as the assets of the company are and will be sufficient to meet them, as and when such assets come into the hands of such liquidator or liquidators or official liquidator. Liquidator to discharge same upon receipt of sufficient assets.

THE COMPANIES (COLONIAL REGISTERS) ACT, 1883.

46 & 47 VICT. CAP. 30.

An act to authorise companies registered under the Companies act, 1862, to keep local registers of their members in British Colonies.

[20th August, 1883.]

WHEREAS many companies registered under the Companies act, 1862, carry on business in British colonies, and dealings in their shares are frequent in such colonies, but delay, inconvenience, and expense are

- (l) This act is repealed except as to Bankruptcy act, 1888, 51 & 52 Vict. c. Ireland by the Preferential Payments in 26, see *ante*, p. 717.

APPENDIX V.	occasioned by reason of the absence of any legal provision for keeping local registers of members, and it is expedient that such provisions as this act contains be made in that behalf :
Short title and construction.	<p>Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :</p> <p>1. This act may be cited for all purposes as the Companies (Colonial Registers) act, 1883 ; and this act shall, so far as is consistent with the tenor thereof, be construed as one with the Companies acts, 1862 to 1880, and the said acts and this act may be referred to as the Companies acts, 1862 to 1883.</p>
Definitions.	<p>2. In this act the term "company" means a company registered under the Companies act, 1862, and having a capital divided into shares ; the term "shares" includes stock ; the term "colony" does not include any place within the United Kingdom, the Isle of Man, or the Channel Islands, but includes such territories as may for the time being be vested in her Majesty by virtue of an act of Parliament for the government of India, and any plantation, territory, or settlement situate elsewhere within her Majesty's dominions.</p>
Power for companies to keep colonial registers.	<p>3. (1.) Any company whose objects comprise the transaction of business in a colony may, if authorised so to do by its regulations, as originally framed or as altered by special resolution, cause to be kept in any colony in which it transacts business a branch register or registers of members resident in such colony.</p>
	<p>(2.) The company shall give to the registrar of joint stock companies notice of the situation of the office where any such branch register (in this act called a colonial register) is kept, and of any change therein, and of the discontinuance of any such office in the event of the same being discontinued.</p>
	<p>(3.) A colonial register shall, as regards the particulars entered therein, be deemed to be a part of the company's register of members, and shall be <i>prima facie</i> evidence of all particulars entered therein. Any such register shall be kept in the manner provided by the Companies acts, 1862 to 1880, with this qualification, that the advertisement mentioned in section thirty-three of the Companies act, 1862, shall be inserted in some newspaper circulating in the district wherein the register to be closed is kept, and that any competent court in the colony where such register is kept shall be entitled to exercise the same jurisdiction of rectifying the same as is by section thirty-five of the Companies act, 1862, vested, as respects a register, in England and Ireland in her Majesty's superior courts of law or equity, and that all offences under section thirty-two of the Companies act, 1862, may, as regards a colonial register, be prosecuted summarily before any tribunal in the colony where such register is kept having summary criminal jurisdiction.</p>
25 & 26 Vict. c. 89.	<p>(4.) The company shall transmit to its registered office a copy of every entry in its colonial register or registers as soon as may be after such entry is made, and the company shall cause to be kept at its registered office, duly entered up from time to time, a duplicate or duplicates of its colonial register or registers. The provisions of section thirty-two of the Companies act, 1862, shall apply to every such duplicate, and every such duplicate shall, for all the purposes of the Companies acts, 1862 to 1880, be deemed to be part of the register of members of the company.</p>

(5.) Subject to the provisions of this act with respect to the duplicate register, the shares registered in a colonial register shall be distinguished from the shares registered in the principal register, and no transaction with respect to any shares registered in a colonial register shall, during the continuance of the registration of such shares in such colonial register, be registered in any other register.

(6.) The company may discontinue to keep any colonial register, and thereupon all entries in that register shall be transferred to some other colonial register kept by the company in the same colony, or to the register of members kept at the registered office of the company.

(7.) In relation to stamp duties the following provisions shall have effect:—

(a.) An instrument of transfer of a share registered in a colonial register under this act shall be deemed to be a transfer of property situated out of the United Kingdom, and unless executed in any part of the United Kingdom shall be exempt from British stamp duty.

(b.) Upon the death of a member registered in a colonial register under this act, the share or other interest of the deceased member shall for the purposes of this act so far as relates to British duties be deemed to be part of his estate and effects situated in the United Kingdom for or in respect of which probate or letters of administration is or are to be granted, or whereof an inventory is to be exhibited and recorded in like manner as if he were registered in the register of members kept at the registered office of the company.

(8.) Subject to the provisions of this act, any company may, by its regulations as originally framed, or as altered by special resolution, make such provisions as it may think fit respecting the keeping of colonial registers.

THE COMPANIES ACT, 1886.

49 VICT. CAP. 23.

An Act to amend the Companies Acts of 1862, 1867, 1870, 1877, 1879, 1880, and 1883. [4th June, 1886.]

WHEREAS it has become expedient to amend the provisions of the Companies act, 1862, and of the other acts amending the same here- 25 & 26 Vict
inafter recited, in so far as the said provisions relate to the liquidation of c. 89.
companies in Scotland :

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. This act may be cited for all purposes as the Companies act, 1886. Short title.

2. This act shall, so far as consistent with the tenor thereof, be con- Construction
strued as one with the Companies acts, 1862, 1867, 1877, 1879, 1880, of acts.
and 1883, and the Joint stock companies arrangement act, 1870, and 25 & 26 Vict.
c. 89.

APPENDIX V. the said acts and this act may be referred to as the Companies acts, 1862 to 1886.

30 & 31 Vict.
c. 131.

40 & 41 Vict.
c. 26.

42 & 43 Vict.
c. 76.

43 Vict. c. 19.

45 & 47 Vict.
c. 28.

33 & 34 Vict.
c. 104.

Effect of
diligence within
60 days of
winding up by
or subject to
supervision of
court.

3. In the winding up, by or subject to the supervision of the Court, of any company under the Companies acts, 1862 to 1886, whose registered office is in Scotland, where the winding up shall commence after the passing of this act, the following provisions shall have effect :

(1.) Such winding up shall, in the case of a winding up by the Court as at the commencement thereof, and in the case of a winding up subject to the supervision of the Court as at the date of the presentation of the petition, on which a supervision order is afterwards pronounced, be equivalent to an arrestment in execution and decree of forthcoming, and to an executed or completed poinding ; and no arrestment or poinding of the funds or effects of the company, executed on or after the sixtieth day prior to the commencement of the winding up by the Court, or to the presentation of the petition on which a supervision order is made, as the case may be, shall be effectual ; and such funds or effects, or the proceeds of such effects, if sold, shall be made forthcoming to the liquidator : Provided that any arrester or pointer, before the date of such winding up, or of such petition, as the case may be, who shall be thus deprived of the benefit of his diligence, shall have preference out of such funds or effects for the expense *bonâ fide* incurred by him in such diligence.

(2.) Such winding up shall, as at the respective dates aforesaid, be equivalent to a decree of adjudication of the heritable estates of the company for payment of the whole debts of the company, principal and interest, accumulated at the said dates respectively, subject always to such preferable heritable rights and securities as existed at the said dates and are valid and unchallengeable, and the right to poind the ground hereinafter provided.

(3.) The provisions of sections one hundred and twelve to one hundred and seventeen inclusive, and also of section one hundred and twenty, of the Bankruptcy (Scotland) act, 1856, shall, so far as consistent with the tenor of the recited acts, apply to the realization of heritable estates affected by such heritable rights and securities as aforesaid ; and for the purposes of this act the words "sequestration" and "trustee" occurring in said sections of the Bankruptcy (Scotland) act, 1856, shall mean respectively "liquidation" and "liquidator" ; and the expression "the lord ordinary or the Court" shall mean "the Court" as defined by this act.

(4.) No poinding of the ground which has not been carried into execution by sale of the effects sixty days before the respective dates aforesaid shall, except to the extent hereinafter provided, be available in any question with the liquidator : Provided that no creditor who holds a security over the heritable estate preferable to the right of the liquidator shall be prevented from executing a poinding of the ground after the respective dates aforesaid, but such poinding shall in competition with the liquidator be available only for the interest on the debt for the current half yearly term, and for the arrears of interest for one year immediately before the commencement of such term.

19 & 20 Vict.
c. 79.

4. In the winding up of any company under the Companies acts, 1862 to 1886, whose registered office is in Scotland, and where the winding up shall commence after the passing of this act, the general and special rules in regard to voting and ranking for payment of dividends, provided by the Bankruptcy (Scotland) act, 1856, sections forty-nine to sixty-six inclusive, or any other rules in regard thereto which may be in force for the time being in the sequestration of the estates of bankrupts in Scotland, shall, so far as consistent with the tenor of the said recited acts, apply to creditors of such companies voting in matters relating to the winding up, and ranking for payment of dividends; and for this purpose sequestration shall be taken to mean liquidation, trustee to mean liquidator, and sheriff to mean the Court.

5. Wherever the expression "the court of session" occurs in the said recited acts, or the expression "the Court" occurring therein or in this act refers to the Court of Session in Scotland, it shall mean and include either division thereof, or, in the event of a remit to a permanent lord ordinary, as hereinafter provided, such lord ordinary, during session, and in time of vacation the lord ordinary on the bills; and in regard to orders or judgments pronounced by the said lord ordinary on the bills in vacation, the following provisions shall have effect:—

APPENDIX V.

Ranking of claims.

Jurisdiction of the Lord Ordinary on the bills in vacation.

- (1.) No order or judgment pronounced by the said lord ordinary in vacation, under or by virtue, in whole or in part, of the following sections of the said recited acts, shall be subject to review, reduction, suspension, or stay of execution, videlicet, of the Companies act, 1862, sections ninety-one, one hundred and seven, one hundred and fifteen, one hundred and seventeen, and one hundred and twenty-seven, and section one hundred and forty-nine so far as it authorises the Court to direct meetings of creditors or contributories to be held, and that portion of section two of the Joint stock companies arrangement act, 1870, which authorises the Court to order that a meeting of creditors or class of creditors shall be summoned; and also sections one hundred and twenty-two and one hundred and twenty-three of the Companies act, 1862, so far as they may affect the sections above enumerated. 25 & 26 Vict. c. 89.
- (2.) All other orders or judgments pronounced by the said lord ordinary in vacation (except as after mentioned) shall be subject to review only by reclaiming note, in common form, presented (notwithstanding the terms of section one hundred and twenty-four of the Companies act, 1862,) within fourteen days from the date of such order or judgment: Provided always, that such orders or judgments pronounced by the said lord ordinary in vacation, under or by virtue, in whole or in part, of the following sections of the Companies act, 1862, shall, from the dates of such orders or judgments, and notwithstanding any reclaiming note against the same, be carried out and receive effect till such reclaiming note be disposed of by the Court, videlicet, sections eighty-five, eighty-seven, eighty-nine, ninety-three (except in regard to the removal or remuneration of liquidators), ninety-five, ninety-six (except in regard to the power to sell), one hundred, one hundred and eighteen, first part of one hundred and forty-one, one hundred and forty-seven, one hundred and fifty (except in regard to the removal of liquidators and the filling up of vacancies caused by such

33 & 34 Vict. c. 104.

APPENDIX V.

removal), one hundred and ninety-seven, one hundred and ninety-eight, and two hundred and one; and also sections one hundred and twenty-two and one hundred and twenty-three of the Companies act, 1862, so far as they may affect the sections above enumerated.

Provided that nothing in this section contained shall in any way affect the provisions of section one hundred and twenty-one of the Companies act, 1862, in reference to decrees for payment of calls in the winding up companies, whether voluntarily or by or subject to the supervision of the Court.

Winding up
may be remitted
to lord ordi-
nary.

6. When the Court makes a winding up or a supervision order or at any time thereafter, it shall be lawful for the Court, in either division thereof, if it thinks fit, to direct all subsequent proceedings in the winding up to be taken before one of the permanent lords ordinary, and to remit the winding up to him accordingly; and thereupon such lord ordinary shall, for the purposes of the winding up, be deemed to be "the Court," within the meaning of the recited acts and this act, and shall have, for the purposes of such winding up, all the jurisdiction and powers of the Court of Session: Provided always, that all orders or judgments pronounced by such lord ordinary shall be subject to review only by reclaiming note in common form, presented (notwithstanding the terms of section one hundred and twenty-four of the Companies act, 1862,) within fourteen days from the date of such order or judgment. But, should a reclaiming note not be presented and moved during session, the provisions of section five of this act shall apply to such orders or judgments: Provided also, that the said lord ordinary may report to the division of the Court any matter which may arise in the course of the winding up. This section and the immediately preceding section shall come into force from the passing of this act, and shall include companies then in the course of being wound up.

No. VI.

ORDERS AND RULES (a).

GENERAL ORDER AND RULES OF THE HIGH COURT OF CHANCERY
TO REGULATE THE MODE OF PROCEEDING UNDER THE COMPANIES
ACT, 1862, ISSUED BY THE LORD HIGH CHANCELLOR, TUESDAY,
11TH DAY OF NOVEMBER, 1862.

The right honourable Richard, Baron Westbury, Lord High Chancellor of Great Britain, with the advice and consent of the right honourable Sir John Romilly, Master of the Rolls, the honourable the Vice-Chancellor, Sir Richard Torin Kindersley, the honourable the Vice-Chancellor, Sir John Stuart, and the honourable the Vice-Chancellor, Sir William Page Wood, doth hereby, in pursuance and execution of the powers given by the statute 25th and 26th Victoria, chapter 89 (b), and of all other powers and authorities enabling him in that behalf, order and direct in manner following :—

APPENDIX VI.

Petition to wind up company (c).

1. Every petition for the winding up of any company by the Court, or subject to the supervision of the Court, shall be intituled in the matter of “The Companies act, 1862,” and of the company to which such petition shall relate, describing the company by its most usual style or firm (d).

2. Every such petition shall be advertised seven clear days before the hearing as follows :—

- (1.) In the case of a company whose registered office, or if there shall be no such office, then whose principal, or last known principal place of business is or was situate within ten miles from Lincoln’s Inn Hall, once in the “London Gazette,” and once at least in two London daily morning newspapers.
- (2.) In the case of any other company, once in the “London Gazette,” and once at least in two local newspapers circulating in the district where such registered office or principal or last known principal place of business, as the case may be, of such company is or was situate.

The advertisement shall state the day on which the petition was presented, and the name and address of the petitioner, and of his solicitor and London agent (if any) (e).

(a) These rules apply to the winding up of companies in county courts, the registrar being substituted for the chief clerk. Any bank may, however, be substituted for the Bank of England by the order of the county court judge. See County Court Rules of 1886, Ord. XLII.

(b) See § 170, now repealed.

(c) See the act, §§ 82 and 148, and *ante*, pp. 654 *et seq.*

(d) See order of 1868, rule 1.

(e) See *ante*, p. 655, and the form of advertisement, *infra*, in Schedule 3, No. 1.

APPENDIX VI.

3. Every such petition shall, unless presented by the company, be served at the registered office, if any, of the company, and if no registered office, then at the principal or last known principal place of business of the company, if any such can be found, upon any member, officer, or servant of the company there, or in case no such member, officer, or servant can be found there, then by being left at such registered office or principal place of business, or by being served on such member or members of the company as the Court may direct; and every petition for the winding up of a company subject to the supervision of the Court, shall also be served upon the liquidator (if any) appointed for the purpose of winding up the affairs of the company (*f*).

4. Every petition for the winding up of any company by the Court, or subject to the supervision of the Court, shall be verified by an affidavit referring thereto, in the form or to the effect set forth in Form No. 2, in the third Schedule hereto; such affidavit shall be made by the petitioner, or by one of the petitioners, if more than one, or in case the petition is presented by the company, by some director, secretary, or other principal officer thereof, and shall be sworn after and filed within four days after the petition is presented, and such affidavit shall be sufficient *prima facie* evidence of the statements in the petition (*g*).

5. Every contributory or creditor of the company shall be entitled to be furnished by the solicitor to the petitioner with a copy of the petition, within twenty-four hours after requiring the same, on paying at the rate of fourpence per folio of seventy-two words for such copy.

Order to wind up company (h).

6. Every order for the winding up of a company by the Court, or subject to its supervision (*i*), shall, within twelve days after the date thereof, be advertised by the petitioner once in the "London Gazette," and shall be served upon such persons (if any) and in such manner as the Court may direct (*j*).

7. A copy of every order for winding up a company, certified to be a true copy thereof as passed and entered, shall be left by the petitioner at the chambers of the judge within ten days after the same shall have been passed and entered, and in default thereof any other person interested in the winding up may leave the same, and the judge may, if he thinks fit, give the carriage and prosecution of the order to such person. Upon such copy being left, a summons shall be taken out to proceed with the winding up of the company, and be served upon all parties who may have appeared upon the hearing of the petition. Upon the return of such summons, a time shall, if the judge thinks fit, be fixed for the appointment of an official liquidator, and for the proof of debts, and for the list of contributories to be brought in, and directions may be given as to the advertisements to be issued for all or any of such purposes, and generally as to the proceedings and the parties to attend thereon. The proceedings under the order shall be continued by adjournment, and, when necessary, by further summons, and any such direction as aforesaid may be given,

(*f*) *Ante*, p. 656.

(*g*) *Ante*, p. 657.

(*h*) See the act, §§ 82, 85, 86, 147, and *ante*, p. 684 *et seq.*

(*i*) See the form of order, *infra*, Schedule 3, Nos. 3 and 4.

(*j*) See the form of advertisement in *ib.* No. 5.

added to, or varied, at any subsequent time, as may be found necessary (k). APPENDIX VI.

Official liquidator (l).

8. The judge may appoint a person to the office of official liquidator without previous advertisement, or notice to any party, or fix a time and place for the appointment of an official liquidator, and may appoint or reject any person nominated at such time and place, and appoint any person not so nominated.

9. When a time and place are fixed for the appointment of an official liquidator, such time and place shall be advertised in such manner as the judge shall direct, so that the first or only advertisement shall be published within fourteen days and not less than seven days before the day so fixed (m).

10. Every official liquidator shall give security by entering into a recognisance with two or more sufficient sureties in such sum as the judge may approve; and the judge may, if he shall think fit, accept the security of any guarantee society established by charter or act of Parliament in England, in lieu of the security of such sureties as aforesaid, or of any of them (n).

11. The official liquidator shall be appointed by order (o), and unless he shall have given security, a time shall be fixed by such order within which he is to do so; and the order shall fix the times or periods at which the official liquidator is to leave his accounts of his receipts and payments at the judge's chambers (p), and shall direct that all moneys to be received shall be paid into the Bank of England, immediately after the receipt thereof, to the account of the official liquidator of the company, and an account shall be opened there accordingly; and an office copy of the order shall be lodged at the Bank of England (q).

12. When an official liquidator has given security pursuant to the directions in the order appointing him, the same shall be certified by the chief clerk, as in the case of a receiver appointed in a cause subject to giving security.

13. The official liquidator shall, on each occasion of passing his account (r), and also whensoever the judge may so require, satisfy the judge that his sureties are living, and resident in Great Britain, and have not been adjudged bankrupt or become insolvent, and in default thereof he may be required to enter into fresh security within such time as shall be directed.

14. Every appointment of an official liquidator shall be advertised in such manner as the judge shall direct, immediately after he has been appointed, and has given security (s).

(k) *Ante*, pp. 686, 687.

(l) See the act, §§ 85, 92, 93, 103, 104, and *ante*, pp. 701 *et seq.*

(m) See the form of advertisement, *infra*, Schedule 3, No. 6, and the form of proposal for the appointment of the official liquidator, *ib.* No. 7.

(n) See the form of recognisance and affidavit of sureties, *ib.* Nos. 9 and 10.

(o) See the form of order, *ib.* Nos. 8

and 9.

(p) See rule 19.

(q) See, further, as to accounts in the Bank of England, rules 36—44; and for the form of direction to open an account there, see Schedule 3, No. 14.

(r) See rule 19.

(s) See the form of advertisement in Schedule 3, No. 15.

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15. Where it is desired to appoint provisionally an official liquidator (*t*) an application for that purpose may, at any time after the presentation of the petition for winding up the company, be made by summons, without advertisement or notice to any person, unless the judge shall otherwise direct; and such provisional official liquidator may, if the judge shall think fit, be appointed without security.

16. In case of the death, removal or resignation of an official liquidator, another shall be appointed in his room, in the same manner as directed in the case of a first appointment, and the proceedings for that purpose may be taken by such party interested as may be authorised by the judge to take the same.

17. The official liquidator shall, with all convenient speed after he is appointed, proceed to make up, continue, complete, and rectify the books of account of the company; and shall provide and keep such books of account as shall be necessary, or as the judge may direct, for the purposes aforesaid, and for showing the debts and credits of the company, including a ledger, which shall contain the separate accounts of the contributories, and in which every contributory shall be debited from time to time with the amount payable by him in respect of any call to be made as provided by the said act and these rules.

18. The official liquidator shall be allowed in his accounts, or otherwise paid, such salary or remuneration as the judge may from time to time direct, including any necessary employment of assistants or clerks by the official liquidator, to which regard shall be had; and such salary or remuneration may either be fixed at the time of his appointment, or at any time thereafter, as the judge may think fit. Every allowance of such salary or remuneration, unless made at the time of his appointment, or upon passing an account, shall be made upon application for that purpose by the official liquidator, on notice to such persons (if any), and supported by such evidence as the judge shall require; nevertheless the judge may from time to time allow any sum he may think fit to the official liquidator, on account of the salary or remuneration to be thereafter allowed.

19. The accounts of the official liquidator shall be left at the judge's chambers at the times directed by the order appointing him, and at such other times as may from time to time be required by the judge, and such accounts shall, upon notice to such parties (if any), as the judge shall direct, be passed and verified in the same manner as receiver's accounts.

Proof of debts (u).

20. For the purpose of ascertaining the debts and claims due from the company, and of requiring the creditors to come in and prove their debts or claims, an advertisement shall be issued at such time as the judge shall direct: and such advertisement shall fix a time for the creditors to send their names and addresses, and the particulars of their debts or claims, and the names and addresses of their solicitors (if any), to the official liquidator, and appoint a day for adjudicating thereon (*x*).

(*t*) See the form of order appointing a provisional official liquidator in Schedule 3, No. 9; and see further, as to him, §§ 85 and 92 of the act, and *infra*, rule 59.

(*u*) See the act, §§ 107, 158, and *ante*, pp. 713 *et seq.*

(*x*) See the form of advertisement, *infra*, Schedule 3, No. 16.

21. The creditors need not attend upon the adjudication, nor prove their debts or claims, unless they are required to do so by notice from the official liquidator ; but upon such notice being given, they are to come in and prove their debts or claims within a time to be therein specified.

22. The official liquidator shall investigate the debts and claims sent in to him, and ascertain, as far as he is able, which of such debts and claims are justly due from the company ; and he shall make out and leave at the chambers of the judge, a list of all the debts and claims sent in to him, distinguishing which of the debts and claims, or parts of debts and claims are so claimed, are, in his opinion, justly due and proper to be allowed without further evidence, and which of them, in his opinion, ought to be proved by the creditors ; and he shall make and file, prior to the time appointed for adjudication, an affidavit, setting forth which of the debts and claims in his opinion are justly due and proper to be allowed without further evidence, and stating his belief that such debts and claims are justly due and proper to be allowed, and the reasons for such belief (*y*).

23. At the time appointed for adjudication upon the debts and claims, or at any adjournment thereof, the judge may either allow the debts and claims upon the affidavit of the official liquidator, or may require the same, or any of them, to be proved by the claimants, and adjourn the adjudication thereon to a time to be then fixed ; and the official liquidator shall give notice to the creditors whose debts or claims have been so allowed, of such allowance (*z*).

24. The official liquidator shall give notice to the creditors whose debts or claims have not been allowed upon his affidavit, that they are required to come in and prove the same by a day to be therein named, being not less than four days after such notice, and to attend at a time to be therein named, being the time appointed by the advertisement, or by adjournment (as the case may be), for adjudication upon such debts and claims (*a*).

25. The value of such debts and claims as are made admissible to proof by the 158th section of the said act, shall, so far as is possible, be estimated according to the value thereof at the date of the order to wind up the company.

26. Interest on such debts and claims as shall be allowed shall be computed, as to such of them as carry interest, after the rate they respectively carry ; any creditor whose debt or claim so allowed does not carry interest, shall be entitled to interest, after the rate of 4*l.* per centum per annum, from the date of the order to wind up the company, out of any assets which may remain after satisfying the costs of the winding up, the debts and claims established, and the interest of such debts and claims as by law carry interest (*b*).

27. Such creditors as come in and prove their debts or claims pursuant to notice from the official liquidator, shall be allowed their costs of proof in the same manner as in the case of debts proved in a cause.

28. The result of the adjudication upon debts and claims shall be stated in a certificate to be made by the chief clerk, and certificates as to any of such debts and claims may be made from time to time. All such certi-

(*y*) See the form of affidavit, *ib.* Nos. 17 and 18.

(*z*) See the form of notice, *ib.* No. 19 ; and the form of notice to attend and be paid, *ib.* No. 23.

(*a*) See the form of notice, *ib.* No. 20 and the form of affidavit to be made by creditor who has received such notice, No. 21.

(*b*) See *ante*, p. 724.

APPENDIX VI. cates shall state whether the debts or claims are allowed or disallowed, and whether allowed as against any particular assets, or in any other qualified or special manner (c).

List of contributories (d).

29. The official liquidator shall, with all convenient speed after his appointment, or at such time as the judge shall direct, make out and leave at the chambers of the judge a list of the contributories of the company; and such list shall be verified by the affidavit of the official liquidator, and shall, so far as is practicable, state the respective addresses of, and the number of shares or extent of interest to be attributed to each such contributory, and distinguish the several classes of contributories. And such list may from time to time, by leave of the judge, be varied or added to, by the official liquidator (e).

30. Upon the list of contributories being left at the chambers of the judge, the official liquidator shall obtain an appointment for the judge to settle the same, and shall give notice in writing of such appointment to every person included in such list, and stating in what character, and for what number of shares or interest such person is included in the list; and in case any variation or addition to such list shall at any time be made by the official liquidator, a similar notice in writing shall be given to every person to whom such variation or addition applies. All such notices shall be served four clear days before the day appointed to settle such list, or such variation or addition (f).

31. The result of the settlement of the list of contributories shall be stated in a certificate by the chief clerk; and certificates may be made from time to time for the purpose of stating the result of such settlement down to any particular time, or as to any particular person, or stating any variation of the list (g).

Sales of property (h).

32. Any real or personal property belonging to the company may be sold, with the approbation of the judge, in the same manner as in the case of a sale under a decree or order of the Court in a suit, or, if the judge shall so direct, by the official liquidator; and upon any such sale by the official liquidator, the conditions or contracts of sale shall be settled and approved of by the judge, unless he shall otherwise direct; and the judge may, if he thinks fit, direct such conditions and contracts, and the abstract of the title to the property, to be submitted to one of the conveyancing counsel of the Court, under the second of the consolidated general orders (hh), and may, on any sale by public auction, fix a reserved bidding; and, unless on account of the small amount of the purchase-moneys, or other

(c) See the form of certificate, *ib.* No. 22; and the form of notice to a creditor to attend and be paid, *ib.* No. 23.

(d) See the act, §§ 93 and 99, and *ante*, pp. 745 *et seq.*

(e) See the forms of the list, *infra*, Schedule 3, Nos. 25, 29, and 30; and the form of the affidavit in support, *ib.* Nos. 24 and 29; and the form of order

varying the list, *ib.* No. 32.

(f) See the form of notice, *ib.* No. 26; and of the affidavit of service, No. 27.

(g) See the form of certificate, *ib.* No. 31.

(h) See the act, §§ 94, 95, 103, and *ante*, p. 708.

(hh) See now R. S. C. Order LI. rr. 7—13.

cause, it shall, having regard to the amount of the security given by the official liquidator, be thought proper that the purchase-moneys shall be paid to him, all conditions and contracts of sale shall provide that the purchase-moneys shall be paid by the respective purchasers into the Bank of England, to the account of the official liquidator of the company.

Calls (i).

33. Every application to the judge to make any call on the contributories, or any of them, for any purpose authorised by the said act, shall be made by summons, stating the proposed amount of such call; and such summons shall be served four clear days at the least before the day appointed for making the call on every contributory proposed to be included in such call; or, if the judge shall so direct, notice of such intended call may be given by advertisement (*k*).

34. When any order for a call has been made, a copy thereof shall be forthwith served upon each of the contributories included in such call, together with a notice from the official liquidator specifying the amount or balance due from such contributory (having regard to the provisions of the said act) in respect of such call; but such order need not be advertised unless, for any special reason, the judge shall so direct (*l*).

35. At the time of making an order for a call, the further proceedings relating thereto shall be adjourned to a time subsequent to the day appointed for the payment thereof, and afterwards from time to time so long as may be necessary; and at the time appointed by any such adjournment, or upon a summons to enforce payment of the call, duly served, and upon proof of the service of the order and notice of the amount due, and non-payment, an order (*m*) may be made for such of the contributories who have made default, or of such of them against whom it shall be thought proper to make such order, to pay the sum which by such former order and notice they were respectively required to pay, or any less sum which may appear to be due from them respectively.

Payment in of moneys and deposit of securities (n).

36. If any official liquidator shall not pay all the moneys received by him into the Bank of England (*o*), to the account of the official liquidator of the company, within seven days next after the receipt thereof, unless the judge shall have otherwise directed, such official liquidator shall be charged in his account with ten shillings for every 100*l.*, and a proportionate sum for any larger amount, retained in his hands beyond such period, for every seven days during which the same shall have been so retained, and the judge may, for any such retention, disallow the salary or remuneration of such official liquidator.

(i) See the act, §§ 102 and 120, and *ante*, pp. 846 *et seq.*

(k) See the forms of the summons, the affidavit in support of it, and the advertisement, *infra*, Schedule 3, Nos. 33—35.

(l) See the forms of the order and the notice, *ib.* Nos. 36—37.

(m) See the forms of this order and

of the affidavit on which to obtain it, *ib.* Nos. 38 and 39; and see the form of affidavit of service of this order, *ib.* No. 42.

(n) See the act, §§ 103, 104, and *ante*, p. 704.

(o) See form of direction to open account, *infra*, Schedule 3, No. 14.

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37. All bills, notes, and other securities payable to the company or to the official liquidator thereof shall, as soon as they shall come to the hands of such official liquidator, be deposited by him in the Bank of England for the purpose of being presented by the bank for acceptance and payment, or for payment only, as the case may be.

38. All orders for payment of calls, balances, or other moneys due from any contributory or other person, shall direct the same to be paid into the Bank of England, to the account of the official liquidator of the company, unless, on account of the smallness of the amount or other cause, it shall, having regard to the amount of the security given by the official liquidator, be thought proper to direct payment thereof to the official liquidator. Provided that where any such order has been made directing payment of a specific sum into the Bank of England, in case it shall be thought proper for the purpose of enabling the official liquidator to issue execution or take other proceedings to enforce the payment thereof, or for any other reason, an order may, either before service of such former order, or after the time thereby fixed for payment, be made, without notice, for payment of the same sum to the official liquidator.

39. At the time of the service of any order for payment into the Bank of England, the official liquidator shall give to the party served a notice, to the purport or effect set forth in form No. 40 in the third schedule hereto, for the purpose of informing him how the payment is to be made; and before the time fixed for such payment the official liquidator shall furnish the cashier of the Bank of England with a certificate, to the purport or effect set forth in form No. 41 in the third schedule hereto, to be signed by such cashier, and delivered to the party paying in the money therein mentioned.

40. For the purpose of enforcing any order for payment of money into the Bank of England an affidavit of the official liquidator, to the purport or effect set forth in form No. 43, in the third schedule hereto, shall be sufficient evidence of the non-payment thereof.

41. All moneys, bills, notes, and other securities paid and delivered into the Bank of England, shall be placed to the credit of the account of the official liquidator of the company; and orders for any such payment and delivery shall direct the same accordingly.

Delivery out of securities, and payment out and investment of moneys (p).

42. All bills, notes, and other securities delivered into the Bank of England, shall be delivered out upon a request signed by the official liquidator, and countersigned by the chief clerk of the judge; and moneys placed to the account of the official liquidator shall be paid out upon cheques or orders, signed by the official liquidator, and countersigned by the chief clerk of the judge.

43. All or any part of the money for the time being standing to the credit of the account of the official liquidator at the Bank of England, and not immediately required for the purposes of the winding up, may be invested in the purchase of Bank 3*l.* per cent. Annuities, Reduced 3*l.* per cent. Annuities, New 3*l.* per cent. Annuities, or New 2*l.* 10*s.* per cent. Annuities, in the name of the official liquidator, or in the purchase of exchequer bills. All such investments shall be made by the Bank of

(p) See the act, §§ 103, 104. As to county courts, see the note *ante*, p. 1041.

England, upon a request signed by the official liquidator, and countersigned by the chief clerk of the judge, and which request shall be a sufficient authority for debiting the account with the purchase money; and such exchequer bills, and in case of an exchange thereof any new exchequer bills, shall be retained by or deposited with the Bank of England, in the name and on behalf of the official liquidator: and such annuities or exchequer bills shall not afterwards be sold or transferred or otherwise dealt with except upon a direction for that purpose, signed by the official liquidator, and countersigned by the chief clerk of the judge, or under an order to be made by the judge (*g*).

44. All dividends and interest to accrue due upon any such annuities, shall from time to time be received by the Bank of England, under a power of attorney to be executed by the official liquidator, and placed to the credit of the account of such official liquidator; and such of the exchequer bills as shall from time to time be in course of payment, shall be delivered by the Bank of England to one of their cashiers, who is to receive the interest due thereon, and exchange the same for new bills, in case such new bills are issued, or otherwise to receive the principal and interest due on such of the said bills, so in course of payment, as cannot be exchanged, and pay the said interest, or principal and interest, as the case may be, into the Bank of England to the credit of the account of the official liquidator of the company.

Meetings of creditors or contributories (r).

45. When the judge shall direct a meeting of the creditors or contributories of the company to be summoned under the 91st or 149th section of the said act, the official liquidator shall give notice in writing, seven clear days before the day appointed for such meeting, to every creditor or contributory, of the time and place appointed for such meeting, and of the matter upon which the judge desires to ascertain the wishes of the creditors or contributories; or, if the judge shall so direct, such notice shall be given by advertisement, in which case the object of the meeting need not be stated, and it shall not be necessary to insert such advertisement in the "London Gazette" (*s*).

46. The votes of the creditors or contributories of the company at any meeting summoned by the direction of the judge, may be given either personally or by proxy; but no creditor shall appoint a proxy who is not a creditor of the company whose debt or claim has been allowed, and no contributory shall appoint a proxy who is not a contributory of the company (*t*).

47. The direction of the judge for any meeting of creditors or contributories under the 91st or 149th section of the said act, and the appointment of a person to act as chairman of any such meeting, shall be testified by a memorandum signed by the chief clerk of the judge (*u*).

(*g*) See the form of request to invest, *infra*, Schedule 3, No. 54.

(*r*) See the act, §§ 91 and 149, *ante*, pp. 687, 688.

(*s*) See the form of notice or advertisement, *infra*, Schedule 3, No. 45.

(*t*) See the form of appointment of

proxy, *ib.* No. 46. As to the stamp, see *ante*, p. 310.

(*u*) See the form of this memorandum, Schedule 3, No. 47; and for the form of the chairman's report of the result of the meeting, see *ib.* No. 48.

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Direction or sanction of the judge (x).

48. The sanction of the judge to the drawing, accepting, making, and indorsing of any bill of exchange or promissory note by any official liquidator, shall be testified by a memorandum on such bill of exchange or promissory note, signed by the chief clerk of the judge (y).

49. Every application for the sanction of the judge to a compromise with any contributory or other person indebted to the company, shall be supported by the affidavit of the official liquidator that he has investigated the affairs of such contributory or person, and stating his belief that the proposed compromise will be beneficial to the company, and his reasons for such belief; and the sanction of the judge thereto shall be testified by a memorandum signed by the chief clerk of the judge, on the agreement of compromise, unless any party shall desire to appeal from the decision of the judge, in which case an order shall be drawn up for that purpose (z).

50. The direction or sanction of the judge for any other proceeding or act to be taken or done by the official liquidator, shall be obtained upon summons, and an order shall be drawn up thereon, unless the judge shall otherwise direct (a).

Applications to the court or judge under §§ 137, 138, 141, 167, and 168 of the act.

51. Every application under the 137th, 138th, or 141st section of the said act shall be made by petition or motion, or, if the judge shall so direct, by summons at chambers: and every application under the 167th or 168th section of the said act shall be made by petition (b).

Orders.

52. All orders made in chambers shall be drawn up in chambers, unless specially directed to be drawn up by the registrar, and shall be entered in the same manner, and in the same office, as other orders made in chambers (c).

Advertisements.

53. When an advertisement is required for any purpose, except where otherwise directed by these rules, the advertisement shall be inserted once in the "London Gazette," and in such other newspaper or newspapers, and for such number of times as may be directed. The judge may, in such cases as he shall think fit, dispense with any advertisement required by these rules (d).

(x) See the act, §§ 95, 159, 160, and *infra*, rule 74.

(y) See the form of memorandum, *infra*, Schedule 3, No. 49.

(z) See the forms of an agreement to compromise; and of the memorandum sanctioning it, *ib.* Nos. 50 and 51.

(a) See the form of order, *ib.* No. 52.

(b) § 137 relates to appeals against

arrangements with creditors: § 138 relates to applications by liquidators in a voluntary winding up: § 141 relates to the appointment of liquidators in a voluntary winding up: and §§ 167 and 168 relate to the prosecution of delinquent directors, &c.

(c) See *infra*, rule 74.

(d) See *infra*, rules 73 and 74.

Admission of documents.

54. Any party to any proceeding in court or chambers relating to the winding up of a company may, by notice in writing in the Form No. 6, in schedule N. to the Consolidated general orders (*dd*), or to the like effect, call on any other party thereto competent to admit the same, to admit any document, saving all just exceptions; and in case of refusal or neglect so to admit, the costs of proving such document shall be paid by the party so refusing or neglecting, unless the judge shall be of opinion that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice shall have been given, except in cases where the omission to give such notice has been, in the opinion of the taxing master, a saving of expense.

Affidavits (e).

55. Where an order shall have been made for the winding up of any company, any person intending to use any affidavit in any proceeding under such order, shall file the same in the Record and Writ Clerks' office (*ee*), and give notice thereof to the official liquidator. The person, other than the official liquidator, filing the affidavit, shall not be required to take an office copy thereof, but an office copy thereof shall be taken by the official liquidator, and he shall produce the same at the hearing of any application or proceeding upon which it is intended to be used, unless the judge shall otherwise direct.

Certificate of chief clerk (f).

56. The 48th, 49th, 50th, 51st, 52nd, and 55th rules of the 35th of the Consolidated general orders, shall apply to all certificates of the chief clerk in the matter of the winding up of any company; nevertheless certificates on passing the official liquidator's accounts may be approved and signed by the judge without delay, and upon being so signed, shall be filed and forthwith acted upon (*g*).

Register and file of proceedings.

57. A register shall be kept of all proceedings in the judge's chambers, in each matter, in the same manner as required by the 57th rule of the 35th of the Consolidated general orders (*gg*), and no documents or proceedings are to be filed in the judge's chambers, unless the judge shall otherwise direct.

(*dd*) See now R. S. C. Ord. XXXII. r. 3.

(*e*) See *infra*, rule 74.

(*ee*) Now the Central Office, 42 & 43 Vict. c. 78.

(*f*) See *infra*, rule 74.

(*g*) These rules relate to the practice respecting certificates, and the time for obtaining a review of a certificate, as well before as after it has been signed by the judge. The time for obtaining a summons to take the opinion of the judge on

a certificate not signed by him is four clear days after its signature by the chief clerk; and the time for applying by summons or motion to discharge or vary a certificate signed and adopted by the judge, is eight clear days after the filing of the certificate. But the judge has power to enlarge these times; see *infra*, rule 73. See for the rules now in force, R. S. C. Ord. LV. rr. 65—71.

(*gg*) See now R. S. C. Ord. LV. r. 73.

APPENDIX VI. 58. All orders, exhibits, admissions, memorandums, and office copies of affidavits, examinations, depositions and certificates, and all other documents relating to the winding up of any company, shall be filed by the official liquidator, as far as may be, in one continuous file, and such file shall be kept by him, or otherwise, as the judge may from time to time direct. Every contributory of the company, and every creditor thereof whose debt or claim has been allowed, shall be entitled, at all reasonable times to inspect such file free of charge, and, at his own expense, to take copies or extracts from any of the documents comprised therein, or to be furnished with such copies or extracts at a rate not exceeding three-halfpence per folio of seventy-two words; and such file shall be produced in court, or before the judge, and otherwise, as occasion may require (*h*).

Provisional official liquidators.

59. All the above rules relating to official liquidators shall, so far as the same are applicable, and subject to the directions of the judge in each case, apply to provisional official liquidators (*i*).

Attendance and appearance of parties (k).

60. Every person, for the time being, on the list of contributories of the company, left at the chambers of the judge by the official liquidator, and every person having a debt or claim against the company, allowed by the judge, shall be at liberty, at his own expense, to attend the proceedings before the judge, and shall be entitled, upon payment of the costs occasioned thereby, to have notice of all such proceedings as he shall by written request desire to have notice of; but if the judge shall be of opinion that the attendance of any such person upon any proceeding has occasioned any additional costs which ought not to be borne by the funds of the company, he may direct such costs, or a gross sum in lieu thereof, to be paid by such person: and such person shall not be entitled to attend any further proceedings until he has paid the same.

61. The judge may from time to time appoint any one or more of the contributories, or creditors, as he thinks fit, to represent before him, at the expense of the company, all or any class of the contributories or creditors, upon any question as to a compromise with any of the contributories or creditors, or in and about any other proceedings before him relating to the winding up of the company, and may remove the person or persons so appointed. In case more than one person shall be so appointed, they shall unite in employing the same solicitor to represent them.

62. No contributory or creditor shall be entitled to attend any proceedings at the chambers of the judge, unless and until he has entered in a book to be kept there for that purpose his name and address, and the name and address of his solicitor (if any), and upon any change of his address or of his solicitor, his new address, and the name and address of his new solicitor (*l*).

(*h*) See the act, § 156, and *ante*, p. *infra*, rule 74, *ante*, p. 687.

704.

(*i*) See the form of this book, Schedule 3, No. 53, *ante*, p. 687.

(*j*) See *ante*, rule 15.

(*k*) See the act, §§ 74, 159, 160, and

Services of summonses, notices, &c. (m)

APPENDIX VI.

63. Services upon contributories and creditors shall be effected (except when personal service is required) by sending the notice, or a copy of the summons or order or other proceeding, through the post in a pre-paid letter, addressed to the solicitor of the party to be served (if any) or otherwise to the party himself at the address entered or last entered pursuant to the preceding rule ; or if no such entry has been made, then, if a contributory, to his last known address or place of abode ; and if a creditor, to the address given by him, pursuant to the foregoing rule 20 ; and such notice, or copy summons, order, or other proceeding, shall be considered as served at the time the same ought to be delivered in the due course of delivery by the post-office, and notwithstanding the same may be returned by the post-office.

64. No service under these rules shall be deemed invalid by reason that the Christian name, or any of the Christian names of the person on whom service is sought to be made has been omitted, or designated by initial letters, in the list of contributories, or in the summons, order, notice, or other document wherein the name of such contributory or creditor is contained, provided the judge is satisfied that such service is in other respects sufficient.

Termination of winding up (n).

65. Upon the termination of the proceedings in chambers for the winding up of any company, a balance-sheet shall be brought in by the official liquidator of his receipts and payments, and verified by his affidavit ; and the official liquidator shall pass his final account, and the balance (if any) due thereon shall be certified. And upon payment of such balance, in such manner as the Court or judge shall direct, the recognisance entered into by the official liquidator and his sureties may be vacated.

66. When the official liquidator has passed his final account, and the balance (if any) certified to be due thereon has been paid in such manner as the judge shall direct, a certificate shall be made by the chief clerk that the affairs of the company have been completely wound up (o) ; and, in case the company has not been already dissolved, the official liquidator shall, immediately after such certificate has become binding, apply to the judge for an order that the company be dissolved from the date of such order (p).

67. When the proceedings for winding up any company have been completed, the file of proceedings and the book containing the official liquidator's account shall be deposited in the Record and Writ Clerk's office (pp).

Duties of solicitor of official liquidator (q).

68. The solicitor of the official liquidator shall conduct all such proceedings as are ordinarily conducted by solicitors of the Court ; and

(m) See the act, §§ 62 and 63, and *infra*, rule 74, *ante*, p. 687.

(n) See the act, §§ 111—113.

(o) See the form of certificate, Schedule 3, No. 55.

(p) See the form of order, *ib.* No. 56.

(pp) Now the Central Office, see 42 & 43 Vict. c. 78.

(q) See the act, § 97, and *infra*, Schedule 3, Form No. 12.

APPENDIX VI.

where the attendance of his solicitor is required on any proceeding in court or chambers, the official liquidator need not attend in person, except in cases where his presence is necessary in addition to that of his solicitor, or the judge shall direct him to attend.

Forms.

69. The forms set forth or referred to in the third schedule to these orders, with such variations as the circumstances of each case may require, may be used for the respective purposes mentioned in such schedule.

Fees.

70. Solicitors shall be entitled to charge, and be allowed, the fees set forth and referred to in the first schedule hereto, unless the Court or judge shall otherwise specially direct.

71. The fees of Court set forth and referred to in the second schedule hereto shall be paid in relation to proceedings in the Court of Chancery under the Companies act, 1862, and shall be collected by means of stamps, in the manner prescribed by the 39th of the Consolidated General Orders.

Taxation of costs.

72. Where an order is made in court or chambers for payment of any costs, the order shall direct the taxation thereof by the taxing master; except in cases where a gross sum in lieu of taxed costs is fixed by the order, in accordance with the 37th rule of the 40th of the Consolidated General Orders (*qq*).

Power of judge (r).

73. The power of the Court, and of the judge sitting in chambers, to enlarge or abridge the time for doing any act, or taking any proceeding, to adjourn or review any proceeding, and to give any direction as to the course of proceeding, is unaffected by these rules.

General directions (s).

74. The general practice of the Court, including the course of proceeding and practice at the judge's chambers, as provided by the statute 15th and 16th Victoria, chapter 80, and the general orders of the Court relative thereto, shall, in cases not provided for by the Companies act, 1862, or these rules, and so far as the same are applicable and not inconsistent with the said act or these rules, apply to all proceedings for winding up a company.

Application of rules.

75. These rules apply only to proceedings under the Companies act, 1862.

(*qq*) See now R. S. C. Ord. LXV., and as to the power of enlarging time, r. 27; and regulation 38 a. R. S. C., Ord. LXIV., r. 7.

(*r*) See the act, §§ 33, 119, and 204, (*s*) See the act, § 170, and *ante*, p. 635.

Commencement of rules.

76. These rules shall take effect and come into operation on and after the 25th day of November, 1862.

Interpretation.

77. The 1st rule of the 23rd of the Consolidated General Orders, and the general interpretation clause therein, shall be deemed to extend and apply to the rules of this order; and such rules shall have the effect of and be deemed to be General Orders of the Court.

WESTBURY, C.
JOHN ROMILLY, M.R.
RICHD. T. KINDERSLEY, V.-C.
JOHN STUART, V.-C.
W. P. WOOD, V.-C.

THE FIRST SCHEDULE.

FEES AND CHARGES TO BE ALLOWED TO SOLICITORS.

	£	s.	d.
For preparing and drawing up every order made at chambers, and attending for same, and at the registrar's office to get same entered	0	13	4
For engrossing every order, in addition to the above fee, per folio	0	0	4
For other duties performed, such of the fees on the higher scale authorised by the 2nd rule of the 38th of the Consolidated General Orders, and the regulations as to solicitor's fees subjoined thereto, as are applicable; except that the special fee allowed on creditor's claims is not to apply.			
Where, under such regulations, a fee of 3 guineas may be allowed for attending any summons or other appointment at the judge's chambers, the same may be increased to any sum not exceeding 5 guineas.			
The fee of 2s. 6d. allowed by such regulations for notices and services shall be reduced to 1s. 6d., where the service may be effected as provided by the above rule 63.			
The usual charges relating to printing shall be allowed in lieu of copies for service, where the fee for copies would exceed the charges for printing and amount to more than £3.			

APPENDIX VI.

THE SECOND SCHEDULE.

FEES TO BE COLLECTED BY MEANS OF STAMPS.

In the judge's chambers.

	£	s.	d.
For every summons	0	3	0
For every order drawn up by the chief clerk	0	5	0
For every advertisement	1	0	0
For every certificate	0	5	0
For every oath, affirmation, declaration, or attestation upon honour	0	1	6

In the registrar's office.

For every order made in court	1	0	0
For every order made in chambers	0	5	0
For every office copy of an order	0	5	0

In the examiner's office.

The same fees as those directed to be paid and collected in such office by the 2nd rule of the 39th of the Consolidated General Orders (ss), and the regulations subjoined thereto.

In the record and writ clerk's office, and report office.

Such of the fees directed to be paid and collected in such office by the 2nd rule of the 39th of the Consolidated General Orders, and the regulations subjoined thereto, as are applicable.

In the taxing master's office.

The same fees as those directed to be paid and collected by the 2nd rule of the 39th of the Consolidated General Orders, and the regulations subjoined thereto.

In the office of the Lord Chancellor's principal secretary.

For every petition	1	0	0
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In the office of the Secretary of the rolls.

For every petition	1	0	0
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THE THIRD SCHEDULE.

FORMS.

No. 1. *Advertisement of petition.* [Rule 2.]

In the matter of the Companies act, 1862 (t) ; and of the company.

Notice is hereby given, that a petition for the winding up of the above-named company by the Court [or, subject to the supervision of the court] of Chancery was, on the day of , 186 , presented to

(ss) See for present rules as to fees, (t) Add now and 1867. See General Order as to Supreme Court Fees, 1884. Order, March, 1868, r.1, *infra*, p. 1034.

the Lord Chancellor [*or*, the Master of the Rolls] by the said company [*or*, by A. B., of _____, a creditor [*or*, contributory] of the said company] [*or, as the case may be*]. And that the said petition is directed to be heard before the Vice-Chancellor _____ [*or*, Master of the Rolls] on the _____ day of _____, 186 ____; and any creditor or contributory of the said company desirous to oppose the making of an order for the winding up of the said company under the above act [acts], should appear at the time of hearing by himself or his counsel for that purpose, and a copy of the petition will be furnished to any creditor or contributory of the said company requiring the same, by the undersigned, on payment of the regulated charge for the same.

C. and D., of &c. [Agents for E. and F., of &c.]

Solicitors for the petitioner.

No. 2. *Affidavit verifying petition.* [Rule 4.]

In Chancery.

In the matter, &c.

I, A. B., of &c., make oath and say, that such of the statements in the petition now produced and shown to me, and marked with the letter A., as relate to my own acts and deeds are true, and such of the said statements as relate to the acts and deeds of any other person or persons, I believe to be true.

Sworn, &c.

No. 3. *Order for winding up by the Court.* [25 & 26 Vict. c. 89, ss. 81, 82.]

The Master of the Rolls } [or Vice-Chancellor }].	day, the _____ day of _____ 186 ____.
	In the matter, &c.

Upon the petition of the above-named company [*or*, A. B., of &c., a creditor [*or* contributory] of the above-named company] on the _____ day of _____ 186 __, preferred unto the Right Honourable the Lord High Chancellor of Great Britain [*or*, Master of the Rolls], and upon hearing counsel for the petitioner, and for _____, and upon reading the said petition, an affidavit of (the said petitioner), filed, &c., verifying the said petition, an affidavit of L. M., filed the _____ day of _____ 186 __, the "London Gazette" of the _____ day of _____, the "Times" newspaper of the _____ day of _____ [enter any other papers] each containing an advertisement of the said petition [enter any other evidence], his Honour [*or*, this Court] doth order that the said _____ company be wound up by this Court, under the provisions of the Companies act, 1862.

No. 4. *Order for winding up, subject to supervision.* [25 & 26 Vict. c. 89, ss. 147, 148.]

The Master of the Rolls } [or, Vice-Chancellor }].	day, the _____ of _____ 186 ____.
	In the matter, &c.

Upon the petition, &c., his Honour [*or*, this Court] doth order, that the voluntary winding up of the said _____ company be continued, but subject to the supervision of this Court; and any of the proceedings under the said voluntary winding up may be adopted as the judge shall think

the chambers of the said judge. And it is ordered that all moneys to be received by the said R. P. H. be paid by him into the Bank of England, to the credit of the account of the official liquidator of the said company, within seven days after the receipt thereof. [*In case two or more official liquidators are appointed, add,* And the said judge doth declare that the following acts, required or authorised by the above statute to be done by the official liquidator, may be done by either [*or, any one, or two*] of the official liquidators hereby appointed, that is to say [*describe the acts*]; and that all other acts so required or authorised to be done be done by both [*or, all*] the official liquidators hereby appointed.]

No. 9. *Order appointing a provisional official liquidator.* [Rules 10, 11, 15, 59].

Master of the Rolls [*or* Vice-Chancellor
at chambers.] { , the day of , 186 .
In the matter, &c.

Upon the application, &c., and upon reading, &c., the judge doth hereby appoint R. P. H., of &c., provisionally, official liquidator of the above-named company [*if security dispensed with, add, without security; or, if security is to be given, add directions as to security, accounts, and payment into the bank, as in form No. 8*]. And the said judge doth hereby limit and restrict the powers of the said R. P. H. as such provisional official liquidator, to the following acts, that is to say [*describe the acts which the provisional official liquidator is to be authorised to do*].

No. 10. *Recognizance of the official liquidator and sureties.* [Rule 10.]

186 .
In the matter, &c.
The Master of the Rolls [or, Vice-Chancellor
and allowed this recognizance.
G. H.,
Chief Clerk.
R. P. H., of &c., W. B., of &c., and T. P., of &c., before our
sovereign lady the Queen in her High Court of Chancery
personally appearing, do acknowledge themselves, and every
of them doth acknowledge himself, to owe to the Right
Honourable Sir John Romilly, Knight, the Master of the
Rolls, and the Honourable Sir Richard Torin Kindersley,
Knight, the senior Vice-Chancellor of the said Court, the
respective sums of lawful money of Great Britain set oppo-
site to their respective names in the schedule hereto, to be
paid to the said Sir John Romilly and Sir Richard Torin
Kindersley, or one of them, or the executors or administra-
tors of them, or one of them : and in default of payment of
the said sums, the said R. P. H., W. B., and T. P., are
willing and do agree, and every of them is willing and doth
agree for himself, his heirs, executors, and administrators,
by these presents that the said sums shall be levied, re-
covered, and received of and from them and every of them,
and of and from all and singular the manors, messuages,
lands, tenements, and hereditaments, goods and chattels, of
them, and every of them, wheresoever the same shall be
found. Witness our sovereign lady Victoria, by the grace of
God, of the United Kingdom of Great Britain and Ireland,
Queen, Defender of the Faith, and so forth, at Westminster,
the day of , 186 .

APPENDIX VI.

Forms.

Whereas, in the matter, of, &c. [*take title from order to wind up*] the Master of the Rolls [*or Vice-Chancellor*] has, by an order dated the _____ day of _____, 186____, appointed the said R. P. H. official liquidator of the said company, and has thereby directed him to give security, to be approved of by the said judge [*or, in case the security precedes the order appointing*, has approved of the said R. P. H. as a proper person to be appointed official liquidator of the said company, upon his giving security]. And whereas the said judge has approved of the said W. B. and T. P. to be sureties for the said R. P. H. in the amounts set opposite to their respective names in the schedule hereto, and has also approved of the above-written recognizance, with the under-written condition, as a proper security to be entered into by the said R. P. H., W. B., and T. P., pursuant to the said order and [*or, pursuant to*] the general order of the said Court in that behalf; and in testimony of such approbation the chief clerk of the said judge hath signed an allowance in the margin hereof. Now the condition of the above-written recognizance is such, that if the said R. P. H., his executors, or administrators, or any of them, do and shall duly account for what the said R. P. H. shall receive, or become liable to pay, as official liquidator of the said company at such periods and in such manner as the said judge shall appoint, and pay the same as the said judge hath [*by the said order*] directed, or shall hereafter direct, then the above recognizance to be void, otherwise to remain in full force and virtue.

THE SCHEDULE ABOVE REFERRED TO.

R. P. H.	.	.	.	.	_____	.	Thousand pounds.
W. B.	.	.	.	.	_____	.	Thousand pounds.
T. P.	.	.	.	.	_____	.	Thousand pounds.

Taken and acknowledged by the above-named R. P. H., &c., &c.

No. 11. *Affidavit of sureties.* [Rule 10.]

In Chancery.

In the matter, &c.

We, W. B., of &c., and T. P., of &c., severally make oath and say as follows:—

1. I, The said W. B., for myself, say that I am worth the sum of £_____ of lawful money of Great Britain, over and above what is sufficient for the payment of all my just debts and liabilities.

2. And I, the said T. P., for myself, say that I am worth the sum of £_____ , of &c. [*as above*].

Sworn, &c.

No. 12. *Sanction of appointment of solicitor to official liquidator, and appointment.* [25 & 26 Vict. c. 89, s. 97.]

In the matter, &c.

The Master of the Rolls [*or, Vice-Chancellor*] sanctions the official liquidator appointing a solicitor to assist him in the performance of his duties.

G. H.,
Chief Clerk.

I hereby appoint Messrs. C. and D., of &c., to be my solicitors in this matter. APPENDIX VI.

Forms.

Dated this day of , 186 .
R. P. H., Official Liquidator.

No. 13. *Order for payment of money or delivery of books, &c., to official liquidator.* [25 & 26 Viet. c. 89, ss. 100, 101.]

The Master of the Rolls }
 [or, Vice-Chancellor } day, the day of , 186 .
 at chambers.] } In the matter, &c.

Upon the application of, &c., and on reading, &c., it is ordered that A. B., of &c., do, within four days after service hereof, pay to [or deliver, convey, surrender, or transfer to or into the hands of] R. P. H. the official liquidator of the said company, at the office of the said R. P. H., situate at &c., the sum of £ , being the amount of debt appearing to be due from the said A. B. on his account with the said company [or, any sum or balance, books, papers, estate, or effects], [or, *specifically describe the property*] now being in the hands of the said A. B., and to which the said company is *prima facie*, entitled [or, *otherwise, as the case may be*].

No. 14. *Direction to open account at the Bank of England.*

[Rules 11, 32, 36—44.]

The Master of the Rolls }
[or, Vice-Chancellor } day of 186 .
at chambers. } In the matter. &c.

at chambers.) In the matter, &c.

To the governor and company of the Bank of England.

Gentlemen,

An order, dated the _____ day of _____, 186____, having been made in the above matter by the Master of the Rolls [*or*, the Vice-Chancellor _____] for winding up the above-named company by the Court of Chancery, under the provisions of the said act, and R. P. H., of _____, having by order dated the _____ day of _____, 186____, been appointed the official liquidator of the said company, you are requested to open an account, to be entitled "The Account of the Official Liquidator of the _____ Company," in your books, pursuant to the said act.

All cheques drawn upon such account must be signed by the official liquidator, whose signature is attached hereto, and countersigned by one of the chief clerks of the said judge, whose signatures are also attached hereto.

I am, Gentlemen,

Your most obedient Servant,

G. H.,

Chief Clerk.

Signatures.

R. P. H., Official Liquidator.

G. W. { Chief Clerks of the Master of the
G. H. { Rolls [*or*, Vice-Chancellor].

APPENDIX VI.
Forms.

No. 15. *Advertisement of appointment of official liquidator.*
[Rule 14.]

In the matter, &c.

The Master of the Rolls [*or*, the Vice-Chancellor] has, by an order dated the day of , 186 , appointed R. P. H., of , to be official liquidator of the above-named company.
Dated this day of , 186 .

G. H.,
Chief Clerk.

No. 16. *Advertisement for creditors.* [Rule 20.]

In the matter, &c.

The creditors of the above-named company are required, on or before the day of , 186 , to send their names and addresses, and the particulars of their debts or claims, and the names and addresses of their solicitors, if any, to R. P. H., of , the official liquidator of the said company, and if so required by notice in writing from the said official liquidator, are by their solicitors to come in and prove their said debts or claims, at the Chambers of the Master of the Rolls [*or*, the Vice-Chancellor], in the Rolls Yard, Chancery Lane [*or*, at No. , Lincoln's Inn], in the county of Middlesex, at such time as shall be specified in such notice, or in default thereof they will be excluded from the benefit of any distribution made before such debts are proved.

 day, the day of , 186 , at o'clock in the noon, at the said chambers, is appointed for hearing and adjudicating upon the debts and claims.

Dated this day of , 186 .

G. H., Chief Clerk.

No. 17. *Affidavit of official liquidator as to debts and claims.*
[Rule 22.]

In Chancery.

In the matter, &c.

I, R. P. H., of &c., the official liquidator of the above-named company, make oath, and say as follows :—

1. I have in the paper writing now produced and shown to me, and marked with the letter A., set forth a list of all the debts and claims the particulars of which have been sent in to me by persons making claims upon, or claiming to be creditors of the said company, pursuant to the advertisement issued in that behalf, dated the day of , 186 ; and the names and addresses of the persons by whom such claims are made.

2. I have investigated the said debts and claims, and examined the same with the books and documents of the said company, in order to ascertain, so far as I am able, which of such debts and claims are justly due from the said company : and I have, in the first part of the said list, set forth such of the said debts and claims, or parts thereof, as, in my opinion, are justly due from the said company, and proper to be allowed without further evidence ; and I have, in the sixth column of the said first part of the said list, set forth the amounts proper to be allowed in respect of such debts and claims ; and I believe that such amounts respectively are justly due and proper to be allowed ; and I have, in the seventh

column of the said first part of the said list stated my reasons for such belief. APPENDIX VI.

3. I have, in the second part of the said list, set forth such of the said debts and claims as in my opinion ought to be proved by the respective creditors.

Forms

Sworn, &c.

No. 18. *Exhibit referred to in affidavit No. 17.*

A.

In the matter, &c.

List of debts and claims of which the particulars have been sent in to the official liquidator.

This paper writing, marked A., was produced and shown to R. P. H., and is the same as is referred to in his affidavit sworn before me this day of , 186 .

W. B., &c.

First part.—Debts and claims proper to be allowed without further evidence.

Serial No.	Names of Creditors.	Addresses and Descriptions.	Particulars of Debt or Claim.	Amount Claimed.	Amount proper to be allowed.	Reasons for belief that amounts are proper to be allowed.
				£ s. d.	£ s. d.	

Second part.—Debts and claims which ought to be proved by the creditors.

Serial No.	Names of Creditors.	Addresses and Descriptions.	Particulars of Debt or Claim.	Amount Claimed.
				£ s. d.

No. 19. *Notice to creditor of allowance of debt.* [Rule 23.]

In the matter, &c.

[Place and date.]

Sir,

The debt claimed by you in this matter has been allowed by the judge at the sum of £ . [If part only allowed, add, If you claim to have a larger sum allowed, you are hereby required to come in and prove the further amount claimed, &c., as in next form.]

I am, &c.,

To Mr. P R

R. P. H., Official Liquidator.

APPENDIX VI.

Forms.

No. 20. *Notice to creditors to come in and prove their debts.*

[Rule 24.]

In the matter, &c.

You are hereby required to come in and prove the debt claimed by you against the above-named company, by filing your affidavit, and giving notice thereof to me, on or before the _____ day of _____ next; and you are to attend by your solicitor at the chambers of the Master of the Rolls, in the Rolls Yard, Chancery Lane [*or*, of the Vice-Chancellor _____, at No. _____, Lincoln's Inn], in the county of Middlesex, on the _____ day of _____, 186____, at _____ o'clock in the _____ noon, being the time appointed for hearing and adjudicating upon the claim.

Dated this _____ day of _____, 186____.

R. P. H., Official Liquidator.

To Mr. S. T.

No. 21. *Affidavit of creditor in proof of debt.* [Rule 24.]

In Chancery.

In the matter, &c.

I, S. T., of &c., make oath, and say as follows :—

1. The above-named company was, on the _____ day of _____, 186____, the date of the order for winding up the same, and still is justly and truly indebted to me in the sum of £_____ for, &c. [*Describe shortly the nature of the debt, and exhibit any security for it; and in the case of a trade debt exhibit a bill of parcels, and verify the reasonableness of the charges, as in proving a debt in a suit.*]

2. I have not, nor hath nor have any person or persons by my order, or to my knowledge or belief, for my use received the said sum of £_____ or any part thereof, or any security or satisfaction for the same or any part thereof [*if any security, add*], except the said [*describe the security*] hereinbefore mentioned or referred to.

Sworn, &c.

No. 22. *Certificate of chief clerk as to debts and claims.*

[Rule 28.]

In the matter, &c.

In pursuance of the directions given to me by the Master of the Rolls [*or*, Vice-Chancellor _____], I hereby certify that the result of the adjudication upon debts and claims against the above-named company, brought in pursuance to the advertisement issued in that behalf, dated the _____ day of _____, 186____, so far as such adjudication has up to the date of this certificate been proceeded with, is as follows :—

The debts and claims which have been allowed are set forth in the first schedule hereto, and, with the interest thereon and costs mentioned in the said schedule, are due to the persons therein named, and amount altogether to £_____.

I have in the first part of the said schedule set forth such of the said debts and claims as carry interest, and the interest thereon has been computed after the rate they respectively carry down to the date of this certificate.

I have in the second part of the said schedule set forth such of the said debts and claims as do not carry interest, and the interest thereon has been computed at the rate of 4l. per cent. per annum, from the _____ day of _____

, 186 , being the date of the said order to wind up the company, down to the date of this certificate. APPENDIX VI.

The claims set forth in the second schedule hereto have been brought in by the persons therein named, and have been disallowed.

Forms.

The evidence produced, &c.

THE FIRST SCHEDULE ABOVE REFERRED TO.

First part.—Debts and claims which carry interest.

No.	Names of Creditors.	Addresses and Descriptions.	Particulars of Debt.	Total due.
1.	J. L.	29, Street, London, Stationer.	On Bill of Exchange, dated, &c.	£ s. d.
		Principal	£	
		Interest at £ per cent. per annum (less Property Tax), from 186 to the date of this Certificate	£	
		Costs of Proof . . .	£	
			Total first Part...£	

Second part.—Debts and claims which do not carry interest.

No.	Names of Creditors.	Addresses and Descriptions.	Particulars of Debt.	Interest on Principal (less Property Tax).	Total due.
40.	W. P.	15, Street, London.		£ s. d.	£ s. d.
		Coal Merchant.	Goods sold		
		Principal	£50 0 0	2 0 0	54 0 0
		Costs of Proof . . .	2 0 0		
			Total £		
			Add Total first Part...£		
			Total first and second Parts...£		

APPENDIX VI.

Forms.

THE SECOND SCHEDULE ABOVE REFERRED TO.

No.	Names of Creditors.	Addresses and Descriptions.	Particulars of Claim.	Amount Claimed.
				£ s. d.

Dated this day of , 186 .
G. H., Chief Clerk.

Approved the }
day of 186 . }

No. 23. *Notice to creditor to attend to receive debt.* [Rule 28.]

In the matter, &c.

Sir,
Upon application at my office, No. Street, Middlesex,
on and after the instant, between the hours of ten and four o'clock,
you may receive a cheque for the amount of your debt, allowed in this
matter as under :—

Principal	£
Interest	£
Costs of proof	£
Total	£

If you cannot attend personally, the cheque will be delivered to your
order upon your filling up and signing the subjoined form.

The bills or securities (if any) held by you must be produced at the
time of such application.

Dated this day of 186 .
I am &c.,
R. P. H., Official Liquidator.

To Mr. S. T.

[*Form of order.*]

Sir,
Please to deliver to W. R. the cheque for £ referred
to in the above letter as payable to me.

S. T., Creditor.

To Mr. R. P. H., Official Liquidator }
of the company. }

No. 24. *Affidavit in support of list of contributories.*
[Rule 29.]

In Chancery.

In the matter, &c.

I, R. P. H., of &c., the official liquidator of the above-named company,
make oath and say, as follows :—

1. The paper writing now produced and shown to me, and marked with the letter A, contains a list of the contributories of the said company, made out by me from the books and papers of the said company, together with their respective addresses, and the number of shares [*or*, extent of interest] to be attributed to each; and such list is, to the best of my knowledge, information, and belief, a true and accurate list of the contributories of the said company, so far as I have been able to make out and ascertain the same.

2. I have, in the first part of the said list marked A, distinguished the persons who are contributories in their own right.

3. I have, in the second part of the said list marked A, distinguished the persons who are contributories as being representatives of, or being liable to the debts of, others.

Sworn, &c.

No. 25. *List of contributories referred to in Form No. 24.*

A.

In the matter, &c.

This list of contributories marked A, was produced and shown to R. P. H., and is the same list of contributories as is referred to in his affidavit, sworn before me this day of 186 .

W. B., &c.

First part.—Contributories in their own right.

Serial No.	Name.	Address.	Description.	In what character included.	Number of shares [<i>or</i> , extent of interest.]

Second part.—Contributories as being representatives of, or liable to the debts of others.

Serial No.	Name.	Address.	Description.	In what character included.	Number of shares [<i>or</i> , extent of interest].

No. 26. *Notice to contributories of appointment to settle list of contributories.*
[Rule 30.]

In the matter, &c.

The Master of the Rolls [*or*, Vice-Chancellor] has appointed the day of 186 , at of the clock in the

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noon at his chambers, in the Rolls Yard, Chancery Lane [*or*, at No. Lincoln's Inn], in the county of Middlesex, to settle the list of the contributories of the above-named company, made out and left at the chambers of the said judge by the official liquidator of the said company, and you are included in such list in the character, and for the number of shares [*or*, extent of interest] stated below ; and if no sufficient cause is shown by you to the contrary at the time and place aforesaid, the list will be settled by the said judge, including you therein.

Dated this day of 186 .
R. H. P., Official Liquidator.

To Mr. A. B. [and to
Mr. C. D., his solicitor].

No. on List.	Name.	Address.	Description.	In what character included.	Number of shares [<i>or</i> , extent of interest].

No. 27. *Affidavit of service of notice.* [Rule 30.]

In Chancery.
In the matter, &c.

I, W. S., of, &c., clerk to Messrs. C. and D., of, &c. the solicitors of the official liquidator of the above-named company, make oath, and say as follows :—

1. The first six columns of the schedule now produced and shown to me and marked with the letter A, contain a true copy of the list of contributories of the said company, made out and left at the chambers of the Master of the Rolls [*or*, Vice-Chancellor], by the said official liquidator, on the day of 186 , and now on the file of proceedings of the said company, as I know from having, on the day of 186 , examined and compared the said schedule with the said list ; and I have, in the seventh column of the said schedule marked A, set forth the names and addresses of the solicitors who have entered appearances for any of the contributories named in the said list.

2. I did, on the day of 186 , in the manner herein-after mentioned, serve a true copy of the notice now produced and shown to me, and marked B, upon each of the respective persons whose names, addresses, and descriptions appear in the second, third, and fourth columns of the said schedule marked A, except that in the tabular form at the foot of such copies respectively I inserted the number on list, name, address, description, in what character included, and number of shares [*or*, extent of interest] of the person on whom such copy of the said notice was served, in the same words and figures as the same particulars are set forth in the said schedule marked A.

3. I served the said respective copies of the said notice, by putting such copies respectively, duly addressed to such persons respectively or their

solicitors, according to their respective names and addresses appearing in the said schedule marked A, and with the proper postage-stamps affixed thereto as prepaid letters, into the post-office receiving-house, No. _____ in _____ street, in the county of _____, between the hours of _____ and _____ of the clock in the _____ noon of the said _____ day of _____.

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Sworn, &c.

No. 28. *The schedule referred to in Form No. 27.*

A.

In the matter, &c.

This schedule marked A was produced and shown to W. S., and is the same schedule as is referred to in his affidavit, sworn before me, this day of _____ 186 .

W. B., &c.

1. Number of List.	2. Name.	3. Address.	4. Description.	5. In what character included.	6. Number of shares [or, extent of interest].	7. Names and addresses of solicitors who have entered appearances, and been served with a copy of the notice referred to in the affidavit of W. S., to which this schedule is an exhibit.

No. 29. *Supplemental list of contributories, and affidavit in support.*

[Rule 29.]

In Chancery.

In the matter, &c.

I, R. P. H., of &c., the official liquidator of the above-named company, make oath, and say as follows :—

1. Since leaving at the chambers of the judge the list of the contributories in this matter, on the _____ day of _____ 186 , it has come to my knowledge that the several persons whose names are set forth in the supplemental list of contributories now produced and shown to me, and marked with the letter B, are, or have been, holders of shares in [or, members of] the said company, and to the best of my judgment, information, and belief, such persons are contributories of the said company.

2. The said supplemental list marked B, contains the names of such persons, together with their respective addresses, and the number of

APPENDIX VI. shares [*or*, extent of interest] to be attributed to each; and such list is, to the best of my knowledge, information, and belief, true and accurate.

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3. I have, in the first part of the said list marked B, distinguished such of the said persons as are contributories in their own right.

4. I have, in the second part of the said list marked B, distinguished such of the said persons as are contributories as being representatives of, or being liable to the debts of others.

Sworn, &c.

No. 30. *Supplemental list of contributories referred to in Form No. 29.*

B.

In the matter, &c.

This supplemental list of contributories marked B, was produced and shown to R. P. H., and is the same supplemental list of contributories as referred to in his affidavit, sworn before me this day of 186 .

W. B., &c.

Note.—*The supplemental list is to be made out in the same form as the original list, Form No. 25.*

No. 31. *Certificate of chief clerk of settlement of the list of contributories.*

[Rule 31.]

In the matter, &c.

In pursuance of the directions given to me by the Master of the Rolls [*or*, Vice-Chancellor], I hereby certify that the result of the settlement of the list of contributories of the above-named company, made out and left at the chambers of the said judge by the official liquidator of the said company on the day of 186 , pursuant to the above statute and the general order of this Court in that behalf, so far as the said list has been settled up to the date of this certificate, is as follows :—

1. The several persons whose names are set forth in the second column of the first schedule hereto, have been included in the said list of contributories as contributories of the said company in respect of the number of shares [*or*, extent of interest] set opposite the names of such contributories respectively in the said schedule.

I have, in the first part of the said schedule, distinguished such of the said several persons included in the said list, as are contributories in their own right.

I have, in the second part of the said schedule, distinguished such of the said several persons included in the said list as are contributories, as being representatives of, or being liable to the debts of others.

2. The several persons whose names are set forth in the second column of the second schedule hereto have been excluded from the said list of contributories.

3. I have, in the seventh column of the said first and second schedules, set forth opposite the name of each of the said several persons respectively, the date when such person was included in or excluded from the said list of contributories.

The evidence produced, &c.

THE FIRST SCHEDULE ABOVE REFERRED TO.

First part.—Contributors in their own right.

Serial No. in list.	Name.	Address.	Descrip- tion.	In what character included.	Number of shares [<i>or</i> , extent of interest].	Date when included in the list.

Second part.—Contributors as being representatives of, or liable to the debts of others.

Serial No. in list.	Name.	Address.	Descrip- tion.	In what character included.	Number of shares [<i>or</i> , extent of interest].	Date when included in the list.

THE SECOND SCHEDULE ABOVE REFERRED TO.

Serial No. in list.	Name.	Address.	Descrip- tion.	In what character proposed to be included.	Number of shares [<i>or</i> , extent of interest].	Date when excluded from the list.

Dated this day of 186 ,

G. H., Chief Clerk,

Approved the }
day of 186 , }

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No. 32. *Order on application to vary list.* [Rule 29.]

Master of the Rolls [*or*,
 Vice-Chancellor] } day the day of 186 .
 at chambers. } In the matter, &c.

Upon the application of W. N. to review the list of contributories of the said company, in respect of the inclusion of the said W. N. therein, and that his name may be excluded therefrom, and upon hearing counsel, &c., and upon reading, &c., It is ordered, That the name of the said W. N. be excluded from the said list of contributories [*or*, the judge doth not think fit to make any order on the said application, except that the said W. N. do pay to R. P. H., the official liquidator of the said company, his costs of this application, to be taxed by the taxing master in case the parties differ].

No. 33. *Affidavit of official liquidator in support of proposal for call.*
 [Rule 33.]

In Chancery.

In the matter, &c.

I, R. P. H., of &c., the official liquidator of the above-named company, make oath, and say as follows :—

1. I have, in the schedule now produced and shown to me, and marked with the letter A, set forth a statement, showing the amount due in respect of the debts allowed against the said company, and the estimated amount of the costs, charges, and expenses of and incidental to the winding up of the affairs thereof, and which several amounts form in the aggregate the sum of £ or thereabouts.

2. I have also in the said schedule set forth a statement of the assets in hand belonging to the said company, amounting to the sum of £ and no more. There are no other assets belonging to the said company, except the amounts due from certain of the contributories of the said company, and, to the best of my information and belief, it will be impossible to realise in respect of the said amounts more than the sum of £ or thereabouts.

3. It appears by the chief clerk's certificate, dated the day of 186 , that persons have been settled on the list of contributories of the said company, in respect of the total number of shares.

4. For the purpose of satisfying the several debts and liabilities of the said company, and of paying the costs, charges, and expenses of and incidental to the winding up the affairs thereof, I believe the sum of £ will be required, in addition to the amount of the assets of the said company mentioned in the said schedule A, and the said sum of £ .

5. In order to provide the said sum of £ , it is necessary to make a call upon the several persons who have been settled on the list of contributories as before mentioned, and having regard to the probability that some of such contributories will partly or wholly fail to pay the amount of such call, I believe that for the purpose of realising the amount required as before mentioned, it is necessary that a call of £ per share should be made.

Sworn, &c.

No. 34. *Summons for intended call.* [Rule 33.]

In the matter, &c.

Let all parties concerned attend at my chambers in the Rolls Yard, Chancery Lane [or, at No. , Lincoln's Inn], in the county of Middlesex, on day, the day of 186 , at of the clock in the noon, on the hearing of an application on the part of the official liquidator of the above-named company, that a call to the amount of £ per share may be made on all the contributories [or, if upon any particular class specify the same] of the said company.

John Romilly, Master of the Rolls.

or

X. Y., Vice-Chancellor.

This summons was taken out by A. & B. of , in the county of , solicitors for the said official liquidator.

To Mr. A. B., of &c., a contributory of the said }
company proposed to be included in the said call. }

No. 35. *Advertisement of intended call.* [Rule 33.]

In the matter, &c.

By direction of the Master of the Rolls [or, Vice-Chancellor], notice is hereby given that the said judge has appointed the day of , 186 , at o'clock in the noon, at his chambers in the Rolls Yard, &c., to make a call on all the contributories of the said company [or, as the case may be], and that the official liquidator of the said company proposes that such call shall be for £ per share. All persons interested are entitled to attend at such day, hour, and place, to offer objections to such call.

Dated this day of 186 .

G. H.,
Chief Clerk.

No. 36. *General order for a call.* [Rule 34.]

Master of the Rolls [or, } the day of
Vice-Chancellor } 186 .
at Chambers. } In the matter, &c.

Upon the application of the official liquidator of the above-named company, and upon reading two orders, dated the day of 186 , and the day of 186 , the chief clerk's certificate, dated the day of 186 , an affidavit of the said official liquidator, filed 186 , and the exhibit marked A, therein referred to, and an affidavit of filed 186 , It is ordered, That a call of pounds per share be made on all the contributories of the said company [or, as the case may be]. And it is ordered that each such contributory do on or before the day of 186 , pay into the Bank of England to the account of the official liquidator of the company, the amount which will be due from him or her in respect of such call.

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No. 37. *Notice to be served with the general order for a call.*
[Rule 34.]

In the matter, &c.

The amount due from you, A. B., in respect of the call made by the above [or within] order, is the sum of £ , which sum is to be paid by you into the Bank of England, to the account mentioned in the said order. You can pay the same in person, or through a banker or other agent ; but this notice and copy order must be produced at the bank upon such payment, and the cashier of the bank will, upon receiving the same, deliver to you a certificate of the payment in, numbered , signed by the said cashier. In order to prevent proceedings being taken against you for non-payment, you must, immediately upon such payment in, cause written notice of the payment, and of the date thereof to be given to me as the official liquidator of the said company, at my office, No. Street, in the county of Middlesex.

Dated this day of
R. P. H., Official Liquidator.

To Mr. A. B.

No. 38. *Affidavit in support of application for order for payment of call due from contributories.* [Rule 35.]

In Chancery.

In the matter, &c.

I, R. P. H., of &c., the official liquidator of the above-named company, make oath and say as follows :—

1. None of the contributories of the said company whose names are set forth in the schedule hereunto annexed, marked A, have paid, or caused to be paid, the respective sums set opposite their respective names in the said schedule, and which sums are the respective amounts now due from them respectively in respect of the call of £ per share in pursuance of the order of the judge in that behalf, dated the day of
186 .

2. The respective amounts or sums set opposite the names of such contributories respectively in such schedule, are the true amounts due and owing by such contributories respectively in respect of the said call.

Sworn, &c.

A.

THE SCHEDULE ABOVE REFERRED TO.

No. on List.	Name.	Address.	Description.	In what character included.	Amount due.
					£ s. d.

Note.—In addition to the above affidavit, an affidavit of the service of the order and notice (Nos. 36 and 37) will be required.

No. 39. *Order for payment of call due from a contributory.*

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The Master of the Rolls, [or, } day, the day of
Vice-Chancellor 186 .
] at Chambers. } In the matter, &c.

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Upon the application of the official liquidator of the above-named company, and upon reading the order, dated the day of , 186 , an affidavit of filed the day of 186 , and an affidavit of the said official liquidator, filed the day of 186 , It is ordered that C. D., of, &c., [or, E. F. of, &c., the legal personal representative of L. M., late of &c., deceased] one of the contributories of the said company [or *if against several contributories*, the several persons named in the second column of the schedule to this order being respectively contributories of the said company] do on or before the day of 186 , or within four days after service of this order, pay into the Bank of England, to the account of the official liquidator of the company [or to A. B., the official liquidator of the said company, at his office, No. Street, in the county of Middlesex], the sum of £ [if against a legal personal representative add, out of the assets of the said L. M., deceased, in his hands as such legal personal representative as aforesaid, to be administered in a due course of administration if the said E. F. has in his hands so much to be administered : or *if against several contributories*, the several sums of money set opposite to their respective names in the sixth column of the said schedule hereto], such sum [or sums] being the amount [or amounts] due from the said C. D. [or L. M.] [or, the said several persons respectively] in respect of the call of £ per share made by the said order dated the day of 186 .

THE SCHEDULE REFERRED TO IN THE FOREGOING ORDER.

No. on List.	Name.	Address.	Description.	In what character included.	Amount due
					£ s. d.

Note.—The copy for service of the above order must be endorsed as required by the 23rd Consol. Order, rule 10 (t).

No. 40. *Notice to be endorsed on, or served with, every order directing payment of money into the Bank of England.* [Rule 39.]

You can make the payment directed by the within [or, above] order at the Bank of England in person, &c. [as in the Form No. 37.]

R. P. H., Official Liquidator.

To Mr.

(t) The endorsement is to the effect and have his estate sequestered. See that if the order is not obeyed, the person now R. S. C., Order XXI., r. 5. in default will be liable to be arrested

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No. 41. *Certificate of payment of money into the Bank of England.*
[Rule 39.]

In the matter, &c.

No.

day of 186 .

I hereby certify that C. D., of &c., has this day paid into the Bank of England the sum of , to be placed to the credit of the official liquidator of the company, pursuant to an order dated the day of , 186 .

For the governor and company of the Bank of England.

H. M.,

Cashier.

£ .

No. 42. *Affidavit of service of order for payment of call.*
[Rule 35.]

In Chancery.

In the matter, &c.

I, J. B., of &c., make oath, and say as follows :—

1. I did, on the day of , 186 , personally serve G. F., of , in the county of , &c., with an order made in this matter by his Honour the Master of the Rolls [*or*, Vice-Chancellor], dated the day of , 186 , whereby it was ordered [*set out the order in the past tense*] by delivering to and leaving with the said G. F. at , in the county of , a true copy of the said order, and at the same time producing and showing unto him, the said G. F., the said original order duly entered.

2. There was endorsed on the said copy, when so served, the following words, that is to say, “ If you, the within-named G. F., neglect to obey this order by the time therein limited, you will be liable to be arrested under a writ of attachment issued out of the High Court of Chancery, or by the serjeant-at-arms attending the same court, and also be liable to have your estate sequestered for the purpose of compelling you to obey the same order.”

Sworn, &c.

No. 43. *Affidavit of non-payment of money by order directed to be paid into the Bank of England.* [Rule 40.]

In Chancery.

In the matter, &c.

I, R. P. H., of &c., the official liquidator of the above-named company, make oath and say as follows :—

1. G. F., the person named in an order made in this matter by his Honour the Master of the Rolls [*or*, Vice-Chancellor], dated the day of 186 , has not paid into the Bank of England, to the account of the official liquidator of the company, the whole or any part of the sum of £ as by the said order directed.

[*Or, in case of several parties.*]

1. None of the several persons whose names and addresses are set forth in the schedule hereunder written, and who have respectively been

duly served with orders made in this matter by his Honour the Master of
the Rolls [*or*, Vice-Chancellor], of the respective dates set oppo-
site to their respective names in the said schedule, have paid into the Bank
of England to the account of the official liquidator of the com-
pany, the whole or any part of the several sums of money set opposite to
their respective names in the said schedule hereunder written, as by the
said orders respectively directed.

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2. I am enabled to depose to such non-payment, by reason of my having this day ascertained by inquiry at the said bank, that such payment [or, payments] has [or, have] not been made, and seen the certificate of payment in, numbered [or, several certificates of payments in, the numbers whereof respectively are set forth in the sixth column of the said schedule, opposite the names of the said respective persons, being certificates] furnished by me to the cashier of the said bank for delivery to the said G. F. [or, several persons respectively] upon such payment [or, payments] being made, still in the hands of the cashier of the said bank. No notice [or, notices] of such payment [or, payments] having been made has [or, have] been given to me by the said G. F. [or, several persons respectively].

Sworn, &c.

THE SCHEDULE ABOVE REFERRED TO.

Name.	Address.	Description.	Amount.	Date of balance order.	Number of certificate.
			£ s. d.		

No. 44. *Request to invest cash in Government stock or Exchequer bills.*
[Rule 43.]

In the matter, &c.

To the Governor and Company of the Bank of England.

Gentlemen,

It appearing that the sum of £ cash is standing to the credit of the account of the official liquidator of the above-named company, you are hereby requested to invest the sum of £ , part thereof, in the purchase of Bank £3 per cent. annuities [or, Reduced £3 per cent. annuities, or, New £3 per cent. annuities, or, New £2 10s. per cent. annuities] in the name of R. P. H., of &c., the official liquidator of the said company [or, in the purchase of Exchequer bills, and to deposit such Exchequer bills in the Bank of England, in the name and on behalf of the said official liquidator]. The said annuities [or, Exchequer bills] are not to be sold, transferred, or otherwise dealt with, except upon a direction for that purpose signed by the official liquidator of the said company, and

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countersigned by the chief clerk of the Master of the Rolls [*or*, Vice-Chancellor], or under an order to be made by the said judge.

Dated this day of , 186 .

I am, gentlemen,

Your most obedient servant,

R. P. H., Official Liquidator.

Countersigned,

G. H., Chief Clerk of the Master of the Rolls

[*or*, Vice-Chancellor].

No. 45. *Notice or advertisement of meeting of creditors or contributories.*

[Rules 45, 46.]

In the matter, &c.

Notice is hereby given that the Master of the Rolls [*or*, Vice-Chancellor] has directed a meeting of the creditors [*or*, contributories] of the above-named company to be summoned pursuant to the above statute, for the purpose of ascertaining their wishes as to [*state the object for which meeting called, unless notice is by advertisement, in which case say, certain matters relating to the winding up of the said company*], and that such meeting will be held on day, the day of 186 , at o'clock in the noon, at in the county of , at which time and place all the creditors [*or*, contributories] of the said company are requested to attend. [The said judge has appointed H. T., of &c., to act as chairman of such meeting.]

Dated this day of 186 .

R. P. H., Official Liquidator.

No. 46. *Appointment of proxy to vote at meeting of creditors or contributories.* [Rule 46.]

In the matter, &c.

I, W. S., of in the county of , being a creditor [*or*, contributory] of the above-named company, hereby appoint of as my proxy to vote for me, and on my behalf, at the meeting of the creditors [*or*, contributories] of the said company, summoned by direction of the Master of the Rolls [*or*, Vice-Chancellor], to be held on the day of and at any adjournment thereof.

As witness my hand, this day of 186 .

W. S.

Signed by the said W. S.,

in the presence of

J. M., of, &c.

No. 47. *Memorandum of appointment of a person to act as chairman at meeting of creditors or contributories.* [Rule 47.]

In the matter, &c.

The Master of the Rolls [*or*, Vice-Chancellor] has appointed Mr. H. T., of &c., one of the creditors [*or*, contributories] of the above-named company, to act as chairman of a meeting of the creditors [*or*, contributories] of the said company, summoned by direction of the said judge

pursuant to the above statute, to be held on day, the
 day of , 186 , at o'clock in the
 noon, at , in the county of , and to report the result of
 such meeting to the said judge.

The said meeting is summoned for the purpose of ascertaining the
 wishes of the creditors [*or, contributories*] of the said company as to
 [*state the object for which meeting called*]; and at such meeting the votes
 of the creditors [*or, contributories*] may be given either personally or by
 proxy.

Dated this day of , 186 .

G. H., Chief Clerk.

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No. 48. *Chairman's report of result of meeting of creditors or contributories.*
 [Rules 45, 46, 47.]

In the matter, &c.

I, H. T., the person appointed by the Master of the Rolls [*or, Vice-
 Chancellor*] to act as chairman of a meeting of the creditors [*or,
 contributories*] of the above-named company, summoned by advertisement
 [*or, notice*] dated the day of , 186 , and held on the
 day of 186 , at in the county of , do
 hereby report to the said judge the result of such meeting as follows:—

The said meeting was attended either personally or by proxy, by
 creditors to whom debts against the said company have been allowed,
 amounting in the whole to the value of £ [*or, by* con-
 tributories, holding in the whole shares in the said company, and
 entitled respectively, by the regulations of the company, to the number of
 votes hereinafter mentioned].

The question submitted to the meeting was, whether the creditors [*or,
 contributories*] of the said company approved of the proposal of the official
 liquidator of the said company, that, &c. [*as the case may be*], and wished
 that such proposal should be adopted and carried into effect.

The said meeting was unanimously of opinion that the said proposal
 should [*or, should not*] be adopted and carried into effect [*or, The result of
 the voting upon such question was as follows:—*]

The undermentioned creditors [*or, contributories*] voted in favour of the
 said proposal being adopted and carried into effect:—

Name of creditor [<i>or, contributory</i>].	Address.	Value of debt [<i>or, number of shares</i>].	Number of votes con- ferred on each contributory by the regu- lations of the company.

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The undermentioned creditors [*or*, contributories] voted against the said proposal being adopted and carried into effect:—

Name of creditor [<i>or</i> , contributory].	Address.	Value of debt [<i>or</i> , number of shares].	Number of votes con- ferred on each contributory by the regu- lations of the company.

Dated this day of 186 .
 (Signed) H. T., Chairman.

No. 49. *Memorandum of sanction of judge to accepting bill of exchange.*
[Rule 48.]

In the matter, &c.

The Master of the Rolls [or, Vice-Chancellor] has sanctioned the acceptance of this bill of exchange by the official liquidator, on behalf of the said company.

G. H., Chief Clerk.

No. 50. *Memorandum of agreement of compromise with a contributory.*
[Rule 49.]

In the matter, &c.

Memorandum of agreement entered into this day of
186 , between R. P. H., of &c., the official liquidator of the above-named
company of the one part, and S. B., of &c., one of the contributories of the
said company, of the other part.

Whereas the said S. B. has been settled on the list of contributories of the said company as a contributory in respect of _____ shares in the said company. And whereas by an order made by the Master of the Rolls [*or*, Vice-Chancellor _____], dated the _____ day of _____ 186____, a call of £ _____ per share was made on all the contributories of the said company, and there is now due from the said S. B. to the said company the sum of £ _____ in respect of the said call. And whereas the said S. B. has proposed to pay to the said official liquidator the sum of £ _____ by way of compromise, and in satisfaction and discharge of the said sum of £ _____, and of all liability whatsoever as a contributory of the said company. And whereas the said official liquidator having investigated the affairs of the said S. B., and believing that such compromise will be beneficial to the said company, hath, in exercise of the power for that purpose given to him by the above statute, agreed to accept the same,

subject to the sanction of the said judge, and to the conditions and agreements hereinafter contained. Now it is hereby agreed by and between the said parties hereto :

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1st. That the said official liquidator shall, before the day of next, apply to the said judge at chambers to sanction this agreement of compromise.

2nd. That upon this agreement being sanctioned by the said judge, the said S. B. shall within days next after such sanction, pay to the said official liquidator the said sum of £ , and when thereto required, shall do and execute all such acts and deeds as may be necessary for transferring, or surrendering and releasing, to the said official liquidator on behalf of the said company, or in such manner as the said judge may direct, the said shares held by the said S. B. in the said company, and all claim and demand whatsoever which the said S. B. has, or may have, against the said company in respect of the said shares, or the distribution of the assets of the said company, or otherwise howsoever.

3rd. That the said sum of £ , and the transfer or surrender and release of the said shares and interest of the said S. B., as aforesaid, shall be accepted by the said official liquidator as, and be deemed and taken to give to the said S. B. a full and complete discharge from all calls and liabilities, claims and demands whatsoever, which the said company, or the official liquidator thereof, now has or may hereafter have, or be entitled to, against the said S. B., in respect of his being or having been the holder of the said shares or otherwise, as a contributory of the said company.

4th. That in case this agreement shall not be sanctioned by the said judge it shall cease and determine, and the said official liquidator and the said S. B. shall be remitted to their original rights with respect to each other, as if this agreement had not been entered into.

5th. That in case this agreement shall be sanctioned by the said judge, and the said S. B. shall not in all respects perform the same on his part, the official liquidator shall be at liberty, with the sanction of the said judge, and without notice to the said S. B., to enforce the performance thereof, or, with the like sanction, to give notice to the said S. B., that he abandons this agreement, whereupon the same shall cease and determine, and the said official liquidator shall be entitled to proceed against the said S. B. to enforce payment of the said sum of £ , or so much thereof as shall then remain due and unpaid, as if this agreement had not been entered into.

R. P. H., Official Liquidator.
S. B.

Witness to the signatures }
of the said R. P. H. and S. B., }
C. D., of &c. }

No. 51. *Memorandum of sanction of judge to agreement of compromise.*
[Rule 49.]

In the matter, &c.

The Master of the Rolls [or, Vice-Chancellor
this agreement of compromise.

] has sanctioned

G. H.,
Chief Clerk.

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Forms.

No. 52. *Order or memorandum of the sanction of the judge for certain acts to be done by the official liquidator.* [Rule 50.]

The Master of the Rolls [or, Vice-Chancellor] } day of 186 .
at chambers. } In the matter, &c.

The Master of the Rolls [or, Vice-Chancellor] doth hereby sanction [or, has sanctioned] the following proceedings being taken [or, acts being done] by the official liquidator of the above-named company, namely [state the proceedings to be taken or acts to be done as,] the bringing [or, instituting] and prosecuting an action at law [or, suit in equity], in the name and on behalf of the said company, against [or, defending an action at law [or, suit in equity] brought [or, instituted] against the said company by] K. M., of &c., to recover a debt or sum of £ alleged to be due from [or, to] the said K. M. to [or, from] the said company, &c.

G. H.,
Chief Clerk.

No. 53. *Appearance book.* [Rule 62.]

In the matter, &c.

Appearance book.

Date when appearance entered.	Party's Name.	Whether creditor or contributory.	If he appears in person, his address for service.	If he appears by a solicitor, his solicitor's name.	Solicitor's address.	Amount of debt [or, number of shares].

No. 54. *Summons for persons to attend at chambers to be examined.*

[25 & 26 Vic. c. 89, s. 115.]

In Chancery.

In the matter, &c.

A. B., &c., and E. F., are hereby severally summoned to attend at the chambers of the Master of the Rolls [or, Vice-Chancellor], in the Rolls Yard, Chancery Lane [or, No. , Lincoln's Inn], in the county of Middlesex, on day of 186 , at of the clock in the noon, to be examined on the part of the official liquidator [or, of W. D., of &c.], for the purpose of proceedings directed by the Master of the Rolls [or, the said Vice-Chancellor] to be taken before me in the above matter. [And the said A. B. is hereby required to bring with him and produce, at the time and place aforesaid, a certain inden-

ture [*describe documents*] and all other books, papers, deeds, writings, and other documents in his custody or power in anywise relating to the above-named company.]

APPENDIX VI.
Forms.

Dated this day of 186 .

G. H.
Chief Clerk.

This summons was taken out by Messrs. C. & D., of in the county of , solicitors for the official liquidator [or, for the said W. D.]

No. 55. *Certificate of the company being completely wound up, and of the official liquidator having passed his final account.*
[Rule 66.]

In the matter, &c.

In pursuance of the directions given to me by the Master of the Rolls [*or, Vice-Chancellor*], I hereby certify that R. P. H., the official liquidator of the above-named company, has passed his final account as such official liquidator, and that the balance of £ thereby certified to be due to [*or, from*] the said official liquidator has been paid in the manner directed by the order dated the day of 186 . And that the affairs of the said company have been completely wound up.

The evidence produced, &c.

Dated this day of 186 .

G. H.,
Chief Clerk.

Approved the }
day of 186 . }

No. 56. *Order to dissolve the company.* [Rule 66.]

The Master of the Rolls [*or, Vice-Chancellor*], the day of 186 .
at chambers. } In the matter, &c.

Upon the application of the official liquidator of the above-named company, and upon reading an order dated the day of , and the chief clerk's certificate, dated the day of , whereby it appears that the affairs of the said company have been completely wound up, and that the balance of £ , due from [*or, to*] the official liquidator has been paid in manner directed by the said order, it is ordered that the said company be dissolved, as from this day of 186 , and that the recognizance dated the day of 186 , entered into by the said official liquidator, together with W. B. and T. P., his sureties, be vacated.

WESTBURY, C.
JOHN ROMILLY, M. R.
RICHD. T. KINDERSLEY, V.-C.
JOHN STUART, V.-C.
W. P. WOOD, V.-C.

APPENDIX VI.

ORDER AND RULES IN CHANCERY ISSUED PURSUANT TO
"THE COMPANIES ACT, 1867."

ORDER OF COURT.

*Saturday, the 21st day of March, 1868, as amended by order of 2nd
March, 1869 (u).*

The right honorable Hugh MacCalmont Baron Cairns, Lord High Chancellor of Great Britain, with the advice and consent of the right honorable John Lord Romilly, Master of the Rolls, the honorable the Vice-Chancellor Sir John Stuart, and the honorable the Vice-Chancellor Sir Richard Malins, doth hereby, in pursuance and execution of the powers given to him by "The Companies Act, 1867," and of all other powers and authorities enabling him in that behalf, order and direct in manner following:—

Petition for winding up (v).

1. Every petition which shall, after this order comes into operation, be presented for the winding up of any company by the Court, or subject to the supervision of the Court, and all notices, affidavits, and other proceedings under such petition, shall be intituled in the matter of "The Companies Acts, 1862 and 1867," and of the company to which such petition shall relate.

Petition to reduce capital (x).

2. Every petition for an order confirming a special resolution for reducing the capital of a company, and all notices, affidavits, and other proceedings under such petition, shall be intituled in the matter of "The Companies Act, 1867," and of the company in question.

3. No such petition as mentioned in the 2nd rule of this order shall be placed in the list of petitions by the secretary of the Lord Chancellor or of the Master of the Rolls, as the case may be, until after the expiration of eight clear days from the filing of such certificate as is mentioned in the 14th rule of this order.

4. When any such petition as last aforesaid has been presented, application may be made, *ex parte* by summons in chambers, to the judge to whose Court the petition is attached, for directions as to the proceedings to be taken for settling the list of creditors entitled to object to the proposed reduction, and the judge may thereupon fix the date with reference to which the list of such creditors is to be made out, pursuant to the 13th section of the Companies Act, 1867; and may, either at the same time or

(u) The order of March, 1868, has been amended by an order of 2nd March, 1869. (See W. N. of that date.) The amendments affect rules 8 and 14, which are here printed as amended.

(v) *Ante*. p. 654. Ord. of 1862, rule I.

(x) See act of 1867, § 11 *et seq.*, *ante*, pp. 402 *et seq.* See, also, the act of 1877, *ante*, p. 1028.

afterwards, as he shall think fit, give such directions as are mentioned in the 5th and 6th rules of this order. The order upon such summons may be in the form No. 1 in the schedule hereto, with such variations as the circumstances of the case may require.

5. Notice of the presentation of the petition shall be published at such times, and in such newspapers as the judge shall direct, so that the first insertion of such notice be made not less than one calendar month before the day of the date fixed as mentioned in the 4th rule of this order. Such notice may be in the form No. 2 in the schedule hereto, with such variations as the circumstances of the case may require.

6. The company shall, within such time as the judge shall direct, file in the office of the clerks of records and writs (*y*), an affidavit made by some officer or officers of the company competent to make the same, verifying a list containing the names and addresses of the creditors of the company at the date fixed as mentioned in the 4th rule of this order, and the amounts due to them respectively, and leave the said list and an office copy of such affidavit, at the chambers of the judge.

7. The person making such affidavit shall state therein his belief that such list is correct, and that there was not at the date so fixed as aforesaid any debt or claim, which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, except the debts set forth in such list, and shall state his means of knowledge of the matters deposed to in such affidavit. Such affidavit may be in the form No. 3 in the schedule hereto, with such variations as the circumstances of the case may require.

8. Copies of such list containing the names and addresses of the creditors and the total amount due to them, but omitting the amounts due to them respectively, or (as the judge shall think fit) complete copies of such list shall be kept at the registered office of the company, and at the offices of their solicitors and London agents (if any), and any person desirous of inspecting the same may at any time, during the ordinary hours of business, inspect and take extracts from the same on payment of the sum of one shilling (*z*).

9. The company shall, within seven days after the filing of such affidavit, or such further time as the judge may allow, send to each creditor whose name is entered in the said list, a notice stating the amount of the proposed reduction of capital, and the amount of the debt for which such creditor is entered in the said list, and the time (such time to be fixed by the judge) within which, if he claims to be a creditor for a larger amount, he must send in his name and address, and the particulars of his debt or claim, and the name and address of his solicitor (if any) to the solicitor of the company; and such notice shall be sent through the post in a prepaid letter addressed to each creditor at his last known address or place of abode, and may be in the form or to the effect of the form No. 4, set forth in the schedule hereto, with such variations as the circumstances of the case may require.

10. Notice of the list of creditors shall, after the filing of the affidavit mentioned in the 6th of these rules, be published at such times, and in such newspapers, as the judge shall direct. Every such notice shall state the amount of the proposed reduction of capital, and the places where the aforesaid list of creditors may be inspected, and the time within which

(*y*) Now the Central Office, sec 42 & (*z*) *Ante*, p. 1084, note (*u*).
43 Vict. c. 78.

APPENDIX VI.

creditors of the company who are not entered on the said list, and are desirous of being entered therein, must send in their names and addresses, and the particulars of their debts or claims, and the names and addresses of their solicitors (if any) to the solicitor of the company ; and such notice may be in the form No. 5, set forth in the said schedule hereto, with such variations as the circumstances of the case may require.

11. The company shall, within such time as the judge shall direct, file in the office of the clerks of records and writs (zz) an affidavit made by the person to whom the particulars of debts or claims are by such notices as are mentioned in the 9th and 10th rules of this order, required to be sent in, stating the result of such notices respectively, and verifying a list containing the names and addresses of the persons (if any), who shall have sent in the particulars of their debts or claims in pursuance of such notices respectively, and the amounts of such debts or claims, and some competent officer or officers of the company shall join in such affidavit, and shall in such list distinguish which (if any) of such debts and claims are wholly, or as to any and what part thereof, admitted by the company, and which (if any) of such debts and claims are wholly, or as to any and what part thereof, disputed by the company. Such affidavit may be in the form No. 6 in the schedule hereto, with such variations as the circumstances of the case may require ; and such list, and an office copy of such affidavit, shall, within such time as the judge shall direct, be left at the chambers of the judge.

12. If any debt or claim, the particulars of which are so sent in, shall not be admitted by the company at its full amount, then, and in every such case, unless the company are willing to set apart and appropriate in such manner as the judge shall direct the full amount of such debt or claim, the company shall, if the judge think fit so to direct, send to the creditor a notice that he is required to come in and prove such debt or claim, or such part thereof as is not admitted by the company, by a day to be therein named, being not less than four clear days after such notice, and being the time appointed by the judge for adjudicating upon such debts and claims, and such notice shall be sent in the manner mentioned in the 9th rule of this order, and may be in the form No. 7, in the schedule hereto, with such variations as the circumstances of the case may require.

13. Such creditors as come in to prove their debts or claims in pursuance of any such notice as is mentioned in the 12th of these rules, shall be allowed their costs of proof against the company, and be answerable for costs, in the same manner as in the case of persons coming in to prove debts under a decree in a cause.

14. The result of the settlement of the list of creditors shall be stated in a certificate by the chief clerk, and such certificate shall state what debts or claims (if any) have been disallowed, and shall distinguish the debts or claims the full amount of which the company are willing to set apart and appropriate, and the debts or claims (if any) the amount of which has been fixed by inquiry and adjudication in manner provided by section 14 of the said act, and the debts or claims (if any) the full amount of which is not admitted by the company, nor such as the company are willing to set apart and appropriate, and the amount of which has not been fixed by inquiry and adjudication as last aforesaid ; and shall show which of the creditors have consented in writing to the proposed reduction, and the total amount of the debts due to them, and the total amount of

(zz) Now the Central Office, see *ante*, p. 1085, note (y).

the debts or claims the payment of which has been secured in manner provided by the said 14th section, and the persons to or by whom the same are due or claimed; but it shall not be necessary to show in such certificate the several amounts of the debts or claims of any persons who have consented in writing to the proposed reduction or the payment of whose debts or claims has been secured as aforesaid (*a*).

15. After the expiration of eight clear days from the filing of such last mentioned certificate, the petition may be placed in the list of petitions upon a note from the chief clerk to the secretary of the Lord Chancellor or of the Master of the Rolls, as the case may be, stating that the certificate has been filed and become binding.

16. Before the hearing of the petition, notices stating the day on which the same is appointed to be heard shall be published at such times and in such newspapers as the judge shall direct. Such notices may be in the form No. 8, in the schedule hereto, with such variations as the circumstances of the case may require.

17. Any creditor settled on the said list whose debt or claim has not, before the hearing of the petition, been discharged or determined, or been secured in manner provided by the 14th section of the said act, and who has not, before the hearing, signed a consent to the proposed reduction of capital, may, if he think fit, upon giving two clear days' notice to the solicitor of the company of his intention so to do, appear at the hearing of the petition and oppose the application.

18. Where a creditor who appears at the hearing under the last preceding rule, is a creditor the full amount of whose debt or claim is not admitted by the company, and the validity of such debt or claim has not been inquired into and adjudicated upon under section 14 of the said act, the costs of and occasioned by his appearance shall be dealt with as to the Court shall seem just, but in all other cases a creditor appearing under the last preceding rule shall be entitled to the costs of such appearance, unless the Court shall be of opinion that in the circumstances of the particular case his costs ought not to be allowed.

19. When the petition comes on to be heard, the Court may, if it shall so think fit, give such directions as may seem proper with reference to the securing in manner mentioned in section 14 of the said act the payment of the debts or claims of any creditors who do not consent to the proposed reduction; and the further hearing of the petition may, if the Court shall think fit, be adjourned for the purpose of allowing any steps to be taken with reference to the securing in manner aforesaid the payment of such debts or claims.

20. Where the Court makes an order confirming a reduction, such order shall give directions in what manner, and in what newspapers, and at what times, notice of the registration of the order and of such minute as mentioned in the 15th section of "The Companies Act, 1867," is to be published; and shall fix the date until which the words "and reduced" are to be deemed part of the name of the company as mentioned in the 10th section of the same act.

Fees.

21. Solicitors shall be entitled to charge and be allowed for duties performed under "The Companies Act, 1867," the same fees as they shall

(a) See *ante*, p. 1084, note (*u*).

APPENDIX VI. for the time being be entitled to charge and be allowed for the like duties performed under "The Companies Act, 1862," unless the Court or judge shall otherwise specially direct.

22. The same fees of Court shall be paid in relation to proceedings in Chancery under "The Companies Act, 1867," as shall for the time being be payable in relation to like proceedings in Chancery under "The Companies Act, 1862," and shall be collected by stamps in manner provided by the general orders of the Court.

General directions.

23. The general orders and practice of the Court, including the course of proceeding and practice in the judges' chambers, shall, in cases not provided for by "The Companies Act, 1867," or these rules, so far as such orders and practice are applicable and not inconsistent with the said act or with these rules, apply to all proceedings in the Court of Chancery under the said act.

24. The power of the Court and of the judge sitting in chambers to enlarge or abridge the time for doing any act or taking any proceeding, to adjourn or review any proceeding, and to give any direction as to the course of proceeding, shall be the same in proceedings under "The Companies Act, 1867," as in proceedings under the ordinary jurisdiction of the Court (*aa*).

Commencement of order.

25. This order shall take effect and come into operation on the 15th day of April, 1868, and shall apply to all proceedings in Chancery under the said act, whether commenced before or after that day, but every proceeding taken under the said act before that day shall have the same validity as it would have had if this order had not been made.

Interpretation.

26. The general interpretation clause of the consolidated general orders shall be deemed to extend and apply to the rules of this order, and this order shall be deemed a general order of this Court.

CAIRNS, C.
ROMILLY, M.R.
JOHN STUART, V.C.
RICHARD MALINS, V.C.

(*aa*) See now R. S. C., Order LXIV., p. 7.

THE SCHEDULE.

No. 1. *Form of order.* [Rule 4.]

The Master of the Rolls [*or* In the matter of The
Vice-Chancellor] Sir at Company, Limited and
Chambers. Reduced; and in the matter of "The
Companies Act, 1867."

Upon the application of the petitioners by summons, dated ,
and upon hearing the solicitor for the petitioners, and on reading the
petition on the day of , preferred unto the Right
Honourable the Lord High Chancellor of Great Britain [*or* Master of the
Rolls], it is ordered that an inquiry be made what are the debts, claims,
and liabilities of or affecting the said company on the day of
 , 186 , and that notice of the presentation of the said petition
be inserted in [the newspapers] on the day of and
[other times of insertion], and that a list of the persons who are creditors
of the company on the said day of , and an office copy
of the affidavit verifying the same, be left at the chambers of the judge on
or before the day of .

No. 2. [See Rule 5.]

In the matter of The Company,
Limited and Reduced; and in the matter of "The
Companies Act, 1867."

Notice is hereby given, that a petition for confirming a resolution
reducing the capital of the above company from £ to £ ,
was on the day presented to [the Lord Chancellor, *or*
Master of the Rolls], and is now pending; and that the list of creditors of
the company is to be made out as for the day of , 186 .

C. and D. of [Agents for A. and B., of].

Solicitors to the company.

No. 3. *Affidavit verifying list of Creditors.* [Rule 7.]

In Chancery.

In the matter of The Company,
Limited and Reduced; and in the matter of "The
Companies Act, 1867."

I, A. B., of, &c., make oath and say as follows:—

1. The paper writing now produced and shown to me, and marked with
the letter A., contains a list of the creditors of and persons having claims
upon the said company on the day of , 186 (the date
fixed by the order in this matter, dated), together with their
respective addresses, and the nature and amount of their respective debts
or claims, and such list is, to the best of my knowledge, information, and

APPENDIX VI. belief, a true and accurate list of such creditors and persons having claims
Forms. on the day aforesaid.

2. To the best of my knowledge and belief there was not, at the date aforesaid, any debt or claim which, if such date were the commencement of the winding up of the said company, would be admissible in proof against the said company other than and except the debts set forth in the said list. I am enabled to make this statement from facts within my knowledge as the of the said company, and from information derived upon investigation of the affairs and the books, documents, and papers of the said company.

Sworn, &c.

List of Creditors referred to in the last Form.

A.

In the matter, &c.

This list of creditors marked A. was produced and shown to A. B., and is the same list of creditors as is referred to in his affidavit sworn before me this day of , 186 .

X. Y., &c.

Names, Addresses, and Description of the Creditors.	Nature of Debt or Claim.	Amount of Debt or Claim.

No. 4. [See Rule 9.]

In the matter of The Company,
Limited and Reduced ; and in the matter of "The
Companies Act, 1867."

To Mr.

You are requested to take notice that a petition has been presented to the Court of Chancery to confirm a special resolution of the above company, for reducing its capital to £ , and that in the list of persons admitted by the company, to have been on the day of , creditors of the company, your name is entered as a creditor [here state the amount of the debt or nature of the claim].

If you claim to have been on the last-mentioned day a creditor to a larger amount than is stated above, you must, on or before the day of , send in the particulars of your claim, and the name and address of your solicitor (if any), to the undersigned, at . In default of your so doing, the above entry in the list of creditors will in

all the proceedings under the above application to reduce the capital of the company be treated as correct. APPENDIX VI.

Dated this day of , 18 .
A. B.,
Solicitor for the said company.

Form 8.

No. 5. [See Rule 10.]

In the matter of the Company,
 Limited and Reduced ; and in the matter of "The
 Companies Act, 1867."

Notice is hereby given, that a petition has been presented to the Court of Chancery for confirming a resolution of the above company, for reducing its capital from £ to £ . A list of the persons admitted to have been creditors of the company on the day of , 186 , may be inspected at the offices of the company at , or at the office of , at any time during usual business hours, on payment of the charge of one shilling.

Any person who claims to have been on the last-mentioned day and still to be a creditor of the company, and who is not entered on the said list and claims to be so entered, must on or before the day of send in his name and address, and the particulars of his claim, and the name and address of his solicitor (if any), to the undersigned, at , or in default thereof he will be precluded from objecting to the proposed reduction of capital.

Dated this day of , 18 .
A. B.,
Solicitor for the said company.

No. 6. [Rule 11.]

In Chancery.

In the matter of The Company,
 Limited and Reduced ; and in the matter of "The
 Companies Act, 1867."

We, C. D., of, &c. [the secretary of the said company], E. F., of, &c. [the solicitor of the said company], and A. B., of, &c. [the managing director of the said company], severally make oath and say as follows :—

I, the said C. D. for myself, say as follows :—

1. I did, on the day of , 186 , in the manner hereinafter mentioned, serve a true copy of the notice now produced and shown to me, and marked B., upon each of the respective persons whose names, addresses, and descriptions appear in the first column of the list of creditors marked A., referred to in the affidavit of , filed on the day of , 186 . [Rule 9.]

2. I served the said respective copies of the said notice by putting such copies respectively duly addressed to such persons respectively, according to their respective names and addresses appearing in the said list (being the last known addresses or places of abode of such persons respectively), and with the proper postage stamps affixed thereto as prepaid letters, into

APPENDIX VI. the post-office receiving house, No. , in Street, in the county
 Forms. of , between the hours of and of the clock in
 the noon of the said day of .

And I, the said E. F., for myself, say as follows :—

If notice issued
 under rule 10. 3. A true copy of the notice now produced and shown to me, and
 marked C., has appeared in the of the day of ,
 186 , the of the day of , 186 , &c.

[Rule 11.] 4. I have, in the paper writing now produced and shown to me, and
 marked D., set forth a list of all claims, the particulars of which have been
 sent in to me pursuant to the said Notice B. now produced and shown to
 me by persons claiming to be creditors of the said company for larger
 amounts than are stated in the list of creditors marked A., referred to in
 the affidavit of , filed on the day of , 186 .

If notice issued
 under rule 10. 5. I have, in the paper writing now produced and shown to me, marked
 E., set forth a list of all claims, the particulars of which have been sent in
 to me pursuant to the notice referred to in the third paragraph of this
 affidavit by persons claiming to be creditors of the said company on the
 day of , 186 , not appearing on the said list of creditors,
 marked A., and who claimed to be entered thereon.

And we, C D. and A. B., for ourselves, say as follows :—

[Rule 11.] 6. We have in the first part of the said paper writing, marked D. (now
 produced and shown to us), and also in the first part of the said paper
 writing, marked E. (also produced and shown to us), respectively set forth
 such of the said debts and claims as are admitted by the said company to
 be due wholly or in part, and how much is admitted to be due in respect
 of such of the same debts and claims respectively as are not wholly
 admitted.

[Rule 11.] 7. We have, in the second part of each of the said paper writings,
 marked D. and E., set forth such of the said debts and claims as are wholly
 disputed by the said company.

8. In the said Exhibits D. and E. are distinguished such of the debts,
 the full amounts whereof are proposed to be set apart and appropriated in
 such manner as the judge shall direct.

Sworn, &c.

Exhibit D., referred to in the last-mentioned affidavit.

D.

In the matter, &c.

List of debts and claims of which the particulars have been sent in to
 by persons claiming to be creditors of the said company for
larger amounts than are stated in the list of creditors made out by the
 company.

This paper writing, marked D., was produced and shown to
 C. D., E. F., and A. B., respectively, and is the same as
 is referred to in their affidavit sworn before me this
 day of , 186 .

X. Y., &c.

FIRST PART.

Debts and claims wholly or partly admitted by the company.

Names, Addresses, and Descriptions of Creditors.	Particulars of Debt or Claim.	Amount claimed.	Amount admitted by the Company to be owing to Creditor.	Debts proposed to be set apart and appropriated in full although disputed.

SECOND PART.

Debts and claims wholly disputed by the company.

Names, Addresses, and Descriptions of Claimants.	Particulars of Claim.	Amount claimed.	Debts proposed to be set apart and appropriated in full although disputed.

Exhibit E., referred to in the last affidavit.

E.

In the matter, &c.

Lists of debts and claims of which the particulars have been sent in to Mr. by persons claiming to be creditors of the company, and to be entered on the list of creditors made out by the company.

This paper writing, marked E., was produced and shown to C. D., E. F., and A. B., respectively, and is the same as is referred to in their affidavit, sworn before me, this day of , 186 .

X. Y., &c.

APPENDIX VI.

Forms.

FIRST PART.

[Same as in Exhibit D.]

SECOND PART.

[Same as in Exhibit D.]

NOTE.—The names are to be inserted alphabetically.

No. 7. [See Rule 12.]

In the matter of The _____ Company,
Limited and Reduced; and in the matter of "The
Companies Act, 1867."

To Mr.

You are hereby required to come in and prove the debt claimed by you against the above company, by filing your affidavit and giving notice thereof to Mr. _____, the solicitor of the company, on or before the _____ day of _____ next; and you are to attend by your solicitor at the chambers of [the Master of the Rolls, in the Rolls Yard, Chancery Lane, *or* the Vice-Chancellor _____ at No. _____ Lincoln's Inn], in the county of Middlesex, on the _____ day of _____, 18____, at _____ o'clock in the _____ noon, being the time appointed for hearing and adjudicating upon the claim, and produce any securities or documents relating to your claim.

In default of your complying with the above directions you will [be precluded from objecting to the proposed reduction of the capital of the company] *or* [in all proceedings relative to the proposed reduction of the capital of the company, be treated as a creditor for such amount only as is set against your name in the list of creditors].

Dated this _____ day of _____, 18____.

A. B.,
Solicitor for the said company.

No. 8. [See Rule 16.]

In the matter of The _____ Company,
Limited and Reduced; and in the matter of "The
Companies Act, 1867."

Notice is hereby given that a petition presented to the [Lord Chancellor] *or* [the Master of the Rolls], on the _____ day of _____, for confirming a resolution reducing the capital of the above company from £ _____ to £ _____, is directed to be heard before [the Vice-Chancellor _____] *or* [the Master of the Rolls], on the _____ day of _____, 186____.

C. and D. of _____ [Agents for E. and F. of _____].
Solicitors for the company.

CAIRNS, C.
ROMILLY, M.R.
JOHN STUART, V.C.
RICHARD MALINS, V.C.

No. VII.

THE LIFE ASSURANCE COMPANIES ACTS.

THE LIFE ASSURANCE COMPANIES ACT, 1870.

33 & 34 VICT. c. 61.

An act to amend the law relating to Life Assurance Companies.

[9th August, 1870.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. This act may be cited as "The Life Assurance Companies Act, 1870." Short title.

2. In this act—

The term "company" means any person or persons, corporate or unincorporate, not being registered under the acts relating to friendly societies, who issue or are liable under policies of assurance upon human life within the United Kingdom, or who grant annuities upon human life within the United Kingdom : (a) Interpretation of terms.

The term "chairman" means the person for the time being presiding over the court or board of directors of the company :

The term "policy holder" means the person who for the time being is the legal holder of the policy for securing the life assurance endowment, annuity, or other contract with the company :

The term "financial year" means each period of twelve months at the end of which the balance of the accounts of the company is struck, or if no such balance is struck, then each period of twelve months ending with the thirty-first day of December :

The term "Court" means, in the case of a company registered or having its head office in England, the High Court of Chancery ; in the case of a company registered or having its head office in Ireland, the Court of Chancery in Ireland ; in all cases of companies registered or having its head office in Scotland, the Court of Session, in either division thereof :

The term "registrar" means the registrar of joint stock companies in England and Scotland, and the assistant-registrar of joint stock companies in Ireland.

3. Every company established after the passing of this act within the United Kingdom, and every company established or to be established out of the United Kingdom which shall after the passing of this act commence to carry on the business of life assurance within the United Kingdom, shall be required to deposit the sum of twenty thousand pounds with the Deposit.

(a) See, as to Industrial Assurance act, 1865, 38 & 39 Vict. c. 60, §§ 4, Societies under the Friendly Societies 28 & 30.

APPENDIX VII. Accountant General of the Court of Chancery (*b*), to be invested by him in one of the securities usually accepted by the Court for the investment of funds placed from time to time under its administration, the company electing the particular security and receiving the income therefrom, and the registrar shall not issue a certificate of incorporation unless such deposit shall have been made, and the Accountant General shall return such deposit to the company so soon as its life assurance fund accumulated out of the premiums shall have amounted to forty thousand pounds (*c*).

Life funds
separate.

4. In the case of a company established after the passing of this act transacting other business besides that of life assurance, a separate account shall be kept of all receipts in respect of the life assurance and annuity contracts of the company, and the said receipts shall be carried to and form a separate fund to be called the life assurance fund of the company, and such fund shall be as absolutely the security of the life policy and annuity holders as though it belonged to a company carrying on no other business than that of life assurance, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of life assurance; and in respect to all existing companies, the exemption of the life assurance fund from liability for other obligations than to its life policy-holders shall have reference only to the contracts entered into after the passing of this act, unless by the constitution of the company such exemption already exists: Provided always, that this section shall not apply to any contracts made by any existing company by the terms of whose deed of settlement the whole of the profits of all the business are paid exclusively to the life policy-holders, and on the face of which contracts the liability of the assured distinctly appears (*d*).

Statements to
be made by
companies.

5. From and after the passing of this act every company shall, at the expiration of each financial year of such company, prepare a statement of its revenue account for such year, and of its balance-sheet at the close of such year, in the forms respectively contained in the first and second schedules to this act.

Statements by
company doing
other than life
business.

6. Every company which, concurrently with the granting of policies of assurance or annuities on human life, transacts any other kind of assurance or other business shall, at the expiration of each such financial year as aforesaid, prepare statements of its revenue account for such year, and of its balance sheet at the close of such year, in the forms respectively contained in the third and fourth schedules of this act.

Actuarial report
and abstract.

7. Every company shall, once in every five years if established after the passing of this act, and once every ten years if established before the passing of this act, or at such shorter intervals as may be prescribed by the instrument constituting the company, or by its regulations or byelaws, cause an investigation to be made into its financial condition by an actuary, and shall cause an abstract of the report of such actuary to be made in the form prescribed in the fifth schedule to this act.

Statement of
life and annuity
business.

8. Every company shall [on or before the thirty-first day of December

(*b*) By 34 & 35 Vict. c. 58, § 1, this money was to be paid into the Court of Chancery and to be dealt with in the same way as other moneys paid into that Court were dealt with; but that section was repealed by the Statute Law Revision act, 1883 (46 & 47 Vict. c. 39). It will

now be paid into the Chancery Division of the High Court of Justice: see Dan. Ch. Practice, 6th ed., p. 2255.

(*c*) See, also, 35 & 36 Vict. c. 41, § 1, *infra*.

(*d*) See, also, 35 & 36 Vict. c. 41, § 2, *infra*.

one thousand eight hundred and seventy-two, and thereafter] within nine months after the date of each such investigation as aforesaid into its financial condition, prepare a statement of its life assurance and annuity business in the form contained in the sixth schedule to this act, each of such statements to be made up as at the date of the last investigation, [whether such investigation be made previously or subsequently to the passing of this act :] Provided as follows :

- [(1.) If the next financial investigation after the passing of this act of any company fall during the year one thousand eight hundred and seventy-three, the said statement of such company shall be prepared within nine months after the date of such investigation, instead of on or before the thirty-first day of December one thousand eight hundred and seventy-two :] (e)
- (2.) If such investigation be made annually by any company, such company may prepare such statement at any time, so that it be made at least once in every three years.

The expression date of each such investigation in this section shall mean the date to which the accounts of each company are made up for the purposes of each such investigation.

9. The Board of Trade, upon the applications of or with the consent of a company, may alter the forms contained in the schedules to this act, for the purpose of adapting them to the circumstances of such company, or of better carrying into effect the objects of this act.

10. Every statement or abstract hereinbefore required to be made shall be signed by the chairman and two directors of the company and by the principal officer managing the life assurance business, and, if the company has a managing director, by such managing director, and shall be printed and the original, so signed as aforesaid, together with three printed copies thereof, shall be deposited at the Board of Trade within nine months of the dates respectively hereinbefore prescribed as the dates at which the same are to be prepared. And every annual statement so deposited after the next investigation (f) shall be accompanied by a printed copy of the abstract required to be made by section seven.

11. A printed copy of the last deposited statement, abstract, or other document by this act required to be printed shall be forwarded by the company, by post or otherwise, on application, to every shareholder and policy-holder of the company.

12. Every company which is not registered under "the Companies Act, 1862," and which has not incorporated in its deed of settlement section ten of "the Companies Clauses Consolidation Act, 1845," shall keep a "Shareholders' address-book," in accordance with the provisions of that section, and shall furnish, on application, to every shareholder and policy-holder of the company a copy of such book, on payment of a sum not exceeding sixpence for every hundred words required to be copied for such purpose.

13. Every company which is not registered under "the Companies Act, 1862," shall cause a sufficient number of copies of its deed of settlement to be printed, and shall furnish, on application, to every shareholder and policy-holder of the company a copy of such deed of settlement on payment of a sum not exceeding two shillings and sixpence.

(e) The words in brackets were repealed by the Statute Law Revision act, 1883, 46 & 47 Vict. c. 39.

(f) "Next investigation" means the first investigation after the passing of the act of 1872, see § 3 of that act, *infra*.

APPENDIX VII.

Documents may be transferred from Board of Trade to registry of Joint Stock Companies.

Documents to be received in evidence.

Penalty for non-compliance with act.

Penalty for falsifying statements, &c.

Penalties how to be recovered and applied.

Notices under this act to policy-holders.

Statements, &c., to be laid before Parliament.

Exceptions.

[Altered from forty-one, pursuant to 34 & 35 Vict. c. 58.]

[§§ 14 and 15 are printed *ante*, pp. 898, 899.]

16. The Board of Trade may direct any printed or other documents required by this act, or certified copies thereof, to be kept by the registrar of joint stock companies or other officer of the Board of Trade; and any person may, on payment of such fees as the Board of Trade may direct, inspect the same at his office, and procure copies thereof.

17. Every statement, abstract, or other document deposited with the Board of Trade or with the registrar of joint stock companies under this act shall be receivable in evidence; and every document purporting to be certified by one of the secretaries or assistant secretaries of the Board of Trade, or by the said registrar, to be such deposited document, and every document purporting to be similarly certified to be a copy of such deposited document, shall, if produced out of the custody of the Board of Trade or of the said registrar, be deemed to be such deposited document as aforesaid, or a copy thereof, and shall be received in evidence as if it were the original document, unless some variation between it and the original document shall be proved.

18. Every company which makes default in complying with the requirements of this act shall be liable to a penalty not exceeding fifty pounds for every day during which the default continues; and if default continue for a period of three months after notice of default by the Board of Trade, which notice shall be published in one or more newspapers as the Board of Trade may direct, and after such publication the Court may order the winding up of the company, in accordance with the Companies Act, 1862, upon the application of one or more policy-holders or shareholders.

19. If any statement, abstract, or other document required by this act is false in any particular to the knowledge of any person who signs the same, such person shall be liable on conviction thereof on indictment to fine and imprisonment, or on summary conviction thereof to a penalty not exceeding fifty pounds.

20. Every penalty imposed by this act shall be recovered and applied in the same manner as penalties imposed by the Companies Act, 1862, are recoverable and applicable (*h*).

[§§ 21 and 22 are printed *ante*, p. 634 (*i*).]

23. Any notice which is by this act required to be sent to any policy-holder may be addressed and sent to the person to whom notices respecting such policy are usually sent, and any notice so addressed and sent shall be deemed and taken to be notice to the holder of such policy.

24. The Board of Trade shall lay annually before Parliament the statements and abstracts of reports deposited with them under this act during the preceding year.

25. This act shall not affect the Commissioners for the Reduction of the National Debt, nor the postmaster general, acting under the authorities vested in them respectively by the acts tenth George the Fourth, chapter twenty-four,* third and fourth William the Fourth, chapter fourteen, sixteenth and seventeenth Victoria, chapter forty-five, and twenty-seventh and twenty-eighth Victoria, chapter forty-three.

(*h*) See §§ 65 & 66 of that act, *ante*, p. 949.

(*i*) See s to the contracts to be in-

cluded in a reduction, *Great Britain Mutual Life Ass. Soc.*, 19 Ch. D. 39, affirmed 20 Ch. D. 351.

FIRST SCHEDULE.

Revenue Account of the _____ for the year ending _____.

18 . (Date.)	£ s. d.	18 . (Date.)	£ s. d.
Amount of funds at the beginning of the year		Claims under policies (after deduction of sums re-assured)	
Premiums		Surrenders	
Consideration for annuities granted		Annuities	
Interest and dividends		Commission	
Other receipts (accounts to be specified)		Expenses of management	
		Dividends and bonuses to shareholders (if any)	
		Other payments (accounts to be specified)	
		Amount of funds at the end of the year, as per Second Schedule	
	£		£

Note 1.—Companies having separate accounts for annuities to return the particulars of their annuity business in a separate statement.

Note 2.—Items in this and in the accounts in the Third and Fifth Schedules should be the net amounts after deduction of the amounts paid and received in respect of re-assurances.

APPENDIX VII.

SECOND SCHEDULE.

Balance sheet of the _____, 18____.			
LIABILITIES.		£	s. d.
Shareholders' capital paid up (if any) . . . £			
Assurance fund			
Annuity fund (if any)			
Other funds, if any, to be specified			
Total funds as per First Schedule	£		
Claims admitted but not paid *			
Other sums owing by the company * (accounts to be specified)			
		£	
ASSETS.			
Mortgages on property within the United Kingdom			
Do, do, out of the United Kingdom			
Loans on the company's policies			
Investments :			
In British Government securities			
Indian and Colonial Government securities			
Foreign government do.			
Railway and other debentures and debenture stocks			
Do, shares (preference and ordinary)			
House property			
Other investments (to be specified)			
Loans upon personal security			
Agents' balances			
Outstanding premiums			
Do, interest			
Cash :			
On deposit £			
In hand and on current account			
Other assets (to be specified)			
		£	

* *Note*.—These items are included in the corresponding items in the First Schedule.

THIRD SCHEDULE.

Revenue Accounts of the _____ for the year ending _____.

(Date.)		(No. 1.) LIFE ASSURANCE ACCOUNT.		(Date.)	
Amount of life assurance fund at the beginning of the year		Claims under life policies (after deduction of sums re-assured)		Surrenders	
Premiums, after deduction of re-assurance premiums		Annuities		Expenses of management	
Consideration for annuities granted		Commission		Other payments (accounts to be specified)	
Interest and dividends		Expenses of management		Amount of life assurance fund at the end of the year, as per Fourth Schedule	
Other receipts (accounts to be specified)					
		£		£	

Note.—Companies having separate accounts for annuities to return the particulars of their annuity business in a separate statement.

(Date.)		(No. 2.) FIRE ACCOUNT.		(Date.)	
Amount of fire insurance fund at the beginning of the year		Losses by fire after deduction of re-assurances		Expenses of management	
Premiums received, after deduction of re-assurances		Commission		Other payments to be specified	
Other receipts to be specified		Amount of fire insurance fund at the end of the year, as per Fourth Schedule			
		£		£	

Note.—When marine or any other branch of business is carried on, the income and expenditure thereof to be in like manner stated in a separate account.

(Date.)		(No. 3.) PROFIT AND LOSS ACCOUNT.		(Date.)	
Balance of last year's account		Dividends and bonuses to shareholders		Expenses not charged to other accounts	
Interest and dividends not carried to other accounts		Loss realised (accounts to be specified)		Other payments	
Profit realised (accounts to be specified)		Balance as per Fourth Schedule			
Other receipts					
		£		£	

Note.—This account is not required if the items have been incorporated in the other accounts of this schedule.

FOURTH SCHEDULE.

Balance sheet of the

, 18

on the

LIABILITIES.		£	s.	d.
Shareholders' capital				
General reserve fund (if any)				
Life assurance fund *				
Annuity fund (if any) *				
Fire fund				
Marine fund				
Profit and loss (if any)				
Other funds, if any, to be specified				
Claims under life policies admitted but not yet paid *		£	s.	d.
Outstanding fire losses				
Do. marine do.				
Other sums owing by the company (accounts to be specified)				
		£		
ASSETS.		£	s.	d.
Mortgages on property within the United Kingdom				
Do. do. out of the United Kingdom				
Loans on the company's policies				
Investments:				
In British Government securities				
Indian and Colonial do.				
Foreign do.				
Railway and other debentures and debenture stocks				
Do. shares (preference and ordinary)				
House property				
Other investments (to be specified)				
Loans upon personal security				
Agents' balances				
Outstanding premiums				
Do. interest				
Cash:				
On deposit				
In hand and on current account				£
Other assets (to be specified)				
		£		

* If the life assurance fund is, in accordance with section 4 of this Act, a separate trust fund for the sole security of the life policy-holders, a separate balance-sheet for the life branch may be given in the form contained in Schedule 2. In other respects the company is to observe the above form. See also note to Second Schedule.

FIFTH SCHEDULE.

STATEMENT RESPECTING THE VALUATION OF THE LIABILITIES UNDER LIFE
POLICIES AND ANNUITIES OF THE _____, TO BE MADE BY
THE ACTUARY.

(The answers should be numbered to accord with the numbers of
the corresponding questions.)

1. The date up to which the valuation is made.
2. The principles upon which the valuation and distribution of profits among the policy-holders are made, and whether these principles were determined by the instrument constituting the company, or by its regulations or byelaws, or otherwise.
3. The table or tables of mortality used in the valuation.
4. The rate or rates of interest assumed in the calculations.
5. The proportion of the annual premium income, if any, reserved as a provision for future expenses and profits. (If none, state how this provision is made.)
6. The consolidated revenue account since the last valuation, or, in case of a company which has made no valuation, since the commencement of the business. (This return should be made in the form annexed.)
7. The liabilities of the company under life policies and annuities at the date of the valuation, showing the number of policies, the amount assured, and the amount of premiums payable annually under each class of policies, both with and without participation in profits; and also the net liabilities and assets of the company, with the amount of surplus or deficiency. (These returns should be made in the forms annexed.)
8. The time during which a policy must be in force in order to entitle it to share in the profits.
9. The results of the valuation, showing—
 - (1.) The total amount of profit made by the company.
 - (2.) The amount of profit divided among the policy-holders, and the number and amount of the policies which participated.
 - (3.) Specimens of bonuses allotted to policies for 100% effected at the respective ages of 20, 30, 40, and 50, and having been respectively in force for five years, ten years, and upwards, at intervals of five years respectively, together with the amounts apportioned under the various modes in which the bonus might be received.

APPENDIX VII.

(Form referred to under heading No. 6 in the Fifth Schedule.)

Consolidated Revenue Account of the _____ for _____ years
commencing _____ and ending _____

	£	s.	d.		£	s.	d.
Amount of funds on _____, 18—, the beginning of the year.				Claims under policies (after deduction of sums re-assured).			
Premiums (after deduction of re-assurance premiums)				Surrenders			
Consideration for annuities granted				Annuities			
Interest and dividends				Commission			
Other receipts (accounts to be specified)				Expenses of management			
				Dividends and bounties to shareholders (if any)			
				Other payments (accounts to be specified)			
				Amount of funds on _____, 18—, the end of the period, as per First (or Third) Schedule			
							£

(Form referred to under heading No. 7 in Fifth Schedule.)

SUMMARY and VALUATION of the POLICIES of the _____ as at _____ 18—.

DESCRIPTION OF TRANSACTIONS.	PARTICULARS OF THE POLICIES FOR VALUATION.				VALUATION.		
	Number of policies.	Sums assured and bonuses.	Office yearly premiums.	Net yearly premiums, if ascertained.	Value by the Sums assured and bonuses.	Office yearly premiums.	Table, Interest per cent.
ASSURANCES.							
I. <i>With participation in profits.</i>							
For whole term of life							
Other classes (to be specified)							
Extra premiums payable							
Total Assurances with profits							
II. <i>Without participation in profits.</i>							
For whole term of life							
Other classes (to be specified)							
Extra premiums payable							
Total Assurances without profits							
Total assurances							
Deduct re-assurances							
Net amount of assurances							
Adjustments, if any							
ANNUITIES.							
Immediate							
Other classes (to be specified)							
Total of the results							

The term "extra premium" in this Act shall be taken to mean the charge for any risk not provided for in the minimum contract premium. If policies are issued in or for any country at rates of premium deduced from tables other than the European mortality tables adopted by the company, separate schedules similar in form to the above must be furnished.

(Form referred to under heading No. 7 in Fifth Schedule.)

VALUATION BALANCE SHEET of		as at	18 .
Dr.	£	Cr.	£
To net liability under Assurance and Annuity transactions (as per summary statement provided in Schedule 5)		By life assurance and annuity funds (as per balance sheet under Schedule 2 or 4)	
To surplus, if any		By deficiency, if any	

SIXTH SCHEDULE.

STATEMENT OF THE LIFE ASSURANCE AND ANNUITY BUSINESS OF
THE ON THE 18 .

(The answers should be numbered to accord with the numbers of the corresponding questions. Statements of re-assurance corresponding to the statements in respect of assurances, under headings 2, 3, 4, 5, and 6, are to be given.)

1. The published table or tables of premiums for assurances for the whole term of life which are in use at the date above mentioned.
2. The total amount assured on lives for the whole term of life, which are in existence at the date above mentioned, distinguishing the portions assured with and without profits, stating separately the total reversionary bonuses and specifying the sums assured for each year of life from the youngest to the oldest ages.
3. The amount of premiums receivable annually for each year of life, after deducting the abatements made by the application of bonuses, in respect of the respective assurances mentioned under heading No. 2, distinguishing ordinary from extra premiums.
4. The total amount assured under classes of assurance business, other than for the whole term of life, distinguishing the sums assured under each class, and stating separately the amount assured with and without profits, and the total amount of reversionary bonuses.
5. The amount of premiums receivable annually in respect of each such special class of assurances mentioned under heading No. 4, distinguishing ordinary from extra premiums.
6. The total amount of premiums which has been received from the commencement upon all policies under each special class mentioned under heading 4 which are in force at the date above mentioned.
7. The total amount of immediate annuities on lives, distinguishing the amounts for each year of life.
8. The amount of all annuities other than those specified under heading

No. 7, distinguishing the amount of annuities payable under each class, the amount of premiums annually receivable, and the amount of consideration money received in respect of each such class, and the total amount of premiums received from the commencement upon all deferred annuities.

9. The average rate of interest at which the life assurance fund of the company was invested at the close of each year during the period since the last investigation.

10. A table of minimum values, if any, allowed for the surrender of policies for the whole term of life and for endowments and endowment assurances, or a statement of the method pursued in calculating such surrender values, with instances of its application to policies of different standing and taken out at various interval ages from the youngest to the oldest.

Separate statements to be furnished for business at other than European rates, together with a statement of the manner in which policies on unhealthy lives are dealt with.

APPENDIX VII.

THE LIFE ASSURANCE COMPANIES ACT, 1872.

35 & 36 VICT. CAP. 41.

An Act to amend the Life Assurance Companies Acts, 1870 and 1871.

[6th August, 1872.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. Whereas by the provisions of the "Life assurance companies acts, 1870 and 1871" (*k*), a life assurance company is required to pay a sum of money into the Court of Chancery by way of deposit, and the certificate of incorporation of such company is not to be issued unless such deposit has been made, and such deposit is to be returned to the company as soon as its life assurance fund amounts to the sum therein mentioned ; and doubts have arisen as to the construction of the said provisions, and it is expedient to remove such doubts ; be it therefore enacted as follows :

Deposit by
company in
Court of
Chancery.

The said deposit may be made by the subscribers of the memorandum of association of the company, or any of them, in the name of the proposed company, and such deposit upon the incorporation of the company shall be deemed to have been made by and to be part of the assets of the company.

The said deposit shall, until returned to the company, be deemed to form part of the life assurance fund of the company, and shall be subject

(*k*) The Life Assurance Companies Act, 1871, has not been printed. It amended §§ 3 and 25 of the act of 1870 in the manner mentioned in the notes to those sections.

APPENDIX VII.

to the provisions of section four of the Life assurance companies act, 1870, accordingly. The Board of Trade may from time to time make, and when made revoke, alter, or add to, rules with respect to the payment and repayment of the said deposit, the investment of or dealing with the same, the deposit of stocks or securities in lien of money, and the payment of the interest or dividends from time to time accruing due on any such investment, stocks, or securities in respect of such deposit. Any rules made in pursuance of this section shall have effect as if they were enacted in this act, and shall be laid before Parliament within three weeks after they are made, if Parliament be then sitting, or if not, within three weeks after the beginning of the then next session of Parliament.

Separation of
life funds.

2. Whereas, by section four of the Life assurance companies act, 1870, it is enacted that, "In the case of a company established after the passing of this act, transacting other business besides that of life assurance, a separate account shall be kept of all receipts in respect of the life assurance and annuity contracts of the company, and the said receipts shall be carried to and form a separate fund, to be called the life assurance fund of the company, and such fund shall be as absolutely the security of the life policy and annuity holders as though it belonged to a company carrying on no other business than that of life assurance, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of life assurance;" and further provisions were made by the same section, with respect to the application of the above-recited part of the said section to existing companies, and doubts have arisen with respect to the construction of the said provisions, and it is expedient to remove such doubts; be it therefore enacted,

That the portion of section four of the Life assurance companies act, 1870, above recited shall apply to every company established before the passing of that act, provided that the Life assurance companies act, 1870, and this act shall not diminish the liability of the life assurance fund for any contracts of the company entered into before the passing of the Life assurance companies act, 1870.

Deposit of
statement
and abstract
required by
33 & 34 Vict.
c. 61, s. 10.

3. Whereas by section ten of the Life assurance companies act, 1870, it is provided that, "Every annual statement so deposited after the next investigation shall be accompanied by a printed copy of the abstract required to be made by section seven," be it therefore enacted that the words "next investigation" shall be construed to mean the first investigation after the passing of the said act.

The Board of Trade shall lay before Parliament any statement or abstract of report which is deposited with them by any company, and purports to be in pursuance of the Life assurance companies act, 1870, although the Board are of opinion that it is not such a statement or abstract as is required to be prepared by that act.

[4. Printed *ante*, p. 643.]

[5. Printed *ante*, p. 733.]

Rules in First
and Second
Schedules to be
rules of court.

6. The rules in the first and second schedules to this act shall be of the same force as if they were rules made in pursuance of the one hundred and seventieth, one hundred and seventy-first, and one hundred and seventy-third sections of the "Companies act, 1872," as the case may be, and may be altered in manner provided by the said sections, and rules may be made under the said sections for the purpose of carrying into effect the provisions of this act with respect to the winding up of companies.

[7. Printed *ante*, p. 260 (*l.*)]

APPENDIX VII.

8. This act shall be construed as one with the Life assurance companies acts, 1870 and 1871; and those acts and this act may be cited together as "The Life assurance companies acts, 1870 to 1872;" and this act may be cited as "The Life assurance companies act, 1872."

Construction
and short title.

[FIRST SCHEDULE, printed *ante*, p. 733.]

[SECOND SCHEDULE, printed *ante*, p. 734.]

NOTE.—Rules have been issued by the Board of Trade under the foregoing Life assurance companies acts. The rules are dated the 28th August, 1872. They relate to obtaining warrants from the Board of Trade for the deposit in Court of £20,000 as required by the acts, and to the payment out (under an order of the Court) of the deposit fund as soon as it is proved to the satisfaction of the Court that the life assurance fund accumulated out of premiums paid to the company amounts to £40,000.

Board of Trade
Rules of August,
1872.

(*l.*) See *ante*, pp. 258—261.

INDEX NO. I.

INDEX TO THE COMPANIES ACTS, 1862—1866, AND TO THE CLAUSES OF TABLE A., AND TO THE RULES PROMULGATED UNDER THE AUTHORITY OF THE ACTS OF 1862 AND 1867, AND TO THE LIFE ASSURANCE COMPANIES ACTS, 1870, 1872.

N.B.—In this Index the numbers preceded by the letter “s.” refer to the sections of the Companies Acts 1862 and 1867; those preceded by the letter “A.” refer to the clauses of Table A. in the first Schedule to the Acts; and those preceded by the letter “r.” refer to the rules promulgated under the authority of the Acts. The references in ordinary type refer to the Act and rules of 1862; those in black type refer to the Act of 1867, and the rules of 1868. The other Companies Acts are distinguished by the addition of the date; the letters “L. A.” refer to the Life Assurance Companies Acts.



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[N.B.—In this Index “s.” means section, “A.” means Table A., and “r.” means rule. The references in black type refer to the Act of 1867, and the rules of 1868.]

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The figure consists of eight small, vertically stacked line drawings of a larva at different stages of development. The top drawing shows a small, segmented worm-like creature. As the drawings progress downwards, the larva becomes more complex, with a more defined head, segmented body, and a distinct tail. The final drawing at the bottom shows a more mature larval stage with a clear head, segmented body, and a tail.

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